



COMPLETE COLLECTION

State Trials

PROCEEDINGS FOR HIGH TREASON

CRIMES AND MISDEMEANORS

EARLIEST PERIOD TO THE PRESENT TIME

WITH NOTES AND CROSS REFERENCE

BY H. HOWELL, ESQ. F.R.S.E.

VOL. XIII.

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1812.

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1812

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A COMPLETE COLLECTION

OF

STATE TRIALS,

&c. &c.

384. The Trial of Sir JOHN FREIND,* knt. at the Old-Bailey, for High Treason: 8 WILLIAM III. A. D. 1696.

Monday, March 23, 1696.

AT the Sessions-House in the Old-Bailey, this day, came on the trial of sir John Freind, knight, for high-treason, upon an Indictment found by the grand jury for the city of London, upon the sessions of oyer and terminer and gaol-delivery of Newgate, on Saturday the 21st instant.

Clerk of Arraignments. Cryer, make proclamation.

Cryer. Oyez, oyez, oyez, All manner of persons that have any thing more to do at this general sessions of the peace, sessions of oyer and terminer, holden for the city of London, and gaol-delivery of Newgate, holden for the city of London and county of Middlesex, adjourned over to this day; draw near, and give your attendance, for now they will proceed to the pleas of the crown for the said city and county; and God save king William.

Cl. of Ar. Make proclamation again.

Cryer. Oyez, You good men of the city of London, summoned to appear here this day, to try between our sovereign lord the king and the prisoner that is to be at the bar; answer to your names as you shall be called, every man at the first call, upon pain and peril that will fall thereon.

Then the petty jury were all called over, and the appearances of those that answered to the call were recorded.

About ten o'clock the lord chief justice Holt, the lord chief justice Treby, Mr. justice Nevill, and Mr. justice Rokeby, came into the court; and there being a great confluence of the nobility and gentry there present, the

prisoner was ordered to be brought to the bar; which was done accordingly.

Cl. of Ar. Sir John Freind, hold up thy hand.

Freind. My lord, I humbly move that I may have one William Courtney (who is to be a principal witness for me at my trial, and is now a prisoner in the Gatehouse) sent for.

L. C. J. (Sir John Holt.) Is he your witness, sir John?

Freind. Yes, my lord, William Courtney is his name.

L. C. J. Sir John, why did not you send, and desire this before?

Freind. My lord, I did not hear of him while last night; and I humbly beseech your lordship, that you will please to let him be sent for.

The Judges consulted among themselves.

L. C. J. Look you, sir John Freind, I'll tell you, if you'll appoint your agent to come hither, you shall have an 'Habeas Corpus ad testificandum': but indeed you might have sent this morning, and then the writ might have been got ready.

Freind. My lord, I did not know so much; for it was last night before I understood that he was to be a witness.

L. C. J. You might have sent last night, or this morning, and you should have had a warrant for the writ.

Freind. I assure your lordship, I did not know so much.

L. C. J. Well, send your agent, or your solicitor, and you shall have a warrant for the writ.

Freind. I beseech your lordship that he may be sent for, and that the messenger may make haste.

L. C. J. Let your solicitor come to my clerk, and he shall have it.

Freind. My lord, if you please to give a rule of court for it, I suppose it may be done presently.

B

* See Holt, 681. East's Pleas of the Crown, chap. 2, sect. 9. 17. See, also, in this Collection, some important Observations on this Case in Lord Erskine's Speech on the Trial of Thomas Hardy, A. D. 1794. And a Note to the Case of Don Pantaleon Sa, vol. 5, p. 466.

L. C. J. No, no, sir John, it must be by writ; the keeper of the Gatehouse else cannot bring him.

Freind. My lord, that will be a long time before it can be done; I desire nothing but that I may have him here to give his evidence for me.

L. C. J. It will be got ready presently; I believe he will be here time enough for you to make use of his testimony.

Freind. But, my lord, suppose he should not be here: it would be a great hindrance to me, and a great injury to my trial.

L. C. J. No, no, sir John, you need not fear any thing of that nature, we are not in such haste; we will not spur you on: but the warrant shall be made; and do you make what haste you can to get the writ, and your witness brought.

[The Lord Chief Justice gave order to Mr. Mason his clerk, to prepare a warrant for an Habeas Corpus, directed for the keeper of the Gatehouse, to bring William Courtney immediately hither to give evidence.]

Cl. of Ar. Sir John Freind, hold up thy hand. [Which he did.]

You stand indicted in London by the name of sir John Freind, late of London, knt. for that, whereas there had been for a long time, and yet is, an open, and notoriously public, and most sharp and cruel war by land, and by sea, had, carried on, and prosecuted by Lewis the French king, against the most serene, most illustrious, and most excellent prince, our sovereign lord William the Third, by the grace of God, of England, Scotland, France, and Ireland king, defender of the faith, &c. All which time the said Lewis the French king, and his subjects were, and yet are enemies of our said lord the king that now is, and his subjects. You the said sir John Freind, a subject of our said sovereign lord the king that now is, of this kingdom of England, well knowing the premises, not having the fear of God in your heart, nor weighing the duty of your allegiance, but being moved and seduced by the instigation of the devil, as a false traitor against the said most serene, most clement, and most excellent prince, our said sovereign lord William the Third, now king of England, &c. your supreme, true, natural, rightful, lawful, and undoubted sovereign lord; the cordial love, and the true and due obedience, fidelity and allegiance, which every subject of our said sovereign lord the king that now is, towards him our said sovereign lord the king should and of right ought to bear withdrawing, and intending utterly to extinguish, and contriving, and with all your strength purposing, designing, and endeavouring the government of this kingdom of England, under our said sovereign lord the king that now is of right, duly, happily, and very well established, altogether to subvert, change, and alter, and his faithful subjects, and the freemen of this kingdom of England, into intolerable and most miserable slavery to the aforesaid French king to subdue and bring;

the first day of July, in the seventh year of the reign of our said sovereign lord the king that now is, and divers other days and times, as well before as after, at London, in the parish of St. Peter Cornhill, in the ward of Lime street, falsely, maliciously, devilishly, and traitorously, did compass, imagine, contrive, purpose, and intend our said sovereign lord the king that now is, then your supreme, true, natural, rightful, and lawful sovereign lord, of and from the regal state, title, honour, power, crown, command, and government of this kingdom of England to depose, cast down, and utterly to deprive; and our said sovereign lord the king to death and final destruction to put and bring; and the aforesaid Lewis the French king, by his armies, soldiers, legions, and subjects, this kingdom of England to invade, fight with, overcome, and subdue, to move, incite, procure, and help, and a miserable slaughter among the faithful subjects of him our said sovereign lord the king, throughout his whole kingdom of England, to make and cause; and that you the said sir John Freind to the aforesaid enemies of our said lord the king that now is, then and there during the war aforesaid, traitorously were adhering and assisting: and the same your most impious, wicked and devilish treasons, and traitorous compassings, intentions, and purposes aforesaid to fulfil, perfect, and bring to effect; and in prosecution, performance, and execution of that traitorous adhesion, you the said sir John Freind, as such a false traitor, during the war aforesaid, to wit, the same first day of July, in the year aforesaid, at London aforesaid, in the parish and ward aforesaid, and divers other days and times, as well before as after, there and elsewhere in London aforesaid, falsely, maliciously, advisedly, secretly, and traitorously, and with force and arms, &c. with one Robert Charnock (late of high treason, in contriving and conspiring the death of our said sovereign lord the king that now is, duly convicted and attainted), and with divers other false traitors to the jurors unknown, did meet, propose, treat, consult, consent, and agree to procure from the aforesaid Lewis the French king, of his subjects, forces, and soldiers, then and yet enemies of our said sovereign lord the king that now is, great numbers of soldiers and armed men this kingdom of England to invade and fight with, and to levy, procure, and prepare great numbers of armed men, and troops and legions against our said lord the king that now is, to rise up and be formed, and with those enemies, at and upon such their invasion and entry into this kingdom of England, to join and unite, rebellion and war against him our said lord the king, within this kingdom of England, to make, levy, and wage, him our said lord the king so as aforesaid to depose, and him to kill and murder; and moreover with the said false traitors, the same first day of July, in the year aforesaid, at London aforesaid, in the parish and ward aforesaid, traitorously you did consult, consent, and agree to send the aforesaid Robert Charnock as a mes-

senger from you the said sir John Freind, and the same other traitors unknown, unto and into the kingdom of France, in parts beyond the seas, unto James the second, late king of England, to propose to him, and desire of him to obtain of the aforesaid French king the soldiers and armed men aforesaid, for the invasion aforesaid to be made; and intelligence and notice of such their traitorous intentions, and adhesions, and all the premises unto the said late king James the second, and the said other enemies and their adherents, to give and exhibit, and them to inform of other particular things and circumstances thereunto relating; as also intelligence from them of the said intended invasion, and other things and circumstances concerning the premises to receive, and the same to you the said sir John Freind, and the said other traitors in this kingdom of England, to signify, report and declare, in assistance, animation, and aid of the said enemies of our said lord the king that now is, in the war aforesaid, and to incite and procure those enemies the more readily and boldly to invade this kingdom of England; and the treasons and traitorous contrivances, compassings, imaginations, and purposes of you the said sir John Freind aforesaid, to perfect and fulfil; and all the premises the sooner to execute, manage and perform, you the said sir John Freind, during the war aforesaid, so as aforesaid continued, to wit, the same first day of July, in the abovesaid seventh year of the reign of our said lord the king that now is, at London aforesaid, in the parish and ward aforesaid, falsely and traitorously did procure and obtain to yourself, and did receive and accept of a certain commission or writing purporting itself to be a commission under and from the aforesaid James the second, late king of England, to constitute you, the said sir John Freind, to be a colonel of horse in the army by you and the other false traitors against our said lord the king that now is, within this kingdom of England to be levied and formed; and in pursuance of the said pretended commission by you the said sir John Freind so obtained and accepted of, and your treasons and all your traitorous intentions aforesaid the sooner to execute, perform, fulfil, and perfect, you the said sir John Freind afterwards, to wit, the same first day of July, in the seventh year abovesaid, at London aforesaid, in the parish and ward aforesaid, falsely, maliciously, advisedly, secretly, and traitorously, divers soldiers, and armed men, and ready to be armed, with force and arms, &c. to raise, and list, and war and rebellion against our said lord the king, within this kingdom of England to make and wage; and to and with the said enemies of our said lord the king, foreigners and strangers, subjects and soldiers of the said Lewis the French king, being about to invade this kingdom of England, at and upon their invasion and entry into this same kingdom, then shortly expected to be made, themselves together with you the said sir John Freind to join and unite, and in troops and legions to form,

did raise, list, and retain, and did procure to be raised, listed, and retained; and divers sums of money, in and about the raising, listing, and retaining of the aforesaid soldiers, and men armed, and ready to be armed upon the account aforesaid, upon the aforesaid first day of July, in the seventh year abovesaid, at London aforesaid, in the parish and ward aforesaid, falsely, maliciously, and traitorously, did give and pay, and cause to be paid; and those soldiers and men, for the treasons, intentions, and purposes aforesaid, then and there, and long after you had in readiness. As also the same first day of July, in the seventh year abovesaid, at London aforesaid, in the parish and ward aforesaid, divers horses, and very many arms, guns, carbines, pistols, swords, and other weapons, ammunition, and warlike things, and military instruments, falsely, maliciously, secretly, and traitorously you did obtain, buy, gather and procure, and cause to be bought, gathered, obtained and procured, and in your custody had and detained, to that intent to use the same in the said invasion, war and rebellion, against our said sovereign lord the king that now is, him our said lord the king of and from the regal state, crown and command of this kingdom of England to depose, cast down and deprive, and him to kill and murder, and all the treasons, intentions, contrivances and purposes of you the said sir John Freind, as aforesaid, to fulfil, perfect, and fully to bring to effect; against the duty of your allegiance, and against the peace of our said sovereign lord the king that now is, his crown and dignity; as also against the form of the statute in this case made and provided.

What sayest thou, sir John Freind, art thou guilty of this high treason whereof thou standest indicted, or not guilty?

Freind. Not guilty, my lord.

Cl. of Arr. Culprit, how wilt thou be tried?

Freind. By God and my country.

Cl. of Arr. God send thee a good deliverance.

Freind. I don't know any thing of it, I am as innocent as the child unborn.

The Warrant for the Habeas Corpus was signed by the Lord Chief Justice Holt, and delivered to the prisoner, who sent it away to the Crown Office by his solicitor, to get the writ sealed.

Freind. My lord, I have something to move, if your lordship please to hear me; and the rest of my lords the judges: That if any matter of law doth arise upon my trial, I may be heard by my counsel, that you may not destroy me without law.

L. C. J. Look you, sir John Freind, if any matter of law do arise at your trial, and you will tell us what that matter of law is, and the court see that it is a matter of doubt, we can, and ought, and no question shall assign you counsel; but that is time enough when such matter goes arise.

Freind. My lord, it is well known to your

lordship, and all the court, that I am not a lawyer; but I hope, as you are of counsel for the king as judges of law, so you will be of counsel for me; for I am not a lawyer, and cannot know whether any matter that arises be law or no; and therefore I humbly beseech your lordship to be so just and kind, as to tell me whether it be law or not law, and I submit myself to your lordship's direction.

L. C. J. Sir John Freind, we are bound to tell you when any thing of that nature appears before us, and to let you have all the benefit of the law that possibly you can have; for we are obliged to be indifferent between the king and you.

Freind. My lord, I don't question it. I desire also I may have pen, ink, and paper.

L. C. J. Yes, yes, by all means. [And he had them.]

Cl. of Arr. Crier, make proclamation.

Crier. Oyez: You good men of the city of London, summoned to appear here this day, to try between our sovereign lord the king and the prisoner that is at the bar, who have been called, and made default, answer to your names, and save your issues.

[Then the Defaulters were called over.]

Cl. of Ar. You the prisoner at the bar, these men that you shall hear called, and personally appear, are to pass between our sovereign lord the king and you, upon trial of your life and death; if therefore you will challenge them, or any of them, your time is to speak unto them as they come to the book to be sworn, before they be sworn.

Crier. Call Thomas Clark.

Freind. Pray, Sir, how many may I challenge?

L. C. J. Look you, Sir John, you may challenge, that is, except against 35, without shewing any cause: if you don't like them to be of the jury, you may refuse them; and as many others as you have cause to except against.

Freind. My lord, I humbly beseech you, that because perhaps I may mistake in numbering, that I may have timely notice before the 35 be excepted against, or else it may occasion me a great deal of prejudice.

L. C. J. Sir, the clerk shall take care of that, he shall inform you how many you challenge, and you shall receive no prejudice of that kind, or by any slip in point of form.

Cl. of Ar. Cryer, call Thomas Clark. (Who appeared.)

Freind. Pray, Sir, must I not see the gentleman?

L. C. J. Yes, yes, by all means. (He was shewn to him.)

Freind. You may swear Mr. Clark; I do not except against him. I desire but honest gentlemen, and I shall come off, I warrant you: I am as innocent as the child unborn.

L. C. J. Swear Mr. Clark.

Cl. of Ar. Hold him the book; (which was done) look upon the prisoner: You shall well

and truly try, and true deliverance make between our sovereign lord the king and the prisoner at the bar, whom you shall have in charge, according to your evidence. So help you God.

Cl. of Ar. Nathan Green.

Freind. I except against him.

Cl. of Ar. Thomas Emms.

Freind. I accept of him for a juryman, I have nothing to object against him. (He was sworn.)

Cl. of Ar. Francis Byer.

Freind. Pray let me see him (He was shewn to him). I do except against him, I challenge him.

Cl. of Ar. Benjamin Dry.

Freind. I except against him.

Cl. of Ar. James Demew.

Freind. I accept him, I have nothing to say against him, I would have him to be a juryman.

Demew. My lord, I am not a freeholder.

L. C. J. Sir John, do you challenge him peremptorily, or do you challenge him for cause?

Freind. My lord, I do not challenge him at all, I accept of him.

Att. Gen. (Sir Thomas Trevor.) If he have no freehold, we that are for the king will except against him, for I would not have any body that is not a freeholder serve upon the jury.

Cl. of Ar. Henry Hunter.

Freind. Pray, my lord, is this gentleman that was called before laid aside? He is not one that I challenge.

L. C. J. No, no, he is challenged by the king's counsel, as no freeholder.

Freind. Then he is only set aside, I suppose; I speak it for this reason, I would not be mistaken in my number.

L. C. J. Care shall be taken of all that; he is not to be reckoned as one that you challenged, he is challenged for want of freehold by the king's counsel.

Cl. of Ar. What say you to Mr. Hunter?

Freind. I accept of Mr. Hunter, let him be sworn. (Which was done.)

Cl. of Ar. John Cox.

Cox. My lord, I have no freehold in London.

Att. Gen. Then let him be set aside.

Cl. of Ar. George Bodington.

Freind. I except against him.

Cl. of Ar. John Hedges.

Freind. I except against him.

Cl. of Ar. You challenge him, Sir, do you?

Freind. Yes, yes, I do.

Cl. of Ar. John James.

Freind. I challenge him.

Cl. of Ar. Thomas Poole.

Freind. I accept of him. (He was sworn.)

Cl. of Ar. Peter Parker.

Freind. I accept of him. (He was sworn.)

Cl. of Ar. George Grove.

Freind. I except against him, for I have him not in my pannel.

L. C. J. How comes that?

Freind. I can't tell, my lord; I have been kept alone while Saturday last, only that wor-

thy gentleman (bowing to Mr. Baker, the prosecutor for the king) was with me to give me notice of my trial before.

Cl. of Ar. Nathaniel Wyersdale.

Freind. I challenge him.

Cl. of Ar. Samuel Blewitt.

Freind. I challenge him.

Cl. of Ar. James Bodington.

Freind. I challenge him.

Cl. of Ar. John Wolfe.

Freind. Sir, I do assure you I have him not in my pannel, upon my word. I challenge him.

Cl. of Ar. Samuel Jackson.

Freind. I accept of him. (He was sworn.)

Cl. of Ar. Nathaniel Long.

Freind. I accept of him. (He was sworn.)

Cl. of Ar. Richard Chiswell.

Freind. I challenge him.

Cl. of Ar. George Child.

Freind. I accept of him. (He was sworn.)

Cl. of Ar. William Walker.

Freind. I accept of him. (He was sworn.)

Cl. of Ar. John Wills.

Freind. I challenge him.

Cl. of Ar. John Hibbert.

Freind. I challenge him.

Cl. of Ar. John Pettit.

Freind. I challenge him.

Cl. of Ar. James Robinson.

Freind. Sir, he is not in my pannel, upon my word.

Cl. of Ar. He is in the original pannel.

Sheriff Buckingham. My lord, here is the Original Pannel, and here's his name here; and there is not a person in this pannel, but what was originally put in, except it be about five or six at the end, and this is none of them.

Freind. I challenge him.

Cl. of Ar. Thomas Hollis. (He did not appear.)

L. C. J. Pray, Sir John, who had you that copy from? Who gave it you?

Freind. Mr. Solicitor.

Mr. Trotman. My lord, he had none from me, I am sure: I received the pannel from the sheriff, but nobody, from sir John, was ever with me for a copy.

Freind. My lord, my solicitor brought it to me on Saturday night.

L. C. J. Who is your solicitor that gave you that copy?

Freind. His name is Mr. Burleigh, my lord.

L. C. J. Where is he? Let's see this Mr. Burleigh.

Freind. My lord, he is gone to the Crown-office, it seems, for the Habeas Corpus.

Just. Rokeby. It is your own solicitor that has put the abuse on you, if it be so.

Cl. of Ar. Thomas Hollis. (He did not appear.)

L. C. J. Pray, sir John Freind, how many have you in all?

Freind. In number, my lord? Would you have me tell you how many I have in number?

L. C. J. Aye, in number in your copy of the pannel.

Sheriff Buckingham. In the pannel there are above fourscore.

Freind. I have seventy-one, my lord. [Then Thomas Hollis appeared.]

Cl. of Ar. Do you challenge him, Sir?

Sh. Buckingham. Pray let the Secondary produce his pannel that he had from my brother and me, and I am sure the court will find they were all named in that pannel.

Mr. Trotman. My lord, I have the pannel, but they never came to me for a copy, as I expected: I had got one ready; if sir John Freind, or any person for him, had sent to me, they might have had it.

Sh. Buckingham. And these people that are not in sir John Freind's pannel, are none of the half-dozen that were added, when we came to the knowledge of them that they were freeholders.

L. C. J. When were they added, Sir?

Sh. Buck. They were added on Friday in the afternoon, and it seems he never came for the pannel to the proper officer; and those that he objects against were not added, but are in the original pannel.

L. C. J. Truly, I cannot see any body is to blame in this matter but your own solicitor.

Mr. Trotman. My lord, I assure you I had made a copy, and wondered I did not hear of them: I do not know where he got this copy.

L. C. J. Treby. In truth, if you would not send to the proper officer for a copy, when you might have had it, you must be content with what you have; for nobody is bound to give you a copy, unless you ask for it.

L. C. J. Well, what say you to Thomas Hollis?

Freind. I challenge him, my lord, for he is not in my pannel.

Cl. of Ar. John Sherbrook.

Freind. I accept of him. (He was sworn.)

Cl. of Ar. James Blackwell.

Freind. He is not in my pannel, upon my word, my lord.

L. C. J. I cannot help it, he is in the sheriff's pannel that is returned here.

Freind. I challenge him.

Cl. of Ar. Thomas Gardner.

Freind. I accept of him.

Gardner. My lord, I am no freeholder in the city.

Just. Rokeby. Mr. Gardner, have you not lately conveyed away your freehold?

Gardner. No, indeed, my lord, I never had any.

Cl. of Ar. William Prince.

Freind. I accept of him. (He was sworn.)

Cl. of Ar. John Simons.

Freind. I challenge him.

Cl. of Ar. Robert White.

Freind. I challenge him.

Cl. of Ar. Joseph Morewood.

Freind. I accept him; his name is John, I suppose, for so it is in my pannel.

Cl. of Ar. No, it is Joseph.

Morewood. My name is Joseph.

Freind. Well, Sir, I accept of you, I don't

question but you are an honest man. [He was sworn.]

Cl. of Ar. Cryer, countez. Thomas Clark.

Cryer. One, &c. [So of the rest to the last.]—*Cl. of Ar.* Joseph Morewood.

Cryer. Twelve good men and true, stand together, and hear your evidence.

The names of the Jury were these: Thomas Clark, Thomas Emms, Henry Hunter, Thomas Poole, Peter Parker, Samuel Jackson, Nathaniel Long, George Child, William Walker, John Sherbrook, William Prince, and Joseph Morewood.

Cl. of Ar. Cryer, make proclamation.

Cryer. Oyez. If any one can inform my lords the king's justices, the king's serjeant, the king's attorney-general, or this inquest now to be taken, of the high-treason whereof the prisoner at the bar stands indicted, let them come forth, and they shall be heard; for now the prisoner stands at the bar upon his deliverance; and all others that are bound by recognizance to give evidence against the prisoner at the bar, let them come forth and give their evidence, or else they forfeit their recognizance; and all jurymen of London that have been called, and have appeared, and are not sworn, may depart the court.

Cl. of Ar. Sir John Freind, hold up thy hand. (Which he did.) You that are sworn, look upon the prisoner, and hearken to his charge: he stands indicted by the name of sir John Freind, late of London, knight (*prout* in the Indictment, *mutatis mutandis*), and against the form of the statute in that case made and provided. Upon this indictment he hath been arraigned, and thereupon hath pleaded Not Guilty, and for his trial hath put himself upon God and the country, which country you are; your charge is to enquire, Whether he be guilty of the high-treason whereof he stands indicted, or not guilty? If you find him guilty, you are to enquire what goods and chattels, lands and tenements, he had at the time of the high-treason committed, or at any time since: if you find him not guilty, you are to enquire if he fled for it: if you find that he fled for it, you are to enquire of his goods and chattels, as if you had found him guilty: if you find him not guilty, nor that he did fly for it, you are to say so, and no more, and hear your evidence.

Mr. Montague. May it please your lordship, and you gentlemen of the jury: this is an indictment of high-treason, that is brought against sir John Freind, the prisoner at the bar, for associating with, and aiding the king's enemies, with a design to procure an invasion from France, and to raise a rebellion within this kingdom; and this was to depose the king, and to restore the late king James; and in order to the effecting these his wicked purposes, the indictment sets forth, That the 1st of July last, he did meet, and consult, and agree with one Mr. Charnock (a gentleman since tried, convicted and attainted of high-treason), how they should procure an army

from France, to come and invade this kingdom; and should raise a sufficient number of men to facilitate the landing of the French: and the indictment particularly charges the prisoner at the bar with sending Mr. Charnock into France, to the late king James, to acquaint him with the design, and to desire him to procure a great number of forces from the French king, to come here, and land within this kingdom: and the indictment does likewise charge him with procuring and receiving a commission from the late king James, to constitute him, the prisoner at the bar, a colonel of horse; and likewise with laying out, and expending, and paying several sums of money in listing and keeping soldiers and men in pay under him, which were to be in his regiment; and with laying out several sums of money in buying arms and horses for this invasion and rebellion that was thus designed to be made, and raised within this kingdom. To this, gentlemen, he has pleaded not guilty: we shall call our witnesses and prove the fact, and we do not doubt but you will find him so.

Freind. Prove this if you can; it cannot be.

Att. Gen. May it please your lordship, and you gentlemen of the jury: the prisoner at the bar, sir John Freind, stands indicted of high-treason, in compassing and imagining the death of the king, and likewise in adhering to the king's enemies.

Gentlemen, the overt-acts laid in the indictment to prove this treason, are these:

That the prisoner at the bar did accept a commission from the late king James, to raise a regiment of horse in this kingdom, in order to join with the French when they invaded it; and there were several meetings and consultations between him and several others whom you will hear named by the witnesses; upon which it was resolved to send a messenger, one Charnock, into France, to desire the late king James to prevail with the French king to get a number of men, in all 10,000, with an assurance that they would assist him with a number of horse when he came: and in pursuance of this design, the prisoner at the bar did raise men, and pay some sums of money for their subsistence, and listed, and had them in readiness; and provided horses and arms. These are the overt-acts laid in the indictment; the evidence that will be produced to you, to prove this treason, and these overt-acts, will be in this manner.

Gentlemen, you will see by the evidence that there has been a design and conspiracy on foot for several years to assassinate the king's person, and to have an invasion from France at that time, by armed force here to subdue this kingdom. The prisoner at the bar, sir John Freind, I think about two years ago had a commission sent him from the late king James, to raise a regiment of horse: there was several other commissions sent likewise, but one was sent to the prisoner, which he accepted of; and in pursuance of it, he appointed several officers, and listed several men for that purpose,

and expended several sums of money for the raising and subsisting of them.

Gentlemen, you will hear that his lieutenant colonel was to be one Blaire, and his major was to be one Slater; and this Slater's father was a clergyman, and he undertook to bring in a troop of clergymen that had refused to take the oaths. One of his captains was one Evans; one Richardson was another; and there were several other officers whom you will hear named by the witnesses, that were appointed, and engaged to make up the regiment.

Gentlemen, you will hear further by the witnesses, that about May or June last, they have raised a considerable number of men, there were several meetings had between the prisoner at the bar and several other persons, in order to send some person over to get forces from France, to invade this kingdom. The first meeting that you will hear of, was at the Old King's-head-tavern in Leadenhall-street, and there were present the prisoner at the bar, my lord of Aylesbury, my lord Montgomery, sir John Fenwick, sir William Perkins, Mr. Charnock (who was lately condemned and executed for the design of murdering the king,) Mr. Porter, and one Cook. At that meeting you will hear what their debates were, and what their resolutions: after several debates, who they should send, they resolved to send Mr. Charnock, to go into France, to desire the late king James to get 10,000 men of the French troops to land upon our coasts, about 8,000 foot, and the rest horse and dragoons; and they did empower him in their names to assure the late king James, that they would, whenever he landed with his French troops, be ready to assist him with near two thousand horse among them.

Upon this, gentlemen, Mr. Charnock undertook to go upon this message: about a week after they met again, for he was unwilling to go upon such an errand, without having a full resolution and assurance from these gentlemen that were thus engaged, that he might satisfy the late king what they would certainly do. So they met again about a week after, and that was at a tavern in St. James's-street, near sir John Fenwick's lodgings, one Mrs. Montjoy's; there was the prisoner at the bar, my lord of Aylesbury, and most of the same company that were at the meeting before: and Mr. Charnock desired to know, if they did agree to what had been proposed and resolved on before; for he was unwilling, and did not care to go without a full assurance of the performance. They did all agree, and desired that he would go with all speed, and that he should assure king James, they would be ready to meet him, if they had notice where he would land.

Pray, gentlemen, observe the time when these meetings were. It was in May or June last, soon after the king was gone to Flanders; and they thought this a fit opportunity, when the king's forces were drawn out of England into Flanders, for carrying on the campaign; then was the proper time, according as they

discoursed the matter, the people being, as they said, generally dissatisfied, and but few forces in England to oppose them.

Mr. Charnock accordingly went over into France, and about a month after returned again, and acquainted them that he had told king James their resolution, and how they would assist him, and what they desired of him; and, in short, had delivered his message: but what king James told him, he thanked them very much for their kindness and readiness to assist him; but at that time the French king could not spare any forces, nor could it be all that summer, and so there was nothing to be done; and thereupon it rested till the last winter.

Then gentlemen, you will hear, that the last winter the design was renewed again, about January last; for sir George Barclay came over from the late king, being a lieutenant in his guards there, and then they entered into a conspiracy to assassinate the king; and that was to be done first to facilitate the invasion, which was to follow immediately upon the execution of the assassination: For they thought they could have no assurance of success in their invasion, as long as the king lived; and I hope every one will take notice, how precious that life is to us, when it is so apparent to all the world, that our enemies cannot hope for any success to their enterprizes and designs to destroy us, but by taking that life away.

Gentlemen, this very conspiracy, you will hear, the prisoner at the bar was acquainted with, and privy to, even this assassination; though indeed you will hear he did not much approve of it, because he thought it would be a disservice to the late king's affairs; but he was at several meetings with Mr. Porter, and Mr. Charnock, and sir William Perkins, and several others that were conspirators in that design, and was acquainted with it, as you will hear by the evidence.

Gentlemen, you will hear further, that about January last, the invasion being intended to be quickly made, the prisoner at the bar, sir John Freind, had frequent meetings with Blair, that was lieutenant-colonel, and other officers, to consider and prepare how to be in a readiness. About that time the prisoner at the bar, captain Blair, and one captain Ridley, met at a place in Exchange-alley, and there they discoursed among one another; and there Ridley said there was a considerable Roman Catholic that was sent to king James, and he would bring the last orders; and sir John Freind said he knew of it very well, it was so, and he hoped he should have them brought very quickly.

At another time, the prisoner at the bar, and Blair his lieutenant-colonel, met at Jonathan's coffee-house, and the prisoner took him up in his coach, and carried him along with him, and there they had a great discourse of the affairs of the regiment. The prisoner at the bar, sir John Freind, told Blair they must be very good husbands of their money: for if the

question but you are an honest man. [He was sworn.]

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Gentlemen, you will hear further, that about January last, the invasion being intended to be quickly made, the prisoner at the bar, sir John Freind, had frequent meetings with Blair, that was lieutenant-colonel, and other officers, to consider and prepare how to be in a readiness. About that time the prisoner at the bar, captain Blair, and one captain Ridley, met at a place in Exchange-alley, and there they discoursed among one another; and there Ridley said there was a considerable Roman Catholic that was sent to king James, and he would bring the last orders; and sir John Freind said he knew of it very well, it was so, and he hoped he should have them brought very quickly.

At another time, the prisoner at the bar, and Blair his lieutenant-colonel, met at Jonathan's coffee-house, and the prisoner took him up in his coach, and carried him along with him, and there they had a great discourse of the affairs of the regiment. The prisoner at the bar, sir John Freind, told Blair they must be very good husbands of their money: for if the

invasion should miscarry, he should not have money enough to carry on his trade, but he would take care about some officers that had not money to mount themselves; but a great many were to prepare for themselves at their own charges, and for those that were to be under them. They had likewise then some discourse about the Toulon fleet coming about, and that he thought it not advisable till the Toulon fleet came round. He said he would not put a foot in the stirrup till that were done; and that he would keep out of the way till all was in a readiness, and advised captain Blair to do so too.

Gentlemen, you will find it further proved, that about May last, the prisoner at the bar paid 20*l.* to this captain Blair, who had laid out monies in the affairs of the regiment, and this was to reimburse him what he had so laid out; and it was in this manner: You have all heard, I suppose, of one colonel Parker, who being taken upon his coming over from France, was a prisoner in the Tower, but made his escape from thence, to which escape the prisoner at the bar was privy. This escape cost 300*l.* as you will hear, and the prisoner laid down 100*l.* of it. But this was to be repaid him again: but how was it? There was one Johnson a priest, a conspirator likewise in this design of assassinating the king, and he undertook and promised, that the late king should pay this 100*l.* And accordingly one Piggott went over into France, and had this 100*l.* paid him by king James, to repay it to sir John Freind: but he thought fit to keep the money, and sir John Freind could not get it of him, and he durst not ask it, because he knew the consideration was not fit to be made public. But he told captain Blair, I cannot pay you the money out of my own pocket; but Piggott ought to pay me, who has received this money of mine. If you will prevail with Johnson, who got this money from the late king to be paid to Piggott, to persuade Piggott to pay this 20*l.* I will allow it in part of the money he is to pay me, and you shall have it. Captain Blair did prevail with Johnson to persuade Piggott to pay this 20*l.* and captain Blair did receive it, and sir John Freind did agree to allow it to Piggott out of the 100*l.* due to him.

Gentlemen, at another time, about Christmas last, there was another 20*l.* paid by sir John Freind's order and direction, by Piggott to Blair, upon the same account, by the mediation of Johnson the priest; and this was paid and allowed, as being laid out in the affairs of the regiment before, he being intrusted as lieutenant-colonel to look after the regiment.

Gentlemen, I have now opened the substance of the evidence; the particulars you will hear from the witnesses themselves. If I have opened it amiss, you will take care, when the witnesses are produced, to observe what they say, who will tell you what really was done, and will rectify any mistake of mine: for I would have no such mistake to do the prisoner at the bar any prejudice.

Sol. Gen. (sir John Hawles). Gentlemen, Mr. Attorney has opened the nature and course of our evidence so fully, that I shall make no repetition of any of the particulars; but call our witnesses, and prove it in order as it hath been opened. And first, we call captain George Porter. [Who came in.]

Freind. My lord, before Mr. Porter is sworn, I desire to know whether he is a Roman Catholic or a Protestant?

L. C. J. Why do you desire that? Is not a Roman Catholic a witness? Though he be a Roman Catholic, that is no objection to his being a witness.

Freind. My lord, I desire to ask him the question, whether he be a Roman Catholic, or no?

L. C. J. Sir John Freind, it is not a proper question.

Freind. My lord, a man ought to know what profession they are of, that are witnesses against him for his life.

L. C. J. Will you ask him whether he be a Christian or no?

Freind. My lord, I desire to know whether he be a Papist or a Protestant.

Att. Gen. If Mr. Porter be willing to tell you, he may; but it is not a proper question.

L. C. J. Especially before he is sworn; he is not intitled to ask any questions whatever, till he be sworn.

Freind. My lord, I beseech you let me have the question answered.

Sol. Gen. Sure you don't consider, that the answer to that question is to accuse himself; you don't consider the consequences of it.

Freind. Pray, my lord, let me have my right.

L. C. J. The question is, Whether it is your right or no?

Freind. My lord, I would not trouble the court if I could help it, but my life and all is at stake, and I must make the best defence I can.

L. C. J. Indeed your question is improper in itself; but if he have a mind to tell you, and answer voluntarily, he may.

Freind. I humbly beg your lordship that he may answer the question.

L. C. J. I cannot see you have a right to have this question answered you.

Freind. Mr. Porter, you are a gentleman, and I desire you will answer, Whether you be a Roman Catholic or not?

Sol. Gen. Before he does answer, I desire he may be acquainted with the danger: he was bred a Protestant, no doubt, and then turning Roman Catholic, he subjects himself to a very severe penalty.

L. C. J. Sir John Freind, I told you your question was not proper to be asked.

Freind. Pray, my lord, let him answer the question, it will be of great use to me in my trial; pray let me have my right.

L. C. J. You shall have all the right done you that can be; but in the first place, if a man be a Roman Catholic, notwithstanding his religion, he is a good witness: and besides that,

it may be, his answering the question may subject him to several penalties; at least he is liable to prosecution upon several acts of parliament that are very penal; and therefore it is by no means to be asked.

Freind. My lord, I pray only that he may answer the question.

L. C. J. No man is bound to answer any question that tends to make him accuse himself, or subject him to any penalties.

Freind. My lord, I do with submission desire it, and it is no great matter for him to say whether he be a Papist or Protestant.

L. C. J. If it be no great matter, then why do you insist upon it? But perhaps it may be a great matter in the consequence of it to him; a man, therefore, is not obliged to answer any such questions.

Freind. I beseech your lordship, let him answer the question.

L. C. J. You have my opinion; if you will, you shall have the opinions of the rest of the judges: my opinion is, That the question ought not to be answered.

L. C. J. Treby. Since your lordship's pleasure is, that we should deliver our opinions upon this point, I must declare, I am of the same opinion, that no man is bound to answer any questions that will subject him to a penalty, or to infamy. If you should ask him, whether he were a deer-stealer, or whether he were a vagabond, or any other thing that will subject him to punishment, either by statute or by common-law, whether he be guilty of a petty larceny, or the like, the law does not oblige him to answer any such questions.*

Freind. Well, I hope the jury will consider it, that he will not answer the question; and therefore they are to take it for granted that he is so.

L. C. J. Treby. And now to this present purpose, to ask a man whether he be a Popish Recusant, is to subject him to danger: for when you ask him that question, if he were not bred up in that religion, then for him to own himself of that religion now, is to own as great a crime as that you are charged with. If it were not so, but he was always bred in that religion, yet there are very great penalties that he is subject to, as, the confiscation of two third parts of his estate, and several other things that he may be liable to, if he should disclose that upon his answer to the question, which without this discovery could not be proved, perhaps. We must keep the law steady and even between the prisoner and the witness.

Just. Nevil. I am of the same opinion, it does subject him to a penalty; and unless he will voluntarily answer it of himself, I think it cannot be demanded of him: for he may subject himself to a prosecution by it.

Just. Rokeby. I think, it is not a question that can of right be imposed upon him; he may answer it, if he will; but he is under no

obligation to answer it, because it may tend to accuse himself of a crime for which he may be prosecuted, and likewise will subject him to other penalties, which the law cannot compel him to subject himself to.

(Then Captain Porter was sworn.)

Freind. I hope, gentlemen of the jury, you will consider this.

Sol. Gen. Mr. Porter, do you know sir John Friend, the prisoner at the bar?

Capt. Porter. Yes, Sir.

Sol. Gen. Pray then will you give my lords and the jury an account what meetings you have had with him, where those meetings were, and when, and what passed between you, about inviting the French over hither, or for a rising here?

Porter. My lord, about the latter end of May last, or the beginning of June, we had two meetings; one was at the King's-Head, in Leadenhall-street, and the other at Mrs. Mountjoy's in St. James's-street. At the first meeting there were present my lord of Ailesbury, my lord of Montgomery, sir John Freind, sir Wm. Perkins, sir John Fenwick, Mr. Cook, captain Charnock, and myself; after dinner Mr. Goodman came in: now at both those meetings it was consulted of, and agreed, to send captain Charnock into France to king James, to desire him to borrow of the French king 10,000 men to come over hither, 8,000 foot, 1,000 horse, and 1,000 dragoons. Capt. Charnock said, he did not care to go upon a foolish message, and therefore desired to know what they would have him to acquaint king James with, and assure him of. They all agreed to meet the king whenever they had notice of his landing, with a body of 2,000 horse; of which every one in particular was to bring their quota wherever he would appoint.

Att. Gen. When was the second meeting?

Porter. That was at Mrs. Mountjoy's.

Att. Gen. But I ask you when it was? How long after the first?

Porter. I believe it was about a fortnight after, or so.

Att. Gen. What was that meeting for?

Porter. The second meeting was to confirm the first. Captain Charnock informed me, that he was to go within three or four days, and therefore desired to have a meeting before he went.

Att. Gen. What discourse was there at that second meeting? What occasion was there for it?

Porter. Capt. Charnock desired the meeting once more before he went, to see whether we all kept our resolution.

Sol. Gen. Pray, what do you know of sir John Freind's agreeing to raise a regiment of horse?

Porter. I know nothing of that matter, but what I have heard several people talk; but I have heard him say, he would be as ready as any man, whenever the king came; and I have heard from capt. Charnock, and from sir Wil-

* See much matter concerning this in Peake's Law of Evidence, c. 3. s. 2.

liam Perkyns, that he had a commission to be a colonel of horse.

Att. Gen. Pray, Sir, upon that second meeting, who were present?

Porter. I told you, Sir, the prisoner at the bar was present at both meetings.

Sol. Gen. Who else were there?

Porter. My lord of Ailesbury, sir William Perkyns, capt. Charnock, and I cannot tell whether my lord Montgomery and Mr. Goodman were there; Mr. Cook and myself were there; but the prisoner at the bar I am sure was there.

Sol. Gen. Pray, capt. Porter, will you remember and recollect yourself, who were at the first meeting?

Porter. I have named them already, Sir.

Sol. Gen. Name them again then.

Porter. My lord of Ailesbury, my lord Montgomery, sir John Freind, sir William Perkyns, sir John Fenwick, capt. Charnock, Mr. Cook, and myself; we dined there, and after dinner Mr. Goodman came in.

Att. Gen. Pray, Sir, when did you see Mr. Charnock after this, and what discourse had you with him about his journey, and the success of it?

Porter. I never saw him till 3 or 4 days after our riot business in Drury-lane, upon the account of which I had been a prisoner in Newgate.

Att. Gen. Well, and what did he say to you?

Porter. He told me that he had been in France, but that king James told him, the French king could not spare so many men that year; and withal, that he had been with sir John Freind, and the several other persons, with messages from the king; but I do not know whether he had been there or no, only as he told me, that he had been, and brought that answer.

Att. Gen. Pray now tell us, what other meetings you have had about this matter this winter?

Porter. I was once with sir George Barclay and sir John Freind, at the Nag's-head in St. James's-street; I cannot tell what discourse they had; they whispered among themselves.

Att. Gen. Who else was there?

Porter. There was sir George Barclay, sir William Perkyns, myself, Mr. Ferguson, and one Humes.

L. C. J. Where was that, do you say?

Porter. At the Nag's-head in St. James's-street.

Att. Gen. Was there any body else there that you can remember?

Porter. Capt. Charnock came in after dinner, but I cannot say he dined there.

Att. Gen. And who else do you remember?

Porter. There came in one Harrison after dinner; he is a reputed Romish priest, and goes by the name of Johnson.

Mr. Mountague. Pray, capt. Porter, what was that meeting for?

Porter. They had several whisperings

among themselves, but what they discoursed of I cannot tell.

Mr. Mountague. Pray, did sir John Freind say any thing that you heard at that meeting?

Porter. Sir George Bareley did say, that some people that were not so violent had written over into France to stop this business; upon which, said I, I hope you will have no letter to-night. Upon which sir John Freind said, is there any thing that is hid behind the curtain? If there be, I am not fairly dealt withal; I will proceed no further.

Att. Gen. If sir John Freind has a mind to ask him any questions, he may.

L. C. J. Pray, capt. Porter, let me ask you this question, Did all that were present at the first meeting, at the King's-head in Leadenhall-street, agree to send Mr. Charnock into France to the late king?

Porter. Yes, my lord.

L. C. J. All of them?

Porter. Yes; we desired captain Charnock to answer to the king for us that we would meet him at the head of 2,000 horse.

L. C. J. Did sir John Freind agree to it?

Porter. Yes, I do positively affirm he did.

L. C. J. Then the second meeting, which, you say, was at Mrs. Mountjoy's, what was said then?

Porter. We did agree all, That capt. Charnock should go on with the message that was resolved upon at the first meeting, and we would go on with the business; and he said he would go away in two or three days.

Att. Gen. Will sir John Freind ask him any questions?

Freind. I will only ask him, if they have done, whether he has any thing more to say?

Porter. No, Sir.

L. C. J. The king's counsel have done with him.

Freind. Then, my lord, I will hear all they can say, and when I have heard the whole evidence, I shall know how to answer to it.

L. C. J. Before you go, captain Porter, I would ask you, what answer Mr. Charnock brought back from France?

Porter. I say, I did not meet with captain Charnock, until after I came out of Newgate for the riot business; and then he told me, he had been there, and he had acquainted the several gentlemen with the messages he had brought from king James, who thanked them for their kindnesses; but the French king could not spare so many men that year.

Sol. Gen. Then the next that we call is Brice Blair (Who was sworn.) Pray, Sir, do you know the prisoner at the bar, sir John Freind?

Capt. Blair. Yes, my lord; and I am very sorry to come on such an account as I do now against him. I am sorry for it with all my heart—

Att. Gen. Well, Sir, pray will you give an account what you know of sir John Freind's having a commission from the late king to be a colonel of horse, and when it was, and how?

Pray tell my lord and the jury the whole matter.

Blair. All that I can say to this business is written in my paper, and I refer to my paper.

Att. Gen. You must not refer to your paper, Sir, you must tell all what you know.

L. C. J. He may look upon any paper to refresh his memory.

Blair. I did see the commission, Sir, and I did read it.

Att. Gen. What commission was it, Sir?

Blair. It was a commission from king James to sir John Freind.

Att. Gen. Where did you see it, Sir?

Blair. I saw it in his lodgings at the Strand, when he lived near the Strand, in Surrey-street.

Att. Gen. Who shewed it you?

Blair. He shewed it me himself.

Att. Gen. What was it for?

Blair. It was for raising a regiment of horse.

Att. Gen. When was it that you did see it? How along ago was it?

Blair. It is well near two years ago, or thereabouts, as I remember.

Att. Gen. Who was to have been colonel of that regiment?

Blair. He was nominated to be colonel of it himself in the commission.

L. C. J. Who was the commission directed to?

Blair. It was directed to him, to sir John Freind.

L. C. J. Well, and what was done upon it? Who were to be the officers?

Blair. He promised me to be his lieutenant-colonel; and I had the same from Mr. Harrison, and there were several letters that I saw, that came from my lord Melford and secretary Caroll, who were with king James.

Att. Gen. What other officers were there appointed?

Blair. There was one Richardson was to be one of his captains, and there was one Mr. Fisher was to be another, and one Hall another; Fisher was to be his eldest captain, and one capt. Evans was to be his captain-lieutenant, and one captain Vernatti was to be another.

Att. Gen. Do you remember who was to be his major?

Blair. No, Sir, I think I cannot be positive as to that. I spoke to capt. Barnesley, that had been a lieutenant in king James's service, to be a lieutenant, and sometimes he accepted, and sometimes he refused it.

Att. Gen. Pray, what did you do as lieutenant-colonel upon this matter?

Blair. I endeavoured all I could to get officers for them, and to raise troops. I endeavoured to get what men I could myself.

Sol. Gen. Pray what did you do? What officers did you procure for him?

Blair. I told you Vernatti and Fisher, and one Mr. Hall that lives at Deal.

Att. Gen. What troops did you get under

you? Did you engage any to serve under you?

Blair. What? I myself, Sir, do you mean?

Att. Gen. Yes, I do.

Blair. Yes, Sir, I did.

Att. Gen. Can you name any of them?

Blair. Yes, Sir, if I make use of my paper.

Sol. Gen. You may make use of your paper to refresh your memory.

Blair. There is a paper of names that I gave in before the council.

L. C. J. Mr. Baker, have you his paper there? Let him see it to refresh his memory.

Mr. Baker. I have none of the papers, my lord; they are all sent before the council.

Att. Gen. Pray, Sir, can you tell who was to have been your lieutenant in your troop?

Blair. One Mr. Bertham.

Mr. Mountague. You say, Sir, you were constituted lieutenant-colonel; pray, who constituted you, and made you so?

Blair. I had only a promise of it from sir John Freind.

Att. Gen. Pray, did you lay out any monies for sir John Freind? or did he ever pay you any money afterwards?

Blair. Yes, I have had several small sums of money from sir John Freind.

Att. Gen. Pray, what was it for?

Blair. It was to drink with the men that belonged to the regiment, and encourage them.

Att. Gen. Pray, did Mr. Piggott pay you any sums of money? and by whose order?

Blair. Yes, he paid me first 20*l.* and afterwards he paid me another 20*l.*

Att. Gen. By whose order was that, Sir?

Blair. It was by the order of sir John Freind.

Att. Gen. Pray, Sir, How do you know that sir John Freind ordered him to pay it you?

Blair. Because it was the money that Piggott had received to repay sir John Freind what he had advanced for the furthering of Parker's escape out of the Tower.

Att. Gen. How do you know that he advanced any money for procuring Parker's escape?

Blair. He told me so himself.

Att. Gen. How much did sir John Freind say he advanced for that purpose?

Blair. He told me 100*l.*

Att. Gen. How did he tell you he was to be paid it again?

Blair. He told me that king James ordered the payment of it at France, when Piggott went over, which was immediately afterwards; and I had of that, first 20*l.* and afterwards 20*l.* by the order of sir John Freind.

Sol. Gen. Pray, Sir, did sir John Freind tell you what Piggott had received in France?

Blair. Yes, he said Piggott had received 100*l.* in France; and he did not pay it him, but if I could get 20*l.* of him, he would allow it.

Att. Gen. Pray about what time was it that the first 20*l.* was received?

Blair. I have set it down in my paper ; there it is.

Att. Gen. But cannot you tell about what time it was ?

Blair. It was about last May or June, the first 20*l.* was paid.

Att. Gen. When was the last 20*l.* paid ?

Blair. It was after I was sick, about Michaelmas.

Mr. Cowper. Pray, Sir, Who was by when the last 20*l.* was paid ?

Blair. Mr. Piggott paid me the last 5*l.* of it, (for I received it at several payments from Mr. Piggott) but the last 5*l.* was before sir John Freind, at Jonathan's coffee-house.

Sol. Gen. Pray, do you know any thing of sir John Freind's receiving any letter from king James ?

Blair. Yes ; he told me he had a letter from king James.

Sol. Gen. How long ago was that ?

Blair. Truly, I cannot tell.

Sol. Gen. I don't ask you the precise day, but was it within a twelvemonth ?

Blair. Yes, I believe it might be thereabouts.

Freind. My lord, I desire he may speak out ; for I don't hear half he says.

L. C. J. Repeat it to him again.

Blair. Sir, you told me you had received a letter from king James.

Freind. My lord, I shall answer to all this afterwards.

Sol. Gen. Pray, had you at any time any discourse with sir John Freind about one Slater ?

Blair. Yes, I had.

Sol. Gen. Pray tell what that was.

Blair. He told me he was to bring him in several officers ; and that he had intended to make two lieutenant-colonels, whereof captain Slater was to be one ; but when he saw I was not satisfied with that, he said he should command a troop of non-swearing parsons, and they should be an independent troop.

Sol. Gen. You say that Slater was to command that troop ?

Blair. Yes, and it was to be an independent troop.

Att. Gen. I think you say, that he and you met at Jonathan's coffee-house ?

Blair. Yes, we did so.

Att. Gen. Pray what discourse had you there ?

Blair. I called him aside, and desired to speak to him ; and it was when Mr. Fisher told me of this plot, and desired me to speak to him, a little before this horrible conspiracy broke out. And I told him what I heard from Fisher, and from Harrison the priest about it ; and he told me that he had heard of it, and he was afraid it would ruin king James, and his affairs.

Att. Gen. What was it that you told him you had heard ?

Blair. This last horrid thing, the conspiracy against the king's life.

Mr. Cowper. Was it before it broke out that he told you he knew of it ?

Blair. Yes, it was shortly before it broke out.

Att. Gen. Pray, did you meet with him again ? And did he carry you in his coach as at any time ?—*Blair.* Yes, he did, Sir.

Att. Gen. What discourse had you then, when you was with him in the coach ?

Blair. He took me in his coach to St. Martin's-le-Grand, and, says he, I will do nothing till the Toulon fleet meet with the Brest fleet ; at that time, perhaps, we shall be all taken up ; but, says he, you may sculk about the town better than I can ; and therefore I'll keep myself private ; and we must be as good husbands of our money as we can ; for money will be very scarce. What do you think you shall need, says he ? Truly, Sir, says I, I can't tell ; that must be according as I am mounted. For I found I had a few indigent officers at that time.

Att. Gen. Pray, what were you to do ?

Blair. We were to sculk up and down ; and when he asked me what money I should need, I told him I could not tell ; for there were several indigent officers, most of which begged at that time ; and here is a letter that I had from sir John Freind, to confirm my receiving money from him.

Att. Gen. Is that sir John Freind's own hand ?—*Blair.* Yes, Sir, it is.

Att. Gen. Then put it in. Give it hither.

[It was delivered in to the Attorney-General.]

Sol. Gen. Pray, what have you heard sir John Freind say of sir John Fenwick's being concerned in this matter ?

Blair. I heard him say, that he believed that he should command the party that he was engaged in, and that sir John Fenwick had four troops of horse, that lay near Reading, to be employed.

Sol. Gen. For what purpose ?

Blair. To be in readiness upon the descent.

Freind. Gentlemen of the jury, I can't hear a word ; I hope you hear.

Att. Gen. Pray, Sir, look upon that letter ; you say you had that letter from sir John Freind, pray, who is that *H* mentioned in it ?

Blair. It means Harrison alias Johnson, the priest.

Att. Gen. Pray, what was that letter written for ?

Blair. It was about the last 20*l.* that I was to receive from Piggott.

Att. Gen. Is that sir John Freind's hand ?

Blair. Yes, I think so.

Att. Gen. Have you seen sir John Freind write ?

Blair. Yes, I have seen him write, and I think it is the same hand.

Att. Gen. Then we desire it may be read.

Then a Juryman desired he might be asked, Whether he saw sir John Freind write that letter ?

L. C. J. What say you, did you see him write that letter ?

Blair. No, my lord ; it came to my lodging.

Att. Gen. Did he ever own to you he had writ you such a letter ?—*Blair.* Yes, he did.

Att. Gen. Pray, let it be read ; read it all, for it is but short.

Cl. of Ar. reads :

For Captain Blair, *These.*

“ Sir ; *Tuesday Morning.*

“ You may much wonder you have not received an answer of yours before now : I have been afflicted with the gout in my hand and foot, that I have not been able to put pen to paper ; (I thank God) I am somewhat better, and do hope to be in London a Thursday next, about the hour of twelve, at Jonathan's coffee-house, if the weather do not prevent me ; if it do, I shall not come before Monday following : I do desire you for to meet me about that hour ; for it is not convenient for to write a note to Mr. H. for some reasons I shall give you when I see you. I wish you good health. I am, Sir, your affectionate friend and servant,

“ JOHN FREIND.”

Juryman. Pray, Sir, what date is it of?

Cl. of Ar. It has no date but Tuesday morning.

Att. Gen. Did sir John Freind meet you on the Thursday, according to this letter?

Juryman. My lord, I desire he may be asked, How this letter came to him, whether by the penny post, or how?

Blair. I don't know, I believe it was by a porter : it came first to me when I was in bed, and my wife brought it up to me.

Att. Gen. Pray, Sir, answer my question. Did sir John Freind afterwards meet you at Jonathan's coffee-house, according to this letter?—*Blair.* Yes, Sir, he did.

Att. Gen. And did you there speak about the business that's contained in that letter?

Blair. Yes, Sir ; and accordingly I had the order.

Att. Gen. What order?

Blair. An order for the 20*l.*

Sol. Gen. Captain Blair, do you remember that you dined with sir John Freind near the Exchange, in January last?

Blair. Yes, I think I did, Sir.

Sol. Gen. What discourse was there between you then? Who was with you besides you two?

Blair. I must refer that to my paper.

Sol. Gen. Well then, what discourse was between you and sir John Freind there?

Blair. It is down in my paper.

Sol. Gen. Do you know one capt. Ridley?

Blair. Yes, Sir.

Sol. Gen. Was he at any time present when you and the prisoner at the bar were together?

Freind. My lord, I cannot hear a word he says.

L. C. J. Here is a great noise indeed, and he, it seems, is not well, and speaks but low ; pray, order silence in the court. [Which was done by Proclamation.]

L. C. J. Look ye, sir John Freind, he speaks of a letter that you sent to him that bears date some Tuesday morning, that you would be in town, and meet him at Jonathan's coffee-house upon Thursday following, at twelve o'clock ;

and that letter was read, and he says he met you accordingly, and there was order taken for the payment of the last 20*l.* This is that he says : did you hear it?

Freind. No, my lord, I did not.

L. C. J. That is what he said. Then go on : you say he met you at Jonathan's coffee-house according to that letter?

Blair. Yes, my lord.

L. C. J. What was done there, when you met?—*Blair.* Nothing but the order.

L. C. J. Who did he give the order to?

Blair. He gave the order to Harrison.

L. C. J. Why, was Harrison there?

Blair. Yes, he came there before I came away.

L. C. J. But you say he gave the order to Harrison?—*Blair.* Yes, my lord.

L. C. J. What was the order for?

Blair. It was to pay me that money.

L. C. J. What money was that?

Blair. It was the last 20*l.*

Att. Gen. Was the 20*l.* paid you afterwards?—*Blair.* Yes, Sir.

Att. Gen. Who paid it?

Blair. Mr. Piggott ; he paid me the last 5*l.* of it before sir John Freind's face.

L. C. J. Was this the first 20*l.* or the last, do you say?—*Blair.* It was the last.

L. C. J. What was this money paid for?

Blair. I believe it was to support me to go about the business of the regiment.

L. C. J. You believe ; that's not enough : but are you sure it was so?

Blair. Yes, I am sure it was for that.

L. C. J. Had you ever demanded money of him before?—*Blair.* Yes, I had.

L. C. J. For what was that money that you demanded?

Blair. It was to drink with the men that were brought in ; to cherish, and keep them together.

L. C. J. To what purpose were those men kept together?

Blair. They were for his regiment.

Sol. Gen. Pray, had sir John Freind any occasion to pay you any money upon any other account?

Blair. No, Sir, not out of that 100*l.*

Mr. Cowper. You do not understand the question. Had you any dealings with sir John Freind, but about this matter concerning the regiment?—*Blair.* No, never in all my life.

Att. Gen. Well, Sir, do you remember your meeting with sir John Freind when one Ridley was there?

Blair. Yes, it was at the chop-house.

Att. Gen. Give an account what passed there.

Blair. Mr. Ridley said, a gentleman was lately gone over to France, about ten days before ; and Mr. Ridley said, he was a very sensible gentleman, a Roman Catholic, an ancient man, about threescore years of age, what he was, I can't tell : he said, he believed he should bring the last orders.

Att. Gen. What did sir John Freind say?

Blair. Sir John Freind said, He knew of it; but he named no more.

Sol. Gen. What was the effect of those orders, as you understood?

Blair. I cannot tell that, Sir, indeed.

Sol. Gen. Did you know Mr. Charnock?

Blair. Yes, I did.

Sol. Gen. What do you know of his going to France?

Blair. I met him upon the Exchange the last summer, and I told him, I expected not to have seen him here at that time, I thought he had been abroad; he told me he was come from France; but who sent him I cannot tell, I do not know, upon my life.

Sol. Gen. Pray what has sir John Freind said to you about Ferguson? Whether was not he to have been an officer in his regiment?

Blair. No; but sir John Freind said, he would join; and Mr. Ferguson himself has told me so.

Att. Gen. When did he tell you so?

Blair. A good while ago.

Att. Gen. How long ago?

Blair. Two years ago, and above.

Sol. Gen. Did sir John Freind tell you any thing about Ferguson, that he would bring in any men?

Blair. Yes, he said he would bring in a great many.

Att. Gen. Will the prisoner ask him any questions?

L. C. J. Sir John Freind, will you ask this witness any questions?

Freind. Yes, my lord, I shall by and bye, if they have done with him.

L. C. J. Yes, they have done with him.

(Then he paused, and perused his Papers.)

Freind. First, as to the commission you charge me with, that I should receive a commission from king James; I desire to know, whether it was signed, or sealed, and what date it was?

Blair. I cannot tell the date, indeed, sir John; for I never thought to come here upon such an account as this: but I think it was in paper, signed above 'James Rex,' and below, 'By his Majesty's Command, Melford;' and a little seal upon the margin.

Freind. This is the hardest thing in the world upon a man; here you have charged me with money to subsist and encourage soldiers.—*Blair.* Yes, Sir.

Freind. I would only say this: you were recommended to me for a very honest man, and you have come to me several times, and told me, Sir, my necessities are very great, I am ready to starve, I have a great charge; for God's sake, will you be pleased to bestow something upon me, to relieve my necessities? It's true, I have given you money several times, but I never gave it for any other use but charity; God knows my heart. I desire you to consider with yourself, and answer it. There is a God above, where you must give an account as well as I, and I hope you will con-

sider of it. Pray declare the truth, Whether you have not writ those lines to me several times, that you were ready to starve, and begged of me to relieve your necessities?

Blair. I have so, Sir, I acknowledge it.

Freind. Pray take me right, and was not that money I gave you, only upon pure charity?

Blair. Yes, you did give me charity, but I had expended so much money in your business, that reduced me to that, God knows my heart. I have laid out many a pound upon this affair.

Freind. It is the hardest thing in the world; this is a Roman Catholic too.

Blair. I am sure it cost me many a pound more than ever I had of you.

Freind. You say you listed a great many men, who were the men? What are their names? Who were they for?

Blair. I have given a list of them to the council.

Freind. Who are they? for God knows, I know nothing of them.

L. C. J. You have a list there, let it be produced.

Blair. I gave it to the council; and, sir John, I brought in several officers to you.

Att. Gen. Remember, and name as many as you can.

Blair. I have named the officers already.

Att. Gen. Name them again.

Blair. Did not I bring captain Fisher to you? and did not you promise to make him your eldest captain?

Freind. No, you never did.

L. C. J. These are questions of your own asking, so you must hear him.

Blair. I brought captain Fisher to you, and accordingly we dined at captain Simons's; and there was captain Ridley, Mr. Richardson, and Mr. Fisher and you talked together, and you listened to him, and in my own hearing you promised he should be eldest captain, upon condition that he would bring in a troop; and this is true, so help me God.

Freind. Pray, where are your men? and what are your men that you listed?

Blair. I never spoke of listing, I only spoke of encouraging.

Freind. Did not you say you had listed a great many men for to be of my regiment?

Blair. No, Sir, I did not.

Att. Gen. I think you do mistake, sir John; he did not say list.

Blair. I had money from you upon the account of encouraging, and treating, and drinking with a great many of the men: and you said it was impossible to keep them together, but that I must have money to treat them, and drink with them; but you desired me to be as good a husband as I could.

Freind. I never said so; these are very hard things upon me.

Blair. Did not I bring captain Cole and captain Neale to you, and his brother-in-law Mr. Robinson, and Mr. Gellibrand? and did not we dine together?

Freind. I know nothing of all this, I declare to you.

L. C. J. If you would ask him any more questions, do.

Blair. I brought those three gentlemen, and we dined together.

L. C. J. Where did you dine then?

Blair. At Hackney, when sir John lived there, at his own house.

Freind. When was it?

Blair. It is above a year ago. Pray, sir John, don't think to dash me out of countenance, though I am very ill; I speak nothing but the truth, and therefore I will not be dashed out of countenance. You know what I say to be true; you then drank a glass of wine to captain Cole: and did not you promise him, because he was one of your mother's name, that he should have a place in the Excise next one of the commissioners? Says I, sir John, what will you give me? O, says he, you shall have the regiment, man. This was before Robinson, his mother-in-law, and Mr. Gellibrand.

L. C. J. Who was to have the place in the Excise?—*Blair.* Captain Cole.

Freind. I know not a word of all this.

Just. Rokeby. Captain Blair, be not dash'd, but speak the truth, and you need fear nothing.

Blair. This, I say, was before Mr. Robinson and Mr. Gellibrand.

Freind. I don't know Gellibrand, nor none of them.

L. C. J. Was that Cole to be any thing in the regiment?

Blair. Yes, he was to have been a captain, and to bring in a troop.

Att. Gen. Sir John, will you ask him any more questions?

Freind. No, I must depend upon the jury, for I cannot remember half what he has said.

Sol. Gen. Do you remember any discourse between you and him, about some brisk men that were to follow him?

L. C. J. But before you ask him, Mr. Solicitor, we must know whether he will ask him any more questions, for he is now his witness. Do you ask him any more questions, sir John?

Freind. I can ask about no more than what I hear.

L. C. J. But ask him what you will.

Freind. My lord, I have not heard half what he has said, I hope the jury will take care in it.

L. C. J. Some part of it was twice repeated to you.

Freind. As to that, my lord, I would ask him a question or two. Was that my letter?

Blair. Yes, it was.

Freind. Did you see me write it?

Blair. No, it came to my hands by a porter, as I believe, when I was in bed; my wife brought it up to me.

Freind. What was that letter for?

Blair. In order to pay the last 20*l.* and I did see a return of a letter that you writ to king James.

Att. Gen. Who shewed you that letter to king James?

Blair. He shewed it me himself.

L. C. J. How long ago is that?

Blair. A year and a half ago, as near as I can remember.

L. C. J. Did he say any thing of an answer he had to it?

Blair. Yes; but I cannot remember what it was directly.

Juryman. He was pleased to say, he saw a letter from king James.

L. C. J. No, no, Sir, it was a letter to king James.

Juryman. My lord, I desire he may be asked, if he knows the contents of that letter?

L. C. J. Did you see him write the letter, or did he shew you the letter he had writ?

Blair. I did not see him write the letter, I see his hand to the letter, and he shewed me the letter, that he said he had written to king James; and there is this particular passage to confirm it, it was at Mr. Piggott's mother's house; I dined with him there that day, and when he shewed me the letter, I told him I was so well pleased with the penning it, that I believed Mr. Ferguson had a hand in it; and he was very angry, that I should think he was not able to write, and did not write the letter himself.

Juryman. My lord, since it seems he perused the letter, I desire he may be asked, whether he can remember the contents of that letter, or any of it?

Blair. Really, my lord, I cannot tell that particularly: but I am apt to think it was about the business of the king, and about the regiment.

L. C. J. Can you tell truly any of the contents of it?

Blair. That it was about the affairs of the regiment, I am positive.

Mr. Cowper. My lord, before he goes away (that the jury may not go away with a mistake), I desire it may be observed, he does not say, he saw sir John Freind write the letter.

L. C. J. No, no, but that he shewed it him himself.

Freind. When was that letter writ that I shewed to you?

Blair. It was about a year and a half ago.

Freind. I declare in the presence of God, I never writ one.

Juryman. He says you shewed him the letter, therefore it is very fit we should see it.

L. C. J. Nay, Sir, you must not talk to the prisoner; if you have any questions to ask, you must propose them to the court.

Freind. I declare in the presence of God, I never writ any such letter as this he now charges me with.

Blair. And I do declare in the presence of God, you shewed me such a letter.

Freind. Yes, you may; but I am a Protestant, you are a Papist; you may do any thing.

Att. Gen. You may ask any questions of him, sir John, but you must not rail at the witness.

Freind. But when you charge me with the writing of a letter to king James, I ought to speak to it. It seems, I am not to ask whether he is a Papist.

Att. Gen. He says, you shewed him a letter, that you said you had written to king James, which he read, and liked the penning of it so well, that he thought Ferguson had a hand in it; at which you were offended, that he should think you could not write such a letter yourself.

Freind. I declare in the presence of God, I never writ any such letter.

Att. Gen. I suppose you'll disprove him by and bye.

Freind. I can have no witnesses to this matter.

Att. Gen. And you can't expect your own denial should go for proof. If you will ask him no more questions, let him go down and ease himself.

Freind. He must not be asked whether he is a Papist; but I hope you will take notice, countrymen, that these witnesses are Papists, and they think they merit Heaven by swearing against Protestants, whom they call Heretics.

L. C. J. Indeed, sir John, I don't hear you: pray speak so loud that the court may hear what you say.

Freind. I will, my lord; I say he is a Roman Catholic, and I have witnesses to swear he is so; and desire I may prove that he is a Roman Catholic, and therefore he is not to be heard against a Protestant.

Att. Gen. Then the next witness we call is Mr. Bertham. [Who was sworn.]

Freind. But I have not done with Mr. Porter.

L. C. J. Well, you shall have him by and bye; let the king's counsel go on in their method.

Att. Gen. Pray, Mr. Bertham, do you know captain Blair that was here just now?

Bertham. Yes.

Att. Gen. How long have you known him?

Bertham. About eight or nine years.

Att. Gen. What discourse have you had with him about any regiment that was to be raised for the late king James?

Bertham. Captain Blair had told me for two years last past, that sir John Freind was to have a regiment of horse, that were to be raised, and lie posted about the town; and captain Blair was to be lieutenant-colonel to the regiment, and I was to be lieutenant to captain Blair in his troop.

Att. Gen. My lord, we only call him to confirm what captain Blair has said, that he was to be his lieutenant, and that this was talked of two years before. Did he tell you sir John Freind was to have a regiment of horse?

Bertham. Yes, Sir, and he obliged me to bring in as many men and horses as I could into this regiment, and he told me capt. Fisher, captain Vernatti, and captain Cole were to be captains in the regiment.

L. C. J. And what were you to be?

Bertham. A lieutenant.

L. C. J. To whom?

Bertham. To captain Blair; he has told me so several times, and talked to me about the affairs of the regiment a great deal, that I cannot now remember, relating to that purpose.

L. C. J. This is no evidence against sir John Freind: he is only called to confirm the testimony of captain Blair; that Blair spoke of it long before he gave his evidence, and so it is not a new thing now invented by him.

Sol. Gen. Sir John Freind did ask what men he had engaged, and among others, he named this Mr. Bertham to be his own lieutenant, and he now tells you Blair promised him so to be two years ago, and then told him sir John Freind was to have a regiment.

Freind. Do you know me, Sir?

Bertham. No, Sir, I never was in your company in my life; I only tell you what I have heard from captain Blair; I do not know that ever I saw your face.

L. C. J. His evidence, sir John Freind, hurts you not, as to any particular thing that he knows against you; he is only brought to confirm what captain Blair said, that he was to be his lieutenant in his troop.

Att. Gen. Then, my lord, we leave it here.

L. C. J. Look ye, sir John Freind, the king's counsel have done, and now you may speak, and say what you have a mind to say in your own defence.

Just. Rokeby. And call what witnesses you have a mind to call.

Freind. My lord, in the first place, I desire to know whether Mr. Courtney is come.

L. C. J. Your solicitor can best tell that.

Freind. I perceive he is not come.

L. C. J. Well, go on: I suppose he will not be long before he comes, we will stay for him.

Freind. My lord, I must wait for my witness: but in the mean time, as to Mr. Porter's evidence, I own I was at the meeting at the King's-Head in Leadenhall-street; I declare I was at that place, and there were some gentlemen there, but how many or whom I cannot say; but I declare there was not one word spoken there of any raising of men, nor any thing of that nature, that he speaks of, but only we were drinking a glass of wine, and eating a dish of meat together, and sir John Fenwick at that time coming in, said to us, I desire you to come to our end of the town, and take a dish of meat with us. And there was nothing spoke of any thing relating to the government. Gentlemen, these are Papists, and I am a Protestant, they don't care what they say, for they think they merit Heaven by destroying Protestants; and they are not to be believed: and that is the reason that I was not to ask them the question, for by law they are not witnesses, and for that I appeal to your lordship.

L. C. J. Holt. Why are they not witnesses?

Freind. Nay, I appeal to your lordship.

L. C. J. Holt. Truly I think they are witnesses, I know nothing to the contrary.

Freind. My lord, Papists are not good witnesses against Protestants for this reason that I shall tell you; I am advised, my lord, that a Papist is not a good witness to prove a Protestant a traitor within the stat. of 25 of Ed. 3.

L. C. J. Holt. Who says so?

Freind. My lord, I desire to know whether there is such a statute?

L. C. J. Holt. Yes, no doubt of it, there is such a statute as that of the 25 of Ed. 3, about Treasons.

Freind. Pray, my lord, does not that make it so?

L. C. J. Holt. No, indeed, I know no such thing.

Sol. Gen. That cannot be, my lord, that any such thing should be, for all were Papists then, there was no such a thing as a Protestant in the time of Ed. 3.

Freind. My lord, there is the statute of the 3rd of James the 1st, cap. 4th, and other statutes made in the time of king Charles the 2nd, particularly in the 30th year of his reign, cap. 2d, whereby it is plain they are not to be levied against Protestants, because they believe them guilty of damnable Heresy; and by those statutes they are reputed infamous.

L. C. J. Where is your statute?

Freind. My lord, I have no Statute-book, I desire it may be inquired into, this advice was given me by my lawyer; I am no lawyer myself: there is the statute of 3 James 1, cap. 4, and the next is 30 Car. 2, cap. 2.

L. C. J. Well, the Statute-book shall be looked into.

Freind. My lord, the person is not come, who is to give evidence against captain Blair; the principal witness, he is a prisoner at the Gatehouse, and your lordship was pleased to say you would have patience till he came.

L. C. J. Yes, yes, we will stay a while.

Freind. I pray, my lord, do, for it will be very material for me.

L. C. J. Treby. Have you any thing to fill up the time with in the mean time? [Then William Courtney appeared.]

L. C. J. Is your solicitor returned with this Habeas Corpus?

Freind. I believe he is in or about the court, but I cannot get him to me, the crowd is so great. [After much ado, Courtney came in.]

L. C. J. Is this the witness you would have?

Freind. Yes, my lord, it is.

L. C. J. Then what do you say to him?

Freind. My lord, must I ask him the questions?

L. C. J. Yes, you must propose your questions to the court, and they will ask them of the witnesses. If this be the person you speak of, you had best examine him.

Freind. Mr. Courtney, I desire you would speak what you know of captain Blair.

Courtney. Gentlemen, I have been a prisoner in the Gatehouse about a month, and while I was there captain Blair at the same time came in as a prisoner, as mentioned in the proclamation; being my old acquaintance, (I

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was in bed, being in upon some other accounts) and when they told me captain Blair was brought in, I desired him to come into my chamber. I told him I was sorry to see him there; I told him I hoped he was none of those concerned in this plot; he said he was in the Proclamation, but that he was innocent, and knew nothing of the plot, nor of the assassination, nor any thing like it; there were several other persons in that place at the same time, and he said he was as innocent as the child unborn.

Freind. Did he mention any thing of me then?

Courtney. At that time he said nothing of you.

Freind. Pray, Sir, do you believe he is a Roman Catholic?

Courtney. I do not know his religion indeed.

Freind. But don't you know him to be a Roman Catholic?

Courtney. He bore the character of one, but I never saw him at any church.

Just. Rokeby. Pray, Sir, how long have you known captain Blair?

Courtney. By sight, I have known him six or seven years.

Just. Rokeby. Pray, upon what account did you call him captain?

Courtney. It was a common name among all the company: he was called so.

L. C. J. What, all the time you knew him?

Courtney. Yes, all the time that I knew him, I knew no other name that he had.

Freind. But did you not hear that he was reputed to be a Roman Catholic?

Courtney. I have heard that character of him among those that I have known, but I have very little knowledge of his religion.

L. C. J. Is this what you can say?

Courtney. There are several others that were witnesses of this, as well as I; I never saw you, sir John Freind, before in my life, to my knowledge, nor ever spoke to you.

Freind. Sir, a note was sent to me, that you could do me some service, and that was the reason I sent for you. I desire Mr. Carpenter, Mr. King, and Mr. Payne may be called.

L. C. J. Have you done with this man then?

Freind. Do you know captain Porter, Sir?

Courtney. Yes, I do, Sir.

Freind. Sir, do you know him to be a Roman Catholic?

Courtney. Sir, I have heard that he has such a character.

L. C. J. What character has he?

Courtney. That he is a Roman Catholic.

L. C. J. That's only by hear-say.

Freind. My lord, I have done with this man.

L. C. J. If you have done with him, then the keeper may carry him back again.

Courtney. Sir, I have something else to say.

Freind. My lord, he says he has something else to say.

L. C. J. Then set him up again: (which was done.) Well, Sir, what is it you have more to say?

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Courtney. Two or three days after that time, there was a prisoner then in the Gatehouse, who was an ensign in the army, was reading the Flying-Post in my chamber, and in that Flying-Post, there was news that capt. Blair was making a great discovery, and that he had accused sir John Freind, for having received a commission for a regiment in which he was to be a lieutenant-colonel, and said a great deal about that regiment, how he had received subsistence money for them from sir John Freind. A little after captain Blair came into the room, and asked me if I had got the news? I told him yes; and captain Blair then asked what was the import of it? I told him it was there, that he was making a great discovery, and particularly, that he was to be lieutenant-colonel to sir John Freind, and had received subsistence money from sir J. Freind for the men of the regiment. Captain Blair answered, that they might put what they would in the news, but he knew nothing of it, nor did he receive any money: and this was a great surprize upon me, and upon those others that heard him, when we were told he was to be the main evidence against sir John Freind.

Freind. Well, Sir, do you know any thing else?

Courtney. Captain Blair was bemoaning himself afterwards, that he went against his conscience in this thing; and his wife told me, that he was very much concerned, because he was going to do this against his conscience, and she was sure it would break his heart.

Freind. Do you know any thing more?

Courtney. And he told me in his chamber upon Friday night last, about nine o'clock I came to see him, he lay upon his bed very ill, and his wife was with him; I asked him how he did? and he clapped his hands, and said he was very ill. Pray, said I, what ails you? Sure you have gotten some very great cold. Oh! no, says he, life is sweet, I don't know what it is I ail, but were it not for life, I should never do what I do.

L. C. J. Did he tell you, he went against his conscience?

Courtney. His wife and he spoke at first, that he went against his conscience, and he believed his conscience was in a miserable state; and this I spoke innocently among some of the prisoners, and I did not know that it was taken notice of, but it seems somebody has acquainted sir John Freind, and so I am brought here; I know nothing of being a witness, I assure you.

Just. Rokeby. Pray, who were present when this discourse was between you and Blair? You say there were two other persons present when this discourse was between you and captain Blair, and his wife: who were those two persons?

Courtney. What discourse do you speak of, my lord?

L. C. J. You said there were two persons in your chamber.

Courtney. Does your lordship mean at the reading of the Flying-Post?

L. C. J. Yes.

Courtney. My lord, this gentleman that I was speaking of, was lying down upon the bed, and captain Blair came into my room, just after the news was read, and asked me if I had got the news? I told him, yes; he asked me what was the import of it? I told him, they said he was making a great discovery, and particularly against sir John Freind.

L. C. J. Well, and who were there then?

Courtney. This ensign that is now a prisoner in the Gatehouse, who, I suppose, can say the same thing.

Att. Gen. Pray, my lord, let Mr. Blair be called while he is here, and let him know what this witness says, that the Court and Jury may know what he has to say to it.

L. C. J. Yes, pray let Mr. Blair be brought in again. (Which was done.)

L. C. J. Treby. Now, let Mr. Courtney repeat what he said now before about captain Blair's declarations to him.

Courtney. My lord, I tell your lordship, there was one Tooley a prisoner in the Gatehouse, when he heard the Flying-Post cried, bought it, or it was ordered to be bought; and it being brought into my chamber, I desired him to read it, and I was walking about the room: in the mean time captain Blair came in, and asked if we had got the news? We said, yes; and he asked what news there was in it? I replied, it is said that you are making a great discovery, that you were to be lieutenant-colonel to sir John Freind, and had received a great deal of subsistence money for the regiment: says he, they may put what they will in their news, but I know of no regiment, nor of any subsistence, nor of any commission. The man that read the book will say the same that I do.

Att. Gen. When was this?

Courtney. This was one day when the Flying-Post came out, the last Saturday but one I think.

L. C. J. But you talked of something he should say to you of going against his conscience.

Courtney. That was upon Friday night last, I came to see captain Blair, and his wife was with him, and captain Blair was very ill, and clapping his hands, and groaning, and moving himself, and in a very miserable condition, truly, I thought he was giving up the ghost. I asked him upon what account he was so sad? and told him I thought he had got some great cold: he told me, No. Well, said I, captain Blair, I understand you are going to-morrow to Hicks's-Hall, and I pray God direct you. Says he several times, I pray God direct us all, life is sweet. Oh! says his wife, dear Sir, he would never do it, but to save his life; but it goes against his conscience: so said I to him, you have had the character of an honest gentleman; I hope you will shew yourself such, and I pray God direct you: I wish no man's

blood may lie at your door. Says he, I am an unfortunate man; that is the thing that troubles me; or something to that purpose; which showed all the remorse of conscience which could be in the world. I spoke of this innocently among the prisoners, and it seems, it was communicated to sir John Freind, and so I am brought here to testify it.

Att. Gen. Pray, what say you to this, captain Blair? You hear what he says; do you give an account what you know of it.

L. C. J. You hear what discourse he says he had with you; what say you to it?

Blair. My lord, this gentleman crowded himself in upon me; my wife was with me, and he told me he had a cup of brandy, which would be good for me if I had a cold. God knows my heart, I desired no company might come to me. Says he, captain Blair, I have heard you have been an honest gentleman all along; and you are going to Hicks's-Hall to-morrow; (and a great deal of such discourse as that), and I pray God Almighty direct you! That's all that I know passed. I was very ill, very sick, as I am far from being well now; but as for any thing of remorse of conscience, as I hope for mercy and salvation, I never expressed any such thing to him.

L. C. J. Did your wife say, that you were troubled, that you were going to do that which went against conscience, and you would not do it, but to save your life?

Blair. No, I am sure she did not.

L. C. J. Did that gentleman thrust himself into your company, or did you desire him for to come to you?

Blair. No, he thrust himself into the room.

Courtney. The sink was hard by, and I heard captain Blair groan, and so I went in to see him; every body had access to him.

Blair. Pray, where is the keeper?

Keeper. Here I am, Sir.

Blair. Did not I beg of you for God's sake, that no one should come to me but my wife?

Att. Gen. If the keeper of the Gatehouse be there, pray swear him.

(The Keeper of the Gatehouse was sworn.)

Sol. Gen. What do you say as to captain Blair's desiring that nobody should come to him, but his wife?

Keeper. Nobody was to come to him unless they forced themselves upon him.

Sol. Gen. Do you know of that man's coming to him?

Keeper. No, Sir, I know nothing of it.

Blair. I always desired to have the door locked with the key on the inside, that nobody might come to me, but whom I had a mind to.

Keeper. He did so, because he was ill, and nobody did come to him that I know of.

Blair. My wife being with me came to me to the bedside, while this man was with me, and I was lying upon my back; and she said, For Christ Jesus's sake, dear Blair, do not speak any thing.

L. C. J. When was this?

Blair. When this gentleman was with me, she desired me not to say any thing before him; because, said she, I do not know but he may be a trepan.

Courtney. Upon the word of an honest man, and my reputation is as dear to me, as yours is to you, she said nothing of that. She told me, you were going to do that which was against your conscience, and you would not do it but to save your life.

Att. Gen. Pray what is this man committed for, you keeper?—*Keeper.* He is committed for suspicion of treason.

Courtney. I have been taken up five times upon suspicion, and this last time I was committed to the Gatehouse.

Att. Gen. Where do you live, Sir?

Courtney. In Old Southampton Buildings.

Sol. Gen. How long have you lived there?

Courtney. I have lodged there about four years and an half; there are several persons can come and give a testimony of me.

Sol. Gen. How came you, Sir, to be brought as a witness here?

Courtney. I was surprized at it: for my part what I did was by way of pity, seeing him in such a condition; I pitied your soul, because you and your wife both shewed so much trouble and remorse of conscience: as for sir John Freind, I never saw him till to-day in all my life, that I know of.

Att. Gen. What countryman are you, Sir?

Courtney. I am an Irishman born.

Att. Gen. Have you any estate in Ireland?

Courtney. No, Sir, I have not.

Sol. Gen. Pray, how came you to go to Mr. Blair?

Courtney. I have known him a long time; I have been often in his company at the coffee-house; I cannot say I am intimately acquainted with captain Blair, but only as I have seen him in the coffee-house a great many times.

Sol. Gen. But I ask you how you came to go to him; because it seems he desired nobody should come to him but his wife?

Courtney. He may say what he pleases; for he lay first in one room, and then in another, and he could never go to the necessary house, but he must go through my room; but if you please to send for Mr. Tooley and capt. Courtney, they will say and swear that these things passed in their presence, or to the same purpose, except what passed between him and me in his own chamber. Ensign Tooley did read the paper of the Flying-Post; and as for what he said of his knowing nothing of the plot, it was talked of up and down the prison, and so it came to me; and I invited him into my chamber as my old acquaintance; though I was not very familiar with him; and as he declared, he knew nothing of the matter.

L. C. J. You hear what he says; captain Blair, did you tell him you knew nothing of the plot?

Blair. Yes, I believe I might at first; as we were talking when I first came in, and I told him the truth: for I was innocent as to

he assassination, for indeed I was so ; and as to the invasion there was only some general discourse, and I was not willing to explain myself among such people as they were, when they asked me any questions about it : I had to do with the king and council.

L. C. J. Sir John Freind, have you any more witnesses to examine ?

Freind. Yes, my lord, I desire Mr. King may be called. [Which was done, and he appeared.]

L. C. J. There he is, Sir, what would you ask him ?

Freind. I desire to know of him, whether he does not know captain Blair and captain Porter to be Roman Catholics, and whether he does not know me to be a Protestant.

King. I am of opinion Mr. Porter is a Papist ; he was always taken to be so at Epsom, where I used to go, and where he used to go, and he was never looked upon as a Protestant.

L. C. J. And what do you take sir John Freind to be ?

King. I take sir John Freind to be a Protestant ; so he is, and so he ever was.

Freind. But when you have been in my company, and they have been speaking of the government, what have I said or done ?

King. Whenever they started any reflecting words upon the government, he was used to say, Forbear, I do not admit of any such discourse.

Att. Gen. How long have you known him ?

King. He has been my acquaintance this fifteen years, and married a relation of my wife's husband. (At which there was very great laughing.)

King. I mean her former husband.

L. C. J. He has reconciled the matter very well for this point ; for he tells you he meant her first husband.

Freind. Ay, my lord, no doubt of it, he will recover it ; it was her former husband. Mr. King, don't you mean it was her former husband ?

King. Yes, Sir, I have told you it was so ; her former husband's name was Thomas Case.

L. C. J. Mr. Tanner, you are to look upon two statutes, the one is 3 Jac. 1, cap. 4, and the 30th Car. 2, cap. 2.

King. My lord, I have heard him say, if I had not taken the oaths to king James, which oaths are binding to my conscience, I could as freely take the oaths to the present government, as any man in England ; but I will live peaceably and quietly under the government : but because I do not take the oaths, I am double taxed, and I will pay it.

Freind. My lord, I desire captain Kaines may be called. [Who appeared.]

L. C. J. What do you ask him, Sir ?

Freind. Captain Kaines, I desire to know of you, whether Mr. Porter and Mr. Blair are Roman Catholics ; and I desire you to speak as to myself, what I am.

Kaines. They are so reputed to be at Epsom ; it was also so reported there ; and I have

been acquainted with sir John Freind several years, being concerned together in the Trained Bands of the Tower-Hamlets, and I have been in his company several times since the king came in, and never heard him give any reflecting language against the government in my life.

L. C. J. Have you done with him, Sir ?

Freind. My lord, I did not hear him ; but I suppose he has declared, as to captain Porter and captain Blair, that they are Catholics.

L. C. J. He says, Porter and Blair are reputed Papists ; and he has known you a long time, and been concerned with you in the Trained-bands, and never heard you reflect upon the government since the king came in.

Freind. My lord, I desire to know, whether he believes me to be a Protestant ?

Kaines. I did always take sir John Freind to be a Protestant.

Freind. Then, next, I desire Mr. Carpenter may be called. [Who appeared.]

L. C. J. What do you ask him, Sir ?

Freind. I desire, Mr. Carpenter, that you will acquaint the court, whether you know captain Porter to be a Roman Catholic, and what you know of me ?

Carpenter. I have been at Epsom several summers, and usually am there in summer time, and he was so reputed there : but as to sir John Freind, I have known him above these 20 years ; I keep a brew-house, as he does, and we have been concerned together, and have had several occasions, upon the account of trade, to meet him upon particulars of appraisement, when any partners came in, and I never knew him but very orderly and civil ; I never heard him reflect any thing upon the government, but was always peaceable and quiet : he was always looked upon as a Protestant, and went to church. That's all that I can say.

Freind. My lord, as to the Statute-Book, will your lordship please that the Statute-Book be sent for ?

L. C. J. Yes, yes, we do not forget it. Have you any more witnesses ? Call all your witnesses, and we will consider of that afterwards.

Freind. I desire Mr. Hawkins may be called. [Who appeared.]

L. C. J. What say you to this gentleman ?

Freind. I desire you, Mr. Hawkins, to give an account what I am ; whether you know me to be a Roman Catholic or a Protestant ?

Hawkins. I have known sir John Freind these twenty odd years, and have had dealings with him many times before the change of government, and since, I never heard him reflect upon the government ; nor never heard him to speak slightly of it : and as to his being of the Protestant religion, I do know as much as any man, as much as another ; I always believed him to be a Protestant of the Church of England, as good as any man alive ; he always went to church.

L. C. J. What, since the Revolution ?

Hawkins. I have not been so conversant with him since that, because I went out of town, and

lived out of town; but I believe there are those at Hackney, that can give an account of that matter.

Freind. I desire major Mould may be called.

L. C. J. Then I suppose you have done with Mr. Hawkins?

Freind. Yes. [Then major Mould stood up.]

L. C. J. Well, what say you, Sir?

Mould. My lord, I have known sir John Freind many years, above these twenty years, and I always looked upon him as a sincere Protestant; and I have often been in his company since the Revolution, and I never heard him speak diminishingly of the government. I believe him to be as good a Protestant as any in England.

L. C. J. How! as any in England? That's a great character.

Freind. Then, I desire Dr. Hollingsworth may be called. [But he did not appear.]

Freind. Then, my lord, I desire Mr. Lupton may be called.

L. C. J. There is Mr. Lupton, what would you have with him?

Freind. I desire he will give an account what he knows of me, what religion I am of?

Lupton. My lord, as to sir John Freind, I have known him this ten years; he was pleased to employ me as a chaplain in his house a considerable time, both before and after the Revolution; and after the Revolution we always used the prayers according to the Church of England, and we did always pray for the present king, and the late queen Mary, at which sir John was many times present.

Att. Gen. How long is it since you left him?

Lupton. About four or five years, as I remember: then sir John's family lessened; he was pleased to say to me, Mr. Lupton, I am going to Tunbridge, and my family lessens, (this is about five or six years ago), and I shall have no occasion for you at present; but if ever I make use of a chaplain again, I will make use of you: this he was pleased to say.

L. C. J. How long is it, do you say, that you have left him?

Lupton. About five years; and as to any objection of his being a Papist, I have often discoursed with sir John Freind about the Popish religion, and he has often spoken with detestation of the principles of the Papists.

Freind. What have you heard me speak of the French; and about any thing of an invasion, how I would venture my life for the Protestant religion, or any thing of that?*

* See in this Collection, Mr. Erskine's Observations and the Arguments on the proposed examination of Daniel Stuart, when called for the third time in Hardy's Case, A. D. 1794. See, too, Lord Russell's Case, vol. 9, pp. 621, et seq.; Hampden's Case, vol. 9, p. 1099; Rosewell's Case, vol. 10, pp. 206, et seq.; Cornish's Case, vol. 11, p. 382; Ashton's Case, vol. 12, p. 747; and the other Cases in this Work referred to by Mr. Erskine in Hardy's Case as above.

Lupton. I have often heard you say, as to the present government, that though you could not comply with it, yet you would live peaceably under it. When we have been talking of these things, you said you never would be in a plot; and though you could not comply with the present government, yet you would never concern yourself in any design against it. For my part, my lord, I know nothing by him, but that he is an honest and a worthy gentleman, though he be so unfortunate to be under this accusation.

Freind. I desire Mr. Hoadley may be called. [Who appeared.]

L. C. J. Well, what say you, Sir?

Freind. Pray, Mr. Hoadley, will you give an account to the court what you know of my being a Protestant, and of my life and conversation?

Hoadley. I believe sir John Freind is a very settled Protestant in the Church of England; and I have reason to believe so, because I have frequently discoursed with him, because I have had a couple of children that were his nephews, upon whose account I have been forced several times to wait upon him; and he has often said he never would be in any plot, and his words that he used to me were really very remarkable, 'Catch me in the corn, and put me in the pound.'

L. C. J. What were his words, Sir?

Hoadley. He used to say he would never be in any plot; for, says he, 'Catch me in the corn, and put me in the pound:' and I have heard him express himself with a great deal of detestation of king-killing, and those principles of the Papists, the assassinating of any crowned head.

Att. Gen. Pray, Sir, how came you to discourse with sir John Freind about king-killing and plots? You are a schoolmaster it seems; how happened this sort of discourse between you?

Hoadley. There will be discourses about these things sometimes.

Att. Gen. But, pray, how was the discourse introduced? What was the occasion of the discourse? Sure there was some occasion extraordinary for him to express himself to you.

Hoadley. I cannot remember the particular occasion, but such discourse there was.

Att. Gen. Pray, how long ago is this time that this discourse was?

Hoadley. I believe it was five or six times within these two years.

Att. Gen. What, have you had the same discourse five or six times one after another?

Hoadley. I cannot say that; but those used to be his words.

Att. Gen. What, in common discourse?

Hoadley. He said he would never be in any plot.

Freind. My lord, I can bring a great many more witnesses of this kind, and I believe I could have a thousand to prove me a Protestant.

L. C. J. Call whom you will, sir John, we will hear them.

Freind. My lord, I am very loth to trouble you.

Just. Rokeby. No, it will not be reckoned any trouble, we will hear all your evidence.

Freind. There is one Mr. Willis and one Mr. Hemings; but I desire it may not be forgotten as to the acts of parliament, for they are very material for me, as I shall shew by and bye. [Mr. Willis appeared.]

L. C. J. Well, what say you to this gentleman?

Freind. Mr. Willis, I desire you'd give an account to their lordships, what you think of me, as to my being a Protestant, and how I have behaved myself in every respect all along?

Willis. My lord, I have always taken it for granted, that those that come to church are Protestants; and I did always take sir John Freind to be a Protestant. The acquaintance I had with him was since he lived in the parish of Hackney, and we have had some converse together; and there have past friendly visits between us; and I do not remember any discourse while I was there that tended to the government one way or another. I was never very often with him, but his discourse was always very obliging, discreet, and prudent, whenever I was there.

L. C. J. Pray, Sir, when did you see him at church?

Willis. Truly, my lord, I cannot call to mind when it was.

L. C. J. Cannot you name any time?

Willis. He may be at church sometimes, and I not see him; our seats are at a distance from one another, and there are pillars between, that one can't see every body; and I cannot call to mind when I did see him last at church.

L. C. J. Has he been there within this year or two?

Willis. He has been gone from Hackney a year and above.

Mr. Mountague. Pray can you say you have seen him at church within these four years?

Willis. Truly I cannot call to mind whether I have or no.

Freind. I desire Mr. Hemings may be called. I could call a great many more, but they are much to the same effect as these are.

L. C. J. Call whom you will, sir John, if you think fit to call them, we will hear them.

Freind. Being they are not here, I will not trouble you farther; it is all to the same purpose.

L. C. J. Well, take your own course; if you'll call them, the court will be sure to hear them.

Freind. But, my lord, here is one thing that I must desire your lordship's direction in: if these gentlemen, my lord, captain Porter and captain Blair, who are the two witnesses, and none but those two against me, if they are Papists, they are not good witnesses against a Protestant, to prove him a traitor within the statute of the 25th of Edward the 3d. For the statute says, He that is indicted must be

proveably attainted; which cannot be by the evidence of Papists, and those that refuse to take the oaths of obedience, which are required to be taken: and therefore I humbly beseech you, that you will please to tender them the oaths, for there is a statute in the 3 Jac. 1, cap. 4, which appoints the tendering of the oaths to them.

L. C. J. That is not our business at this time.

Freind. Then I must beg your pardon that they are not substantial witnesses; for this is the law, as I am informed. I humbly submit to your lordship, whether this be not the law. I only speak it to know whether it be convenient for me to rehearse it. I asked the question before they were sworn. I know not whether it be convenient for me to move it now.

L. C. J. Ay, ay, it is very convenient now; now is the proper time.

Freind. Before ever they were sworn I would have asked them the question whether they were Papists or not, but it was not allowed, it was over-ruled: now, my Lord, there is such a statute, and I humbly beseech you to tender them the oaths, and that would be a demonstration that they were Papists, and then they could be no good witnesses.

L. C. J. You say well, if we could find such a statute, that no Papist should be a witness; but there is no such.

Freind. My lord, I beg your pardon, and I hope you will not take it amiss; I offer what I am advised to offer.

L. C. J. No, no, by no means, there will be nothing taken amiss.

Freind. For the statute of the 25th of Edward the third, and that of the 30th of king Charles the second, and that of the 3d of king James the first, cap. 4, here it is plainly demonstrable, that Papists are not to be believed against any Protestant, who is with them esteemed a damnable heretic; and then they believe the pope and their priests can absolve them from all oaths, and they are declared to be given to evasions, and equivocations, and mental reservations, and can have dispensations for all their villanies; and therefore they are not to be credited: their evidence is of no value unless they will in this manner upon their oaths renounce these principles: therefore I humbly beg they may have the oaths tendered them.

L. C. J. That is not our business now.

Freind. And, my lord, your lordship was pleased to promise me that if any matter of law did arise, my counsel should be heard.

L. C. J. First let us know, whether there be any such law as you mention, or to any such purpose.

Freind. My lord, I desire my counsel may come in, and speak to it: for my life is in danger, and so is every honest gentleman's life every day. I am as clear as the child unborn, I have no witnesses to prove any thing, and therefore I desire my counsel may be heard.

L. C. J. If the court did think there were any colour in this objection that you make, we would let you have counsel; we would do it; nay, we are desirous to do it if it could.

Freind. What, my lord?

L. C. J. To allow you counsel, if there were any colour in this objection in relation to Papists not being witnesses. I would be glad to see the counsel that would own this objection: but indeed, I see no colour in it: the statute shall be produced that you quote, and then we shall see, whether there be any thing like it in that statute. Pray will you read those words that you say are in that statute to that purpose?

Freind. I am not so expert to know the words before and after; and therefore I think it is requisite I should have counsel.

L. C. J. It is supposed you have had counsel, and I suppose your counsel that have advised you to make this objection, have instructed you whereabouts in the statute it is.

Freind. My lord, I desire my counsel may be called in and heard to it.

L. C. J. I tell you, that by law we cannot hear counsel to any such matter that has no colour of objection in law in it? though for my part, I wish we could, because I would fain hear what any counsel can say to make out such an objection, that Papists are not good witnesses.

Freind. My lord, I wish you would hear my counsel to it.

L. C. J. Look ye, sir John Friend, you have desired that this statute may be turned to, and you desire to have them read, and they shall be all read from the beginning to the end.

Freind. I desire the statutes of the 25th of Edward the third, the 3d of king James the 1st c. 4. and the 30th of K. Charles the 2d, may be read.

L. C. J. What chapter is that of the 30th of K. Charles the second?

Friend. Really it is not put down in my paper.

L. C. J. Then look out the chapter, while he is reading the other. Look ye, gentlemen of the jury, sir John Freind does desire the statute of the 25th of Edward 3, may be read, which is the statute about treasons, and the statute upon which he is indicted, and it shall be read, therefore pray hearken to it.

Cl. of Arr. (Reads it.) This is made in the 25th year of K. Edward the third. "A declaration which offences shall be judged treason. Item, Whereas divers opinions have been before this time, in what cases treasons shall be laid, and what not."

Freind. My lord, I beg the favour I may speak one word before it go on to be read.

L. C. J. Yes, with all my heart.

Freind. I speak it, my lord, because it will be to the very thing now in question, I am advised that consultation to levy war is no treason, without rebellion and insurrection: and in-

viting men to come from beyond sea is no treason, unless a foreign prince be invited to come with his own subjects; for English, Scotch, and Irish are not enemies, but rebels, and to be dealt with otherwise; therefore I leave it to your lordships, for I am no lawyer, only I am advised to insist upon these things.

Then the Statute of the 25th of Edward 3 about treasons, was read throughout, only about the middle the prisoner made some interruption.

Freind. I believe this statute is not the statute I go upon; that which I mainly insist upon, is the statute of the third of king James the first, cap. 4.

Just. Rokeby. This is the same statute you are indicted upon, the great statute for treasons; and as to your objection last mentioned, what is treason and what is not, he is not yet come to that part.

Freind. Well then, let him go on with it. (It was read to the end.)

L. C. J. Now it has been read, is this the statute you would have?

Freind. There must needs be a mistake as to the chapter, it is set down the 25th of Edw. 3. but there is no chapter.

L. C. J. Yes, this must be the statute, it relates to treasons, and it has those words in it, that what you read out of your papers relates to. Well, that we may go on in order of time, what statute of king James is it that you mention?

Freind. It is the 3d of king James 1, cap. 5, it is upon account of tendering the oaths appointed to be taken by the statute, and (reading out of a paper) to tell the court that they ought to have the oaths tendered them.

L. C. J. That is the business of another time; read the statute.

Cl. of Arr. "An Act for the discovering and repressing Popish Recusants." What part is it?

Freind. Truly, my lord, I cannot tell.

L. C. J. It is a long statute, but if he will have it read, it must be read all.

Freind. My lord, I would not give the court any trouble, but it is about having the oaths tendered to them.

Cl. of Arr. I believe this is the paragraph, "And for the better trial how his Majesty's subjects stand affected in point of their loyalty and due obedience," &c.

A great part of the Statute was read, relating to that matter.

L. C. J. What else would you have read, sir John Friend?

Freind. I only gather from thence, that no Roman Catholic is capable of swearing against a Protestant, because the pope and the priests can absolve them from their oaths.

L. C. J. Well, what have you more to say?

Friend. My lord, I only speak this as to Roman Catholics, they do not regard an oath against a Protestant, because they have their priests that can absolve them, and therefore

how such a man's oath can weigh any thing, I cannot apprehend; therefore if I have omitted any thing, I hope your lordship will supply it, as you are my counsel; for you are a counsel for me, as well as the king.

L. C. J. Yes, yes, I would help you in any thing I could.

Freind. My lord, I thank you; I desire you to help me, for I am as innocent as the child unborn, whatsoever these men have sworn: These are hard things that are laid upon a gentleman, and no man is safe at this rate, they being sworn by two Papists, who will swear any thing against Protestants.

L. C. J. Look ye, sir John Friend, have you any witnesses to produce, that these two men have any displeasure or malice against you, that they should accuse you falsely?

Freind. My lord, I am sorry I have not my witnesses; I have been so kept up, that I had not time for people to come to me; I had not my counsel to come to me before Saturday.

L. C. J. How happened that?

Freind. My lord, there was a mistake in that, I think it was Friday, either Friday or Saturday: I had them not till Friday in the afternoon: I was kept so close that none were permitted to come at me: on Thursday I had an order, but there was a mistake in the order, and I desired to get another order, but I could not get any body to get another order for me, to have my friends to go and enquire into things, or else I should have found out enough of witnesses.

Att. Gen. I am sure he had an order for counsel, at the same time that notice was given him of his trial.

L. C. J. When was that?

Att. Gen. On Tuesday, my lord.

L. C. J. What say you to it, Mr. Baker?

Mr. Baker. My lord, I did attend sir John Freind on Tuesday last, to give him notice of his trial as this day; and I at the same time told him if he would name his counsel to me, I would procure an order for them to come to him. The next morning he was pleased to name to me sir Bartholomew Shower; I took the liberty to tell him, that he being so concerned at the House of Lords, and at the committee about parliamentary business, some other persons that had named him of their counsel, notwithstanding orders were procured for him to go to them as their counsel, yet by that means they were disappointed of him, and great delay was given to the prisoners; and therefore I desired him to consider of it, and to send to sir Bartholomew Shower, and any other counsel that he had a mind to, and know their pleasures, whether they would attend him; and if he would send me word, I would procure an order for him. But not hearing from him, I went on Wednesday to him again, and he said he sent to Mr. Northey, but he would not come to him till he had spoke with sir Bartholomew Shower, but he would send me word that night, yet he did not. But the next day came Mr. Burleigh to me to the duke of

Shrewsbury's office, and brought me the names of the persons that he would have assigned him of counsel, and immediately I procured an order for it, and away he went with it. This was upon the Thursday; Mr. Welden, and Mr. Cresset, or one of them, were named in the order, I am not positive which, and Mr. Underhill, and Mr. Burleigh were to be admitted to him. Mr. Burleigh had the order; if he did not carry it to him, I cannot help that.

L. C. J. When was that order for the counsel?

Mr. Baker. It was upon Thursday, my lord.

Freind. My lord, may I speak?

L. C. J. Yes, yes, what you will.

Freind. My lord, the reason why I had not my witnesses was this: there was a gentleman, one colonel Cash, lieutenant to my lord Lucas, he undertook to go, and put in his name, and three more, one John Neale, and one Phillips to have an order to go about to look after my witnesses; but they did not put in any one of their names, but they took up and secured my kinsman Cash, and put him into the messenger's hands, and would not suffer me to have any of his assistance; therefore I saw what a design there was upon me.

Att. Gen. As for Mr. Cash, there was very good reason for it, he was secured for suspicion of treason.

L. C. J. If you had wanted any witnesses, and had not been so fully prepared as you expected to be, you should have moved before the trial came on to put it off.

Just. Rokeby. But my lord put a question to you before, can you shew any reason why these persons should have any malice against you?

Freind. My lord, I was not so much a lawyer as to know these things; but it is a hard thing, that a man that's innocent must suffer at this rate: I have been disappointed in every thing, for these gentlemen have not been permitted to answer, whether they are Roman Catholics or no.

Rokeby. Nor have your witnesses proved that they are Roman Catholics, but only that they are reputed so.

L. C. J. Well, I cannot tell what avail that would have been of, if they had been proved so. Have you any more to say, sir John Freind?

Freind. No, my lord, I leave it to God, and you, and the jury to consider of it.

Sol. Gen. May it please your lordships, and you gentlemen of the jury, I am of counsel in this case for the king, against sir John Freind, the prisoner at the bar; and it comes to my turn to sum up the evidence that has been given. Sir John Freind, the prisoner at the bar, cannot but own, that he hath hitherto had a very fair trial, and he shall have no reason to complain, that I do him any injury in my part. I am sure both he, and you, and all of us, very well remember, when persons of as good quality as he is, or better, had not the same usage or liberty of defence, in such cases, as this gentleman has had: and though all things are

very well now, yet the time was, within all our memories, when innocency was no safety for a man's life, much less for his liberty; and when those two are taken away, and are invaded, property signifies nothing. The time was, when the Protestant religion, and the church of England, of which the prisoner boasts himself to be, (and for a very good reason, because it is the best of religions,) I say, the time was, when that was in danger; and when Popery (for which he now reflects upon the witnesses) was like to have over-run both us and it; and if his majesty, with the hazard of his life, and at a great expence, had not rescued us, there is nobody doubts, but that all that we feared at that time, would have been made good upon us ere now. And it is a melancholy thing to consider, that there should be a sort of people amongst us, so in love with what we then dreaded, as to be continually endeavouring to bring it about again. And it is an ungrateful thing, when his majesty ventured his life then and has done it several times since to defend us, and does all that he can to keep our enemies at a distance, there should be a party of men, that do what they can to invade their country, to destroy his majesty's subjects, and to fall upon himself, when he is present amongst us. I will not accuse the prisoner at the bar particularly, though it is plain he knew of it.

Freind. Know of it? I declare before God, and the world, I know nothing of it.

Sol. Gen. This, if it were among equals were certainly a most ungrateful thing, when another person is fighting in my defence, that I should design against his life; or when he does what he can to protect my estate, I should be invading and spoiling his.

Gentlemen, if the prisoner at the bar is not guilty of what he is accused of, and what you have heard the witness give evidence of, then nothing of this doth relate to him: but if what has been given in evidence against him is true, then the prisoner at the bar is one of those persons, that has done all he can to make this country, which has been the place of retreat for all Protestants to fly to, from persecution in their own countries; I say to make it as unsafe for them, as that from which they came.

Gentlemen, The evidence against him is, first, Mr. Porter, and he gives it in evidence, that at the Old King's Head in Leadenhall-street, there was a meeting of the prisoner, and Porter and several others, in order to consider the best means, how to bring back the late king James; and they concluded at last, that the best means would be to send somebody into France, to advise the late king James to borrow of the French king 10,000 men, 1,000 horse, 1,000 dragoons, and 8,000 foot, and that he should make what speed he could to land with them here; and to encourage and invite him to do so, they promised him their assistance, and they did not doubt but to be ready to meet him with 2,000 horse at his landing.

Gentlemen, the person that was pitched upon

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to go upon this errand, was Mr. Charnock, a person lately executed for the treasons of which he was attainted. Mr. Charnock was diffident whether this was the effect of sober consideration, and therefore would not undertake to carry this message until there had been another meeting of the same persons; to see whether they continued in the same mind. Another meeting accordingly was appointed, and agreed upon, and that was at Mrs. Mountjoy's tavern at St. James's, and there, he says, there were almost all the persons that were in Leadenhall-street, and at that meeting the question being asked, whether they were of the same opinion, that Mr. Charnock should go to France to the late king upon that message, that I told you of before? they did all agree to abide by the old resolution; that he should go, and make as speedy a return as he could, and bring back the late king's answer.

Captain Porter tells you, that Mr. Charnock did go to France, and comes and brings word back, that the French king could not at that time spare that force that was then desired; and so it was delayed at that time, because the French king was not at leisure then to employ his men in this service; but it was likely to have taken place, but very lately, if the providence of God had not prevented it.

Gentlemen, our next witness is Captain Blair, and he tells you, That about two years ago, sir John Freind, the prisoner at the bar, shewed him a commission that he had received from the late king James, to raise a regiment of horse, of which he was to be colonel; that this was signed James Rex at the top, and countersigned by my lord Melford, and it was in paper. And that there were a great many consultations between sir John Freind, himself, and others, about the raising of this regiment, and providing officers for it. He tells you he was to have been lieutenant colonel, and was to procure as many officers and troopers as he could; and he tells you, he did procure several officers; and he names them; one Fisher was to be eldest captain, one Vernatti, and one Hall, and one Bertham, and that Bertham was to be lieutenant to Blair in his own troop.

Gentlemen, a great deal of the evidence which captain Blair has given, is indeed out of sir John Freind's own mouth, and that is as strong an evidence as possibly can be given; and he does for that purpose tell you, that he said one Evans was to be a captain of horse, and one colonel Slater was grown so much in sir John Freind's favour, that he rivalled captain Blair, in the opinion of sir John Freind; and sir John Freind for that reason would have two lieutenant colonels, whereof Slater was to be one. Captain Blair says, he took that amiss, that any one besides himself should be in that post, and resented it to sir John Freind; and therefore sir John Freind found out another office for Slater; and that was to be a captain of a troop of horse, that should consist of non-swearing parsons, and which were to be an independent troop.

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Gentlemen, He tells you that he did list several men, but the particular persons, though he has named the officers, he did not so distinctly remember, but they are in the paper that he delivered to the council, which he has not about him: He tells you, that sir John Freind told him, that one Richardson was another captain of horse, and the like of one Mr. Cole, that he was to be a captain likewise.

He also acquainted you, gentlemen, that he did receive from sir John Freind several sums of money, and he acquaints you in particular with the manner how; he says that sir John Freind had expended 100*l.* towards the 300*l.* that was paid for the escape of colonel Parker out of the Tower; and that sir John Freind was to be reimbursed by monies that were to be transmitted from king James at St. Germain. He tells you that Piggott had received the money, but did not deal with sir John Freind so fairly as to pay it to him; but when captain Blair was pressing on sir John Freind for some money, sir John Freind was contented that he should have 20*l.* provided he got it from Piggott out of this 100*l.* Captain Blair had not interest enough it seems to get it himself from Piggott, but he applies himself to one Harrison or Johnson, (for it seems he goes by both those names) a priest, who had an interest in Piggott, by which means he got 20*l.* of Piggott, and this he says was in June or July last.

Then, Gentlemen, he tells you afterwards, he was pressing upon sir John Freind to have another 20*l.* and sir John Freind was contented he should have it, provided he had it from Piggott, and he produces ye a letter that was from that very person, the prisoner at the bar, which is to that purpose; excusing himself that captain Blair had not heard from him, but that he would meet him at such a time, and at such a coffee-house. The matter indeed is not directly expressed in words, but at the time and place the prisoner did meet Blair, and there was Harrison and this Piggott, and there 5*l.* of the last 20*l.* was paid him; and the other 15*l.* was paid him afterwards; and he swears these two twenty pounds were paid to him by sir John Freind, upon account of the charge that Blair had been at in drinking with, and treating those men who were to be engaged with sir John Freind in his regiment.

Gentlemen, he tells you likewise, that sir John Freind told him he had written a letter to king James, and he shewed him this letter, and this was at that Piggott's mother's house; and when Blair read it, he tells you he thought it was so well penned, that he did apprehend Ferguson must have a hand in it, and that it was none of sir John Freind's own; and that upon this sir John Freind was angry, that he should suspect that sir John was not the writer of this letter; all this shews an intelligence with king James, and makes out all the rest of the intended invasion by king James, and a French force here.

Captain Blair likewise tells you, gentlemen,

that sir John Fenwick had four troops of horse, as sir John Freind told him, by way of encouragement, which were all ready for the service; and that Ferguson undertook to bring a number of men, and was to be one himself in that party; and all this was to be put in practice when the Toulon fleet came about, and joined the Brest fleet. And lastly he tells you, when he went in the coach with sir John Freind, sir John told him they must act very warily, and be very good husbands, for in truth it had cost him so much, that if the fleet did not come soon, or the design should miscarry, he should want money to carry on his trade. All this positive evidence is of the witness's own knowledge from the prisoner's own mouth.

Against this evidence, gentlemen, he takes exception: that the two witnesses are Roman Catholics; but this is no exception to their evidence at all; for it was never yet allowed, or indeed objected, that I know of, before, that Roman Catholics were not good witnesses. A Roman Catholic may be an honest man, notwithstanding his religion: But, I think, that every body knows that men who have been ill in other things, though Roman Catholics, may, as to those particular things, be good witnesses. Nay, not long ago, but on Wednesday last we produced some witnesses, who were Roman Catholics, and yet allowed for good evidence, though engaged in that horrid conspiracy against the life of the king; and if any thing would have taken off their evidence, certainly the guilt of such a crime would do it, more than the pretence of any particular persuasion of religion. Nay, I must crave leave to say farther, that this argument is so far from making him no witness, that it makes it the more likely he does speak the truth, and therefore is a good witness. For though Roman Catholics may be honest men, yet they are more likely to engage in such a design than any other men. And I think I may very safely add, sir John Freind would not have found so many that he could engage in such a business as this, that were of any religion but the Roman Catholic, and therefore he applied himself to these persons, as most likely to embark with him on such a bottom.

Gentlemen, as to what Courtney, that was brought from the Gate-house, says about his discourse with captain Blair in the prison; captain Blair has upon his oath declared, that he did not go so far as to say, he did any thing against his conscience, but only Courtney bid him take care what he swore, and pressed him no farther. He pretends he came casually into Blair's chamber, but it is plain he intruded into his room; for it is sworn by the jailor, and Blair himself, that he had given directions none should come into his room but his wife, so that does not discountenance the evidence of Blair at all; and if you do believe what our witnesses have said, captain Porter and captain Blair, then sir John Freind is guilty of all the crimes that are charged upon him in this indictment, and I hope you will be so just to

your prince, to your country, and to yourselves, as to find him guilty accordingly.

Mr. Cowper. If your lordship pleases, spare me a word on the same side. My lord, I do not trouble your lordship out of an apprehension that there is any thing necessary to be said to the court in this matter, or for the satisfaction of the jury, but, if possible, that we might convince the prisoner at the bar, that he has had no hard measure, in this prosecution, meted to him, but that he is proved guilty of the crime of which he stands accused, and that really there is no weight at all in the defence which he has made.

The first part of it goes to discredit one of our evidences, captain Blair, from some discourse that he would object to have passed between him and the person here produced, in the prison of the Gate-house. And the first part of that discourse was, upon Blair's first coming into the prison; and as to that time, the objection amounts to no more than this; that captain Blair would not confess, when he was pumped by a fellow-prisoner, that he was engaged in so horrid a design. What weight there is in such an objection, truly I cannot see, but will leave it to any man's judgment to consider, that a man, when he is freshly taken up on such an occasion, does not immediately confess his guilt to every body that meets him, nay, to persons that would not have liked him for making such a confession, but perhaps would have destroyed him in prison for so doing.

The other discourse was upon Friday, the next day, I think, before captain Blair went to Hicks's-hall, to his examination; and then he intrudes himself into Blair's chamber, when he lay very ill upon the bed, accosts him with a cup of brandy in his hand, and with good advice at the same time, that he should take great care in what he should say at Hicks's-hall, and the like: and then captain Blair, it seems, did express some reluctance in the thing he was going about, as if it were against his mind and inclination. If that were true, (though captain Blair denies it positively upon his oath) yet it was no more than, I am willing to observe for the prisoner, captain Blair did express here, when he first came into court; and it is no more than what is natural, since the prisoner had been his friend and intimate, and he was going to depose that against him, which was likely to prove fatal to him.

My lord, as to another part of his defence, it consists chiefly in this: the evidence brought to prove, that the king's witnesses are reputed Roman Catholics, and that the prisoner is a reputed Protestant of the church of England. If that be true too, all that can be rationally and fairly collected from thence is this, that they (the witnesses I mean) when they engaged in such a black and execrable design, might be very good Papists; but I am sure it will be agreed, that the prisoner in so doing was a very bad Protestant.

My lord, he objects to their evidence this

likewise, that, if they be papists, they may be absolved by the pope, or their priests, though they should swear falsely. Possibly that may be so, for aught I know; I confess, I am not very well acquainted with the principles of that religion: but this I dare say, that every one, who has heard what has been sworn by them, will think it so great a disservice to the popish cause and interest, that it will be one of the last things their priests will ever absolve them of.

My lord, there is another matter the prisoner has thought fit to insist upon; he has brought two or three clergymen to depose, that whenever he discoursed with them (it seems at all times) he was talking about being in a plot, and very readily told his resolution not to be in any. It seems it still swam uppermost; his professions were made very causelessly: for they all say nothing introduced them; but of his own mere motion he was always declaring he was not then in a plot, nor ever would be. I have heard, that one way, weak men and children often discover their knowledge of a secret intrusted to them, is, by a repeated and unnecessary declaring, that they know nothing of the matter.

My lord, in the next place for his defence, he just offered a point of law; but the court so well satisfied him in that, that I think he waved it. He alledged, that a bare conspiracy to levy war is not treason; and the court did him right in declaring (as God forbid but they should) that it is not treason: but I desire the gentlemen of the jury would consider that the prisoner at the bar is not accused barely of a conspiracy to levy war, but you are told to what end that war was to be levied, to join the late king upon his descent into this kingdom with a French power, in order to drive his majesty out of the kingdom, and to depose him from the crown; which is a killing him in the eye of the law: and that is high-treason, by whatever means they intended to effect it; whether by war, or a stab, or any other manner, it is indifferent.

In the next place, my lord, I would not take notice of another part of his defence, which had been better let alone, wherein he admits that he was present at the two meetings he is accused to have been at by Porter; but he only differs in one point, that there was nothing talked then but general and indifferent discourse. The witnesses have sworn what the discourse was, and you will weigh the one against the other; his affirmation of a thing unlikely in defence of himself, and what is deposed upon oath by the king's witnesses to the contrary.

My lord, there is one thing more I would take notice of, and that is the evidence of Mr. Bertham, which we do not produce as a direct evidence against the prisoner at the bar, but as a confirmation of what was sworn by Blair. And it does shew that the matter sworn by Blair, was not of late devised out of malice, or otherwise, to destroy the prisoner;

for that Blair acquainted Bertham with, and discoursed him about the principal matters of fact, that are now sworn, at least two years ago; and besides his evidence and the evidence of Blair concur in this particular, that he was to be lieutenant in Blair's troop.

My lord, such a concurrence of evidence and other circumstances in this matter, greatly increase the weight of the proof against the prisoner, especially when there is nothing material alledged by him in his defence, and therefore I shall trouble your lordship no further.

L. C. J. Holt. Look ye, gentlemen of the jury, sir John Freind, the prisoner at the bar, is indicted for high treason. The treason that is mentioned in the indictment is conspiring, compassing and imagining the death and destruction of the king. To prove the conspiracy and design of the king's death, there are two principal overt-acts that are mainly insisted upon. The one is the consulting and agreeing with divers others to send Mr. Charnock into France to king James, to desire him to persuade the French king to send over forces here to assist them; who were to furnish other forces for the raising of a war within this kingdom, in order to depose the king: and accordingly Mr. Charnock was sent upon that design. The other overt-act is the prisoner's having a commission from the late king, and preparing and directing men to be levied, and to be ready to be in a regiment, of which sir John Freind was by that commission to be colonel; and this was always to assist in the restitution of king James, and in order thereunto in the deposing and expulsion of king William.

These, gentlemen, I tell you, are the two overt-acts that are principally insisted upon: and to prove sir John Freind guilty of these there are two witnesses that have been produced; the one is captain Porter, who speaks to the first, the other is captain Blair, who speaks to the second.

Captain Porter tells you, That, the latter end of May, or the beginning of June last, he and sir John Freind, and others that he mentioned, were at the King's-Head tavern in Leadenhall-street, and there they entered into a discourse about the returning of the late king James; and they did consider among themselves which was the most effectual way, and what were the most probable means to have him restored: and thereupon it was agreed among them, that they would send a messenger into France to him, to desire him that he would solicit the French king to furnish him with 10,000 men, to be sent into England, 8,000 foot, 1,000 horse, and 1,000 dragoons; and they did agree, that when these forces were sent, consisting of this number of men, then they would be ready to meet and join them with 2,000 horse: every one of them was to furnish his quota: to which sir John Freind did expressly agree. The messenger that they agreed to send was with them in company, and heard the consult, which was Mr.

Charnock, who was lately tried and since executed.

This being at that time determined, Mr. Charnock intended to go upon the execution of that design, and made ready for his journey: but before he went, he had a desire to meet with the company again, and have a further discourse upon this matter, to see whether they did persevere in the resolution they had so taken. There was another meeting about a week or a fortnight after, which was at Mr. Mountjoy's, a tavern in St. James's-street, where met sir John Freind, captain Porter, and divers others of the company that were before at the King's-head. And there they entered into a debate of the matter again; the question there was, Whether Mr. Charnock should be sent into France, as it was formerly agreed? And there it was again determined he should go; to which he agreed; and captain Porter says, that he did go about two or three days after.

Mr. Porter tells you farther, That about the time that Mr. Charnock came back, Mr. Porter was in prison, and he did not see him upon his first return, but afterwards he met and spoke with him, and asked him what was the effect of his negotiation? And Mr. Charnock told him, that he had done as he was directed; that he had been with king James, and he had spoke to the French king; but the answer returned was this, That the French king had occasion for his forces that year to be otherways employed, and therefore he could not afford such a number of men that year; and Mr. Porter asked him whether he had been with the rest of the gentlemen, and acquainted them therewith? And he said he had. This is the substance of Mr. Porter's evidence; whereby you may perceive what the meetings were for, what resolutions were there taking, and what was the issue and effect of them.

The next witness is captain Blair; and his evidence goes to the other part, that is, to sir John Freind's having a commission from the late king James, and engaging him and others to be in his regiment, whereof sir John was to be colonel, and the providing of officers. And for that the evidence stands us:

Captain Blair tells ye, that about two or three years ago, he was with sir John Freind at his lodgings in Surrey-street, and there he did produce a commission that he had from king James to be colonel of a regiment of horse; he was to raise it himself, and was to appoint and provide what officers he thought fit. He says, he read the commission, and it was signed at the top James Rex, and countersigned at the bottom Melfort; this he is positive in; and farther, that sir John Freind did promise that he should be lieutenant colonel of this regiment, and also that captain Blair would get as many men as he could; and that there were other officers that were appointed in that regiment, and particularly one Fisher was brought to sir John Freind by captain Blair, to be his first captain, and one colonel Slater, who was

much in favour with sir John Freind, was, to have been another lieutenant-colonel; for, said sir John Freind, I have a mind to him to be my lieutenant-colonel, and though you are so too, yet it is no matter if we have two in this regiment; at which Blair took very great offence, and expressed as much to sir John Freind; whereupon sir John Freind told him, it should not be so, but said he would make another provision for Mr. Slater; that he should be a captain of an independent troop, that should be composed of non-swearing parsons, and that shall satisfy him.

And sir John Freind did intrust captain Blair with the providing of men, and managing of them. And captain Blair tells you, he was at a great deal of charge, and laid out diverse sums to caress them, and keep them together; and wanting money to proceed in that affair, he came to sir John Freind, and made great complaints, that he wanted money to carry on the design, by obliging the men to keep together, and therefore pressed sir John Freind to furnish him with some money; says sir John, There is 100*l.* due to me, because I laid down 100*l.* to further the escape of colonel Parker, and Piggott has received it, and had directions to pay it me, but I cannot yet get it. You shall have 20*l.* out of that 100*l.* if you can get it. Well, but how is that 20*l.* to be had? It seems there was one Harrison or Johnson a priest, who had some interest in this Piggott, and he was to help him to it; and thereupon the 20*l.* was actually paid the latter end of June or the beginning of July last. This 20*l.* he swears he did receive upon that account, by the direction of sir John Freind, to be so employed as you have been told.

Then captain Blair had occasion for more money, which was some time after Michaelmas last, which was to be employed as the former was: and he was very importunate to obtain it of sir John Freind: at length he did obtain it, as he tells you, and the manner how. He produces a letter under sir John Freind's own hand, which seems to be an answer to a letter that captain Blair had sent to him before, he thinks it to be his own hand, for he is acquainted with his hand-writing. But that is not all to prove it his hand, for the contents of the letter are remarkable, which are about the payment of money to Blair: The letter bears date on a Tuesday morning, and is directed to captain Blair; and a porter brought it, as he thinks, to his house; and thereby it was appointed that they should meet on Thursday next at Jonathan's coffee-house about the hour of twelve. And accordingly captain Blair came to Jonathan's coffee-house, where he accordingly met with sir John Freind, and there was Harrison the priest, and Piggott, and there he does receive a sum of money upon the same account: So that now the proof of this letter does not depend barely upon the knowledge of the hand, but the contents of it; and the subsequent meeting at the time and place mentioned in

the letter, is a great evidence that it was sir John Freind's hand writing, and more money is proved to be actually paid in the presence of sir John Freind, which is the most material part of the evidence. And you are told further, that as sir John Freind and captain Blair were going together in a coach, from Jonathan's coffee-house to St. Martin's-le-grand, there was a discourse between them: and sir John Freind said, For his part he would not stir till such time as the Toulon fleet was come about, and joined with the Brest fleet. That he did think he was in danger of being apprehended when it came about, and therefore captain Blair was to skulk till then, as he himself told him he would do, but yet he should get what men he could. And this is a great argument of his being concerned in the intended invasion, and that his making preparation for his regiment had relation to the French invasion which was expected.

It seems, two years ago, there being a great intimacy between Blair and sir John Freind as appears by all the evidence, Blair was acquainted with this design. For you are told of the letter that was writ by him to king James, which he shewed to captain Blair, and it was concerning his regiment; he says, that sir John Freind owned he writ that letter himself, that Blair did read the letter, and finding it so well penned, he said that he thought Ferguson had a hand in it, at which sir John Freind was angry; but Blair says, the letter was concerning the regiment of which sir John Freind was colonel.

Then, gentlemen, you have Bertham called to prove, that Blair did tell him, that he was to be his lieutenant colonel, which was long before there were any thoughts of any discovery of this intended invasion, and before the discovery of the plot of assassination, which sir John Freind did own he had some knowledge of, but he disliked it, and said it would ruin king James's affairs. So that, gentlemen, I think this is the sum and substance of the evidence that has been given upon this occasion against sir John Freind, to induce you to believe him to be guilty of this crime with which he now stands charged.

But now you are to consider what sir John Freind says on behalf of himself. In the first place, he makes an objection against the credit of all these witnesses, that they are not to be believed, because, says he, they are known or reputed to be Roman Catholics and Papists, and their consciences and their oaths are large, especially when they think they can do an injury to any Protestant; and therefore they are not to be allowed as witnesses, at least their credit is not sufficient to induce a jury to believe them. At first indeed, he urged there was a statute and a law that did disable them from being witnesses; but I must tell you there is no such statute, nor indeed is their being Papists any diminution at all to the credit of their testimony: For Papists are legal witnesses, and though there are severe laws to

punish them for their non-conformity to the church of England, and for other their Popish practices; yet I know of no law that renders them infamous, or incapable of being witnesses. For you are to consider Papists are Christians, and swear by the same evangelists that Protestants do; and as for that supposition, that they look upon Protestants as Heretics, and can have a dispensation for any oaths that they take against them; you are to consider, as it has been very well observed by the king's counsel, that they are never like to obtain any dispensation or pardon, if they should forswear themselves to defeat the designs of the Popish party; and therefore it is a very inconsiderable objection, and in this case hath no weight.

But then he does insist upon it, that captain Blair is not to be believed; and there are two objections he makes against him. First, that he did deny that he knew any thing of the plot. For Blair being upon this occasion brought prisoner to the Gate-house, and afterwards, upon a discourse of some news in the Flying-post, wherein it was mentioned that captain Blair had confessed all, and made a full discovery, and thereupon he should say, he was innocent of the plot, and knew nothing of it. You, gentlemen, are to consider the weight of this objection. First, suppose he had said so, it might be, he was not willing (as he was not obliged) to own it, and would not confess it at that time, and to those persons. It was not his interest and prudence to be too open; and therefore it does not follow, but because a man would not trust others with his confession, but denied his knowledge of a plot when there was no occasion for him to own it, that now he swears it positively, therefore he should swear falsely.

But secondly, captain Blair, who was called for the vindication of himself, and his testimony, has upon his oath declared to you, that he did not say he knew not any thing of the plot, but did deny any concern in, or knowledge of the assassination. Now this business for which sir John Freind is tried, is not for being a party in the designed assassination, but of a design with force to depose the king, and restore king James.

Then as to the other matter that was upon Friday night last; Courtney the witness says, that he came to captain Blair's chamber, and took notice of his being to be a witness at Hicks's-hall the next day, and said, I pray God direct you; and he says his wife, then present, said it was against his conscience, and he seemed to be in very great trouble about it, and owned as much. But now captain Blair himself, being examined upon his oath, does deny positively, that either he or she said any such thing as that it was against his conscience: He says, that Courtney got in to him on purpose to surprize him, and he was aware of it, and his design being to keep himself free from all company, he gave directions to the keeper (as the keeper himself swears) to let no body come to him but his wife; and Mr. Courtney intruded himself upon him.

Besides, gentlemen, you are to consider the probability of that which Mr. Courtney saith: When a man is to be a witness the next day upon a bill of indictment before a grand jury, that he should be so indiscreet, as to tell any body he was going to swear against his conscience, is strange and very unaccountable. You are therefore to consider of this whole matter, what evidence captain Blair has given, and the import of it, and the weight and credibility of that evidence which is given against him.

Then sir John Freind insists upon another matter: Says he, I am a Protestant, and it is not likely that I that am a Protestant should conspire with Papists against Protestants; and for that he has called eight witnesses, who tell you they have known him, some twenty years, some more, others ten, and that they have frequently conversed with him, and never knew that he was ever popishly affected, and they have been frequently in his company since the Revolution, and they never knew that at any time he reflected upon the government; nay, I think one said, that once he did reprove a man for talking undecently of the government; that he used constantly to go to church four or five years ago (though there is no account of that since.) And particularly there is one Mr. Lupton that was his chaplain, and he tells you he was in his house; and there he read the common-prayer in the family since the Revolution, and prayed for the king, and the late queen, and sir John Freind was often present at the prayers, and particularly when he prayed for the present king, and the late queen; but he says he himself has been gone thence five years, and has been little conversant with him since.

There is another witness tells you, he has been in sir John Freind's company divers times, whom he believes to be a Protestant of the church of England, and hath had a discourse concerning the present government; and that sir John Freind said, that though he could not take the oaths, and thereby conform to the government, yet he was resolved to live quietly under it; and would not engage in any manner of plot, for he that caught him in the corn should put him in the pound.

This is the sum and substance of the evidence on both sides; and you, gentlemen, are to consider the weight of this part of his defence too, whether it be a sufficient answer to the evidence given against him, and has weight enough to out-balance what the witnesses for the king have sworn? For although he was a Protestant, yet it is plain he had no great liking to the government; and therefore would not take the oaths; and though he was present at the common prayer, when the king and queen were prayed for, yet whether he joined in those prayers is very uncertain. There are a great many, who are not very well affected to the present government, that come to church, and are present at the public prayers; but it may be a very great doubt, whether

they join in their prayers for the present government or no; his conscience that scruples the taking the oaths, might scruple that too; but whether sir John Freind's being a Protestant, and his declaring he would never be in a plot, be a sufficient proof, that therefore he never was in one; and that his former discourse of that kind should discredit these witnesses, that have sworn he has been so much concerned in a Plot, you are to consider; and comparing the weight and nature of the evidence on the one side, and the other, it must be left to your determination.

Then there is another thing that he did insist upon, and that is matter of law. The statute of the 25th Ed. 3, was read, which is the great statute about treasons; and that does contain divers species of treason, and declares what shall be treason. One treason is the compassing and imagining the death of the king; another is the levying of war: Now, says he, here is no war actually levied; and a bare conspiracy or design to levy war does not come within this law against treason. Now for that, I must tell you, if there be only a conspiracy to levy war, it is not treason: but if the design and conspiracy be either to kill the king, or to depose him, or imprison him, or put any force or restraint upon him, and the way and method of effecting of these, is by levying a war, there the consultation, and the conspiracy to levy a war for that purpose, is high-treason, though no war be levied: For such consultation and conspiracy is an overt-act proving the compassing the death of the king, which is the first treason mentioned in the statute of the 25th of Ed. 3. For the words of that statute are; 'That if any man shall compass or imagine the death of the king.' Now because a man designs the death, deposition or destruction of the king, and to that design, agrees and consults to levy war, that this should not be high-treason, if a war be not actually levied, is a very strange doctrine, and the contrary has always been held to be law. There may be a war levied without any design upon the king's person, or endangering of it; which, if actually levied is high-treason; but a bare designing to levy war, without more, will not be treason. As for example;* if persons do assemble themselves, and act with force in opposition to some law, which they think inconvenient, and hope thereby to get it repealed; this is levying a war and treason, though purposing and designing it is not so: So when they endeavour in great

numbers with force to make some reformation of their own heads, without pursuing the methods of the law, that is a levying of war, and treason, but the purposing and designing it is not so.

But if there be, as I told you, a purpose and design to destroy the king, and to depose him from his throne, or to restrain him, or have any power over him, which is proposed or designed to be effected by war that is to be levied, such a conspiracy and consultation to levy war, for the bringing this to pass, is an overt-act of high-treason. So that, Gentlemen, as to that objection, that he makes in point of law, it is of no force, if there be evidence sufficient to convince you, that he did conspire to levy war for such an end.*

Gentlemen, the evidence you have heard what it is, you may consider the weight of it, and the circumstances that do attend it; and likewise the answers that have been given by the prisoner to invalidate that evidence, and to prove the improbability of what they have testified against him. You have heard, I say, the evidence on the one side, and on the other: If you are not satisfied, that what the witnesses have sworn is true, that sir John Freind did engage in such a design for such a purpose, then you are to acquit him; but on the other side, if you believe that sir John Freind is guilty of what the witnesses have deposed against him, then you are to find him Guilty.

Juryman. My lord, we desire we may have that letter with us that was produced here.

L. C. J. No, no, you cannot have it by law.

Juryman. May it not be left with the foreman, my lord?

L. C. J. No; but you may look upon it in court before you go away, if you will.

Then the Letter was handed to the Jury, and one of them handed it to the prisoner.

L. C. J. Why do you do so? You should not give the prisoner the letter.

Juryman. It was done to see whether it was his hand; and we desire, if there be any body here that knows his hand writing, or that saw him write it, may be produced.

L. C. J. Why? Did not he own the letter to the witness afterwards? It was sworn to you he did; and that he met according to the appointment in the letter, and that money was paid.

Then the Jury withdrew to consider of their

* "Rising with force to pull down all inclosures, to expel strangers, to pull down bawdy houses, is levying of war, and treason: but a bare purposing and designing to raise such a force, for such a purpose, is not treason." Note to former Edition. As to this, see the case of Peter Messenger and others in this Collection, vol. 6, p. 879, and the cases there referred to, together with Mr. Luders's observations thereon.

* As to this matter, see East's Pleas of the Crown, chap. 2, sect. 9, and the Stat. 36 G. 3, c. 7, s. 36. The doctrine of constructive Treason is much agitated in numerous cases in this Work. See, in particular, the Case of lord Russell, vol. 9, p. 577, and the discussions to which it gave rise, vol. 9, p. 695, et seq.; the Case of lord George Gordon, A. D. 1780, and those of Hardy and Horne Tooke, A. D. 1794. See, also, Mr. Luders's Considerations on the Law of High Treason in the article of Levying War.

verdict, and an officer was sworn to keep them according to law, till agreed; and about a quarter of an hour afterwards they returned into court, and the prisoner was brought to the bar.

Clerk of Arr. Gentlemen, answer to your names. Thomas Clark—

Mr. Clark. Here. (And so did all the rest of the twelve.)

Cl. of Arr. Gentlemen, are you agreed of your verdict?—*Jury.* Yes.

Cl. of Arr. Who shall say for you?

Jury. Our foreman.

Cl. of Arr. Sir John Freind, hold up thy hand, (which he did). Look upon the prisoner: how say ye, is he Guilty of the high-treason whereof he stands indicted, or Not Guilty?—*Foreman.* Guilty, my lord.

Cl. of Arr. What goods or chattels, lands or tenements had he at the time of the high-treason committed, or at any time since?

Foreman. None, to our knowledge.

L. C. J. Jailor, look to him, he is found guilty of high-treason.

Cl. of Arr. Then hearken to your verdict as the court has recorded it. You say that sir

John Freind is guilty of the high-treason whereof he stands indicted, but that he had no goods, nor chattels, lands nor tenements, at the time of the high-treason committed, or at any time since, to your knowledge.

L. C. J. Discharge the jury.

Cl. of Arr. Gentlemen, the court discharges you, and thanks you for your service.

L. C. J. Then we had best to adjourn the court till to-morrow morning.

Cl. of Arr. Cryer, make proclamation.

Cryer. Oyez, oyez, oyez! All manner of persons that have any thing more to do, at this general Sessions of the Peace, Sessions of Oyer and Terminer, holden for the city of London; and Gaol-delivery of Newgate, holden for the city of London and county of Middlesex, may depart hence for this time, and give their attendance here again to-morrow morning at seven o'clock; and God save the King.

Then the prisoner was carried back to Newgate, and was brought the next day to the bar to offer what he had to say for stay of judgment; and afterwards received sentence of death as a traitor.

385. The Trial of Sir WILLIAM PARKYNS, knt. at the Old-Bailey, for High Treason: 8 WILLIAM III. A. D. 1696.*

Tuesday, March 24, 1696.

THIS day the Trial of Sir William Parkyns, knt. came on at the Sessions-House, Old-Bailey, for High-Treason.

Cl. of the Ar. Cryer, make Proclamation.

Cryer. O yes, O yes, O yes. All manner of persons that have any thing more to do at this general sessions of the peace, sessions of Oyer and Terminer, holden for the City of London; and Gaol-delivery of Newgate holden for the City of London and county of Middlesex, and were adjourned over to this day, draw near, and give your attendance, for now they will proceed to the Pleas of the Crown for the same city and county: and God save the King.

Cl. of Ar. Middlesex. Cryer, make proclamation.

Cryer. O yes, You good men of the county of Middlesex, summoned to appear here this day, to try between our sovereign Lord the king, and the prisoner that shall be at the bar, answer to your names as you shall be called, every man at the first call, upon pain and peril shall fall thereupon.

* See East's Pleas of the Crown, chap. 2, sect. 8, 9, and the authorities there cited. See too, in this Collection, the cases of sir Henry Vane, vol. 6, p. 119, of Messenger and others, vol. 6, p. 379; of Whitebread and others, vol. 7, p. 311; of Dammaree and others, A. D. 1710, and of Deacon, A. D. 1746.

Then the Jury that were returned in the panel were all called over, and the appearances of those who answered to the call were recorded.

About ten of the clock the Judges, (to wit,) the Lord Chief Justice Holt, the Lord Chief Justice Treby, and Mr. Justice Rokeby, came into the court.

Cl. of Ar. Set sir William Parkyns to the bar. (Which was done.) Sir William Parkyns, hold up thy hand.

Parkyns. My lord, if you please, I humbly beg the favour of one word before I am arraigned. My wife coming to see me in my distress, sent up a trunk of linen for our use, and the sheriffs of London have seized it, and do detain it. It has linen in it, and all her necessary things, and all things have been torn from me, since I was apprehended, but what is there; I have nothing to subsist upon but what is there; for no money can I get from any body, nobody will pay us a farthing.

Mr. Sheriff Buckingham. My lord, we were sent for to Mr. Secretary Trumball's office, and when we came there, there was a trunk that had been seized, as belonging to sir William Parkyns; and when we came thither it was opened, and there was in it some household linen, and some plate, and Mr. Secretary Trumball was pleased, after having searched the trunk, to seal it up, and deliver it to my brother and me, to be kept; and this is all we know of it.

L. C. J. Holt. Where was this trunk seized?

Sh. Buckingham. We found it in the secretary's office, and it was delivered to us there, and we gave a receipt for it to bring it down again when called for; we did not seize it.

L. C. J. Look ye, sir William Parkyns, your trunk was seized, I suppose, in order to search for papers.

Parkyns. Yes, I believe it was; but I hope it shall be delivered back now they have found nothing in it, and I have nothing else to subsist upon but what is there.

L. C. J. Is there any plate there? What is there in the trunk?

Sh. Buckingham. There is some diaper and damask linen, a carpet and some pieces of plate, two or three hundred ounces of plate, for ought I know. We had it from the Secretary's office; we did not seize it.

[Then the Judges consulted among themselves.]

L. C. J. He ought to have his plate to sell, to support him that he may have bread.

Parkyns. Will your lordship please to direct the sheriff to deliver it back?

L. C. J. Well, some care or other shall be taken in it.

Parkyns. My lord, I have nothing to subsist upon, unless I can make something of what is there: I have a wife and four children, and nothing to subsist upon.

L. C. J. Let your wife make application for it at the Secretary's, it cannot now be done here. Why did you not make complaint of it before? If you had, care had been taken in it.

Parkyns. I was told there was a petition; for, my lord, I was a close prisoner, and they told me there was a petition; but my wife never mentioned any thing of it to me till afterwards; and they talked of an order of council that they had for the sheriff's seizing it; but when I came to enquire into it, there was no order about it, but only to search and examine it.

L. C. J. Well, some order shall be taken about it.

Sh. Buckingham. My lord, we have given a receipt to the Secretary for it.

L. C. J. But he must have wherewithal to subsist and buy him bread while he is in prison.

Sh. Buckingham. My lord, I see Mr. Burleigh there, who was sir John Freind's solicitor; I would humbly move your lordship that it may be inquired into, how he came by the pannel of the jury yesterday? For it seems to reflect upon us, as if we had given the prisoner a wrong pannel.

Just. Rokeby. No, I think there can be no reflection upon you; but I think it would be very proper to have the matter examined.

L. C. J. Ay, let Burleigh come in. [Which he did.] Pray, how came you by the pannel which you gave to sir John Freind?

Burleigh. My lord, I had three several co-

pies sent me by sir John Freind's friends, to the Horn tavern about three or four o'clock, and I delivered one of them to sir John Freind; but he had one before I delivered mine.

L. C. J. Who sent them to you, or brought them to you?

Burleigh. I had them brought to me by a porter.

Mr. Baker. You know you might have had it from the proper officer, for asking.

Burl. I had them brought me from Sir John Freind's friends.

L. C. J. Can you tell who had it from the sheriff?

Burl. My lord, I know not: I had three copies sent me in a quarter of an hour's time; whence they came, I know not; the sheriff knows me, and every body else.

Sh. Buck. I do know you, and would have you be fair in your practice.

Baker. The inquiry is made, because a false copy is put upon him; you might have had a true copy if you had applied yourself right.

Burl. I sent to Mr. Farrington for it.

L. C. J. The sheriff delivered it the secondary, who is the proper officer.

Just. Rokeby. Sir John Freind said he had it from him yesterday.

Burl. But he had one before; how he came by it, I can't tell; nor whence those came that were brought me in.

Just. Rokeby. If you will not take care to go to the right place, it is nobody's fault but your own, if you suffer by it.

Burl. I was with my lady, and delivered a petition for this trunk.

L. C. J. But it seems it was under the conuzaunce of the secretary, and direction was given to go thither: some care or other must be taken in it, and shall; but go on now to arraign the prisoner.

Cl. of Arr. Hold up thy hand. (Which he did.) Thou standest indicted in Middlesex by the name of sir William Parkyns, late of the parish of St. Paul Covent-Garden, in the county of Middlesex, kt. For that, Whereas an open, and notoriously public and most sharp and cruel war, for a long time hath been, and yet is, by sea and by land, had, carried on, and prosecuted by Lewis the French king, against the most serene, most illustrious, and most excellent prince, our sovereign lord William the 3d, by the grace of God, of England, Scotland, France, and Ireland, king, defender of the faith, &c. During all which time, the said Lewis the French king and his subjects were, and yet are enemies of our said lord the king that now is, and his subjects, You the said sir William Parkyns, a subject of our said sovereign lord the king that now is of this kingdom of England, well knowing the premises, not having the fear of God in your heart, nor weighing the duty of your allegiance, but being moved and seduced by the instigation of the devil, as a false traitor against the said

most serene, most clement, and most excellent prince, our said sovereign lord William the 3d, now king of England, &c. your supreme, true, natural, rightful, lawful, and undoubted sovereign lord; the cordial love, and true and due obedience, fidelity and allegiance, which every subject of our said lord the king that now is, towards him our said lord the king, should bear, and of right ought to bear, withdrawing, and utterly to extinguish, intending and contriving, and with all your strength purposing, designing and endeavouring the government of this kingdom of England, under him our said lord the king that now is, of right, duly, happily and very well established, altogether to subvert, change, and alter; as also the same our sovereign lord the king to death and final destruction to put and bring; and his faithful subjects, and the freemen of this kingdom of England, into intolerable and most miserable slavery, to the aforesaid French king, to subdue and bring; the first day of July, in the 7th year of the reign of our said sovereign lord the king that now is, and divers other days and times, as well before as after, at the parish of St. Paul Covent-Garden aforesaid, in the county aforesaid, falsely, maliciously, devilishly and traitorously did compass, imagine, contrive, purpose, design and intend our said sovereign lord the king that now is, then your supreme, true, natural, rightful, and lawful sovereign lord, of and from the regal state, title, honour, power, crown, command, and government of this kingdom of England, to depose, cast down, and utterly to deprive; and the same our sovereign lord the king, to kill, slay, and murder; and the aforesaid Lewis the French king, by his armies, soldiers, legions, and subjects, this kingdom of England to invade, fight with, conquer, and subdue, to move, stir up, procure and aid; and a miserable slaughter among the faithful subjects of our said lord the king, throughout all this whole kingdom of England, to make and cause; and that you the said sir William Parkyns, to the aforesaid enemies of our said lord the king that now is, then and there, during the war aforesaid, traitorously were adhering and aiding; and the same most abominable, wicked and devilish treasons, and traitorous compassings, contrivances, intentions, and purposes of yours aforesaid, to fulfil, perfect and bring to effect; and in prosecution, performance, and execution of the traitorous adhesion aforesaid, you the said sir William Parkyns, as such a false traitor, during the war aforesaid, to wit, the same 1st day of June, in the year aforesaid, at the parish aforesaid, in the county aforesaid, and divers other days and times, as well before as after, there and elsewhere in the same county, falsely, maliciously, advisedly, secretly, and traitorously, and with force and arms, with one Robert Charnock, (late of High-Treason, in contriving and conspiring the death of our said sovereign lord the king that now is, duly convicted and attainted) and with divers other false traitors,

to the jurors unknown did meet, propose, treat, consult, consent, and agree, to procure, from the aforesaid Lewis the French king, of his subjects, forces, and soldiers, then and yet enemies of our said lord the king that now is, great numbers of soldiers and armed men, this kingdom of England to invade and fight with, and to levy, procure and prepare great numbers of armed men and troops, and legions against our said sovereign lord the king that now is, to rise up and be formed; and with those enemies at and upon such their invasion and entrance into this kingdom of England, to join and unite; rebellion and war against him our said sovereign lord the king, within this kingdom of England, to make, levy, and wage; and the same our sovereign lord the king so as aforesaid to depose, and him to kill and murder. And further, with the said false traitors, the same first day of July, in the year aforesaid, at the parish aforesaid, in the county aforesaid, traitorously you did consult, consent, and agree to send the aforesaid Robert Charnock as a messenger from you the said sir Wm. Parkyns, and the same other traitors unknown, as far as, and into the kingdom of France, in parts beyond the seas, to James the 2d, late king of England, to propose to him, and desire of him to obtain of the aforesaid French king, the soldiers and armed men aforesaid, for the invasion aforesaid to be made; and intelligence and notice of such their traitorous intentions, and adhesions, and all the premises to the said late king James, and the said other enemies and their adherents, to give and exhibit; and them to inform of the said things, particulars, and circumstances thereunto relating; as also intelligence from them of the late intended invasion, and other things and circumstances concerning the premises to receive, and them to you the said sir William Parkyns, and the said other traitors in this kingdom of England, to signify, report and declare, in assistance, animation, and aid of the said enemies of our said sovereign lord the king that now is, in the war aforesaid: and to stir up and procure those enemies the more readily and boldly this kingdom of England to invade, the treasons and traitorous contrivances, compassings, imaginations and purposes of you the said sir William Parkyns aforesaid to perfect and fulfil, and all the premises the sooner to execute, manage and perform, and the invasion aforesaid to render and make the more easy, you the said sir William Parkyns afterwards, to wit, the 10th day of February, in the year aforesaid, at the parish aforesaid, in the county aforesaid, and divers other days and times, as well before as after, there and elsewhere in the same county, falsely, maliciously, advisedly, secretly, traitorously and with force and arms, with the aforesaid Robert Charnock, and very many other false traitors to the jurors unknown, did meet, propose, treat, consult, consent and agree, him our said sovereign lord the king that now is, by lying in wait and deceit, to assassinate, kill and murder; and that execrable;

abominable and detestable assassination and killing the sooner to execute and perpetrate, afterwards, to wit, the same day and year, there traitorously you did treat, propose and consult with those traitors, of the ways, methods, and means, and the time and place where, when, which way, and how our said sovereign lord the king, so by lying in wait, the sooner might be killed and slain; and did consent, agree and assent with the same traitors, that forty horsemen or thereabouts of those traitors, and others by them and you the said sir William Parkyns to be hired, procured and paid, with guns, carbines and pistols with gunpowder and leaden-bullets charged, and with swords, rapiers and other weapons armed, should lie in wait and be in ambush our said lord the king in his coach being when he should go abroad, to attack; and that a certain and competent number of those men so armed, should set upon the guards of our said lord the king then and there attending him, and being with him, and should over-power and fight with them, whilst others of the same men so armed him our said lord the king should kill, slay, and murder; and that you the said sir William Parkyns, then and there did take upon you to provide five horses for those men which should so kill and murder our said sovereign lord the king; and also that you the said sir William Parkyns, your treasons, and all your traitorous intentions, designs and contrivances aforesaid to execute, perpetrate, fulfil and bring to effect, afterwards, to wit, the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, divers horses, and very many arms, guns, carbines, rapiers and swords, and other weapons, ammunition and warlike things, and military instruments, falsely, maliciously secretly, and traitorously did obtain, buy, gather, and procure; and to be bought, obtained, gathered, and procured did cause, and in your custody had and detained, with that intention them in and about the detestable abominable and execrable assassination, killing, and murder of our said lord the king, and the invasion aforesaid, as aforesaid, to use, employ and bestow; and also your treasons and all your traitorous intentions, purposes, and contrivances aforesaid to execute, perpetrate, fulfil and fully bring to effect, you the said sir William Parkyns, afterwards, to wit, the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, falsely, maliciously, advisedly, secretly and traitorously, divers soldiers and men armed, and ready to be armed, after the said detestable, abominable and execrable assassination, killing, and murder of our said sovereign lord the king so as aforesaid should be done perpetrated and committed, to rise and muster, and war and rebellion within this kingdom of England to make and wage, and with the enemies of our said lord the king, foreigners and strangers, subjects and soldiers of the said Lewis the French king, being about to invade this kingdom of England, at and upon their invasion and entrance into this king-

dom then expected to be shortly made, themselves, together with you the said sir William Parkyns, to join and unite, and into troops and legions to form, you did levy, list, and retain, and did procure to be levied, listed and retained; and those soldiers and men for the treasons, intentions and purposes aforesaid, then and there, and afterwards in readiness you had, against the duty of your allegiance, and against the peace of our said sovereign lord the king that now is, his crown and dignity; as also against the form of the statute in this case made and provided.

How sayest thou, sir William Parkyns, Art thou Guilty of this high treason whereof thou standest indicted, or Not Guilty?

Parkyns. Not Guilty.

Cl. of Ar. Culprit, how wilt thou be tried?

Parkyns. By God and my country.

Cl. of Ar. God send thee good deliverance.

Parkyns. My lord, If your lordship pleases to favour me with a word or two.

L. C. J. Aye, what say you, sir?

Parkyns. My lord, I have been kept in hard prison ever since I was committed, nobody has been suffered to come to me till Friday last, then my counsel came to me; and being charged with many facts as I see in this indictment, it will be necessary to have divers witnesses to clear myself of these particulars; they are dispersed up and down, and I have had no time to look after them, and therefore I beg your lordship to put off my trial till another day.

L. C. J. When had you first notice of your trial?

Parkyns. The first notice of my trial was on Wednesday last, in the afternoon

L. C. J. That is a sufficient time of notice; sure you might have provided your witnesses, and prepared for it by this time.

Parkyns. But, my lord, being kept so close prisoner, I had no opportunity for it; for it was not possible for me to get any body to come to me till Friday noon, not so much as my counsel, and then there was but two days, Saturday and Monday, (Sunday is no day for any business) and it is impossible for me to be ready in the manner that I ought to be. It is a perfect distress and hardship upon me, to be put so soon upon my trial without my witnesses, and what should enable me to make my defence; therefore I humbly intreat your lordship to put it off till another day.

L. C. J. What witness do you want, sir William?

Parkyns. I have divers witnesses, my lord, that can give an account where I was from time to time; but they are many of them out of town, and I have sent about every way, but cannot get them together in so short a time.

L. C. J. When had he notice of his trial?

Mr. Baker. On Wednesday I told him, that he must expect to be tried this day, and withal, that if he would name me any counsel that he would have come to him, he should have an order next morning for them.

L. C. J. You were told, it seems, on Wednesday that you might have what counsel you would.

Mr. Baker. And he had an order upon Thursday morning for his counsel.

Parkyns. I could not have it without application to the court at Whitehall, and could have nobody to come to me till Thursday, and it was Friday before I could get my counsel to me.

L. C. J. You might have sent for your witnesses on Thursday, and employed somebody about that matter then.

Parkyns. The solicitor that I employed was employed otherways, and I could not employ any body else.

L. C. J. Yes; you might have employed any other about that business.

Parkyns. I had nobody to send, I was kept close, and nobody permitted to come to me.

L. C. J. Your Solicitor you desired had leave to come to you.

Mr. Baker. You know that those you sent for, you had an order for.

Parkyns. I could not get him till Thursday to me, I had no messengers to send till then.

Mr. Baker. I gave the keeper direction, to let him have persons come to him to send on any errand.

L. C. J. The keeper had orders, it seems, to let any messenger come to you; and he would have helped you to somebody to send of this errand, to be sure.

Keeper. I always did it, as soon as I know they have notice of their trial.

Parkyns. But the keeper is not always in the way; and besides, when I had notice given me of my trial, it was execution day, and he was not at home that day.

L. C. J. He names no witnesses, only he says he has divers witnesses, neither is there any oath made of any witnesses; pray how long is it since you were committed?

Parkyns. I was committed this day fortnight.

L. C. J. Your commitment charged you with high-treason, and therefore you knew what you stood accused of; were you not committed for high-treason?

Parkyns. Yes, my lord, I believe I was.

Sol. Gen. (Sir John Hawles) My lord, he had a very fair time to prepare for his defence, for he saw his name in the proclamation a good while before he was taken, and there it is declared what he stands charged with.

L. C. J. You might have had a copy of your commitment, you had a right to have it, and thereby you might have seen what you were accused of.

Keeper. We never do deny it, if it be demanded.

L. C. J. You cannot deny it; you know what penalty you are under if you do.

Parkyns. Nobody was permitted to come to me.

L. C. J. You might have asked for a copy, or any body else; for you had notice of your trial so long ago as Wednesday last.

Mr. Baker. I gave him notice of his trial on Wednesday, and then told him he must prepare for it against this day; he said he would endeavour to petition for a longer time; I told him it would be in vain, for he must prepare for his trial to day, and could have no longer time.

L. C. J. Sir William, truly we do not see any reason to put off the trial upon these suggestions.

Parkyns. My lord, it is very hard; then I humbly beg I may have the favour, that I may have counsel allowed me; I have no skill in indictments.

L. C. J. We cannot allow counsel.

Parkyns. My lord, if I have no counsel, I do not understand these matters, nor what advantage may be proper for me to take in these cases.

L. C. J. You are not ignorant, sir William, that counsel has been always refused when desired in such cases.

Parkyns. My lord, there is a new act of parliament that is lately made, which allows counsel.

L. C. J. But that does not commence yet, sir William.

Parkyns. My lord, it wants but one day.

L. C. J. That is as much as if it were a much longer time: for we are to proceed according to what the law is, and not what it will be.

Parkyns. But it is declarative of the common law, because it says it was always just and reasonable.

L. C. J. We cannot alter the law till law-makers do it.

Parkyns. Will your lordship be pleased to let it be read?

L. C. J. Ay, if you have a mind to it, it shall be read.

Parkyns. Yes, if your lordship pleases.

L. C. J. Read it.

Cl. of Arr. (Reads.) "An Act for regulating of Trials in Cases of Treason, and misprision of treason." (7 Will. and M. Cap. 3.)

All the first paragraph of the new Act was read.

L. C. J. Look ye, sir William Parkyns, this law has not taken any effect as yet; but the law stands as it did before the making of this act.

Parkyns. But, my lord, the law says it is just and reasonable that it should be so.

L. C. J. We go according to the law as we find it is.

Parkyns. And, my lord, what is just and reasonable to-morrow, sure is just and reasonable to day; and your lordship may indulge me in this case, especially when you see how streight notice I have had, and what a little time has been allowed me, that I am not able to make any defence.

L. C. J. We cannot make a law, we must go according to the law; that must be our rule and direction.

Parkyns. Yes, my lord, but what is just and reasonable, sure is law: the law is grounded upon reason.

L. C. J. The parliament has thought fit to make such a law, which is to commence from the 25th of this month: it is not a law till the time comes that the parliament hath appointed for its being a law.

Parkyns. But, my lord, if my notice had been a convenient notice, I had been within the time limited by the act of parliament; and no one can want the advantage of that act from henceforward, nor suffer for such want but myself, which is a particular hardship upon me.

L. C. J. We cannot alter the law, we are bound by our oaths to proceed according to the law as it is at present.

Parkyns. Pray, my lord, let it be put off till another day then.

L. C. J. You shew no reason for it; you name no witnesses that you want; nor have we any oath that we ought to have in such a case.

Parkyns. I will do both if your lordship will oblige me to it.

L. C. J. There ought to be an oath certainly; but we think you have had fair and convenient notice: for you have had as much notice as sir John Freind had, who was tried yesterday.

Parkyns. As I am informed, he was charged with single facts about the town, but I am charged with many particular things more than he was.

L. C. J. The act of parliament says nothing of notice of trial; that still continues as it was before; and you have had very convenient notice: go on, Mr. Hardesty, to swear the jury.

Cl. of Ar. Sir William Parkyns, you the prisoner at the bar, Those men that you shall hear called and personally appear, are to pass between our sovereign lord the king and you upon trial of your life and death; if therefore you will challenge them, or any of them, you are to speak unto them as they come to the book to be sworn, and before they be sworn,

Parkyns. I hope your lordship will be of counsel for me then.

L. C. J. So we will; we will do you all the right we can. Look ye, you know you may challenge 35 without cause, and as many as you will with cause, but no more than 35 without cause.

Cl. of Ar. Sir Goddard Nelthorp.

Parkyns. I except against him.

Cl. of Ar. Leonard Hancock, esq.

Parkyns. I except against him, he is the king's servant.

Cl. of Ar. William Withers, esq.

Parkyns. I challenge him.

Cl. of Ar. Samuel Powell, esq.

Parkyns. I challenge him.

Cl. of Ar. William Northey, esq.

Parkyns. Well, I don't except against him.

Cl. of Ar. Hold Mr. Northey a book. (Which was done.) Look upon the prisoner. You shall well and truly try, and true deliverance make between our sovereign lord the king

and the prisoner at the bar, whom you shall have in charge, according to your evidence; So help you God.

Cl. of Ar. Thomas Tench.

Parkyns. I challenge him.

Cl. of Ar. John Wolf.

Parkyns. I challenge him.

Cl. of Ar. James Bodington.

Parkyns. I challenge him.

Cl. of Ar. John Smith.

Parkyns. I challenge him.

Cl. of Ar. Edward Gould.

Parkyns. I have no exception against him. (He was sworn.)

Cl. of Ar. John Raymond.

Parkyns. I challenge him.

Cl. of Ar. Daniel Thomas.

Parkyns. I have no exception against him. (He was sworn.)

Cl. of Ar. Isaac Honeywood.

Parkyns. I challenge him.

Cl. of Ar. William Underwood.

Parkyns. I challenge him.

Cl. of Ar. Arthur Bayley.

Parkyns. I challenge him.

Cl. of Ar. Nehemiah Erming.

Parkyns. I challenge him.

Cl. of Ar. John Webber.

Parkyns. I challenge him.

Cl. of Ar. John Cane.

Parkyns. I have no exception to him.

Att. Gen. We challenge him for the king.

Cl. of Ar. Thomas Glover.

Parkyns. I challenge him.

Cl. of Ar. Henry Whitchcott.

Parkyns. I have no objection against him. (He was sworn.)

Cl. of Ar. Timothy Thornbury.

Parkyns. I challenge him.

Cl. of Ar. Dormer Sheppard.

Parkyns. I challenge him.

Cl. of Ar. John Temple.

Parkyns. I challenge him.

Cl. of Ar. Nathaniel Gold.

Parkyns. I have no exception against him.

Mr. Gold. My lord, I am no freeholder in this county.

Mr. Baker. Nor have you no copyhold, Sir?

Mr. Gold. Yes, Sir, I have.

Att. Gen. However, let him be set by.

Cl. of Ar. Robert Breedon.

Parkyns. I challenge him.

Cl. of Ar. Thomas Taylor.

Parkyns. I challenge him, he is the king's servant.

Cl. of Ar. Joseph Blissett.

Parkyns. I challenge him.

Cl. of Ar. John Billier.

Parkyns. I challenge him.

Cl. of Ar. Francis Chapman.

Parkyns. I challenge him.

Cl. of Ar. John Cleeve.

Parkyns. I challenge him.

Cl. of Ar. Robert Bampton.

Parkyns. I have no exception to him. (He was sworn.)

Cl. of Ar. William Atlee.

Parkyns. I challenge him.

Cl. of Ar. Thomas Sutton.

Parkyns. I have no exception to him. (He was sworn.)

Cl. of Ar. Thomas Edling.

Parkyns. I have no exception against him. (He was sworn.)

Cl. of Ar. Robert Sanderson.

Parkyns. I have no exception against him. (He was sworn.)

Cl. of Ar. Ralph Marsh.

Parkyns. I have no exception against him. (He was sworn.)

Cl. of Ar. Richard Bealing.

Parkyns. Pray, Mr. Hardesty, how many have I challenged.

Mr. Hardesty. I will tell you presently, Sir.—You have challenged twenty-five.

Parkyns. But there are two that I gave reason for: Do you put them in among them? that is, Mr. Hancock and Mr. Taylor as the king's servants.

Cl. of Ar. You may speak to my lord about it; but if that be allowed, then there are but twenty-three.

Parkyns. Well, Sir, go on then.

Cl. of Ar. Richard Bealing.

Parkyns. I challenge him.

Cl. of Ar. William Partridge.

Parkyns. I challenge him.

Cl. of Ar. Nicholas Roberts.

Parkyns. I challenge him.

Cl. of Ar. Peter Lavigne.

Parkyns. I challenge him.

Cl. of Ar. Joseph Whiston.

Parkyns. I have no objection to him. (He was sworn.)

Cl. of Ar. Andrew Cook.

Parkyns. I challenge him.

Cl. of Ar. Samuel Hooper.

Parkyns. I challenge him.

Cl. of Ar. Thomas Heames.

Parkyns. I have no exception to him. (He was sworn.)

L. C. J. Sir William Parkyns, you have challenged two, and have assigned the cause of your challenge, that is, Hancock and another, and the reason of your challenge is, because they are the king's servants. I am to acquaint you, that is no cause of challenge; but however, the king's counsel do not intend to insist upon it, if there are enough besides. They are willing to go on with the pannel; and I speak this, because I would not have it go for a precedent, nor have it understood that the cause you assign is a good cause: But however they will not stand with you, if there be enough to serve.

Parkyns. My lord, I submit to it; the jury is full, I think.

Cl. of Ar. No, there are but eleven sworn yet.

Parkyns. But how far have I gone in my challenges?

Cl. of Ar. There are four which you may challenge more.

Parkyns. There are two allowed me, though it be not a precedent: Are there four still?

Cl. of Ar. Yes, you may challenge four more, and no more. Edward Thompson.

Parkyns. I challenge him.

Cl. of Ar. Nicholas Rufford.

Parkyns. I have no exception of him. [He was sworn.]

Cl. of Ar. Cryer, countez. William Northey.

Cryer. One, &c. (and so the rest till the twelve.)

Cl. of Ar. Nicholas Rufford.

Cryer. Twelve good men and true, stand together, and hear your evidence.

Cl. of Ar. Cryer, make proclamation.

Cryer. Oyez, if any one can inform my lords the king's justices, the king's serjeant, the king's attorney-general, or this inquest now to be taken, of the High-Treason whereof the prisoner at the bar stands indicted, let them come forth, and they shall be heard; for now the prisoner stands at the bar upon his deliverance; and all others that are bound by recognizance to give evidence against the prisoner at the bar, let them come forth, and give their evidence, or else they forfeit their recognizance.—And all jury-men of Middlesex that have appeared, and are not sworn, may depart the court.

The names of the twelve sworn were these; William Northey, Edward Gold, Daniel Thomas, Henry Whitchcott, Robert Bampton, Thomas Sutton, Thomas Edling, Robert Sanderson, Ralph Marsh, John Whiston, Thomas Heames, and Nicholas Rufford.

Cl. of Ar. Sir William Parkyns, hold up thy hand. [Which he did.] You that are sworn, look upon the prisoner, and hearken to his cause: He stands indicted by the name of sir William Parkyns, late of the parish of St. Paul Covent-Garden, in the county of Middlesex, knight, that whereas (*prout* in the Indictment, *mutatis mutandis*,) and against the form of the statute made and provided. Upon this Indictment he hath been arraigned, and thereunto hath pleaded Not Guilty, and for his trial hath put himself upon God and his country. which country you are; your charge is to inquire, whether he be guilty of the high-treason whereof he stands indicted, or Not Guilty; if you find that he is Guilty, you are to inquire what goods and chattels, lands, tenements, he had at the time of the high-treason committed, or at any time since: If you find him Not Guilty, you are to inquire whether he fled for it; if you find that he fled for it, you are to inquire of his goods and chattels, as if you had found him guilty; if you find him Not Guilty, nor that he did fly for it, you are to say so, and no more; and hear your evidence.

Mr. Mountague. May it please your lordship, and you gentlemen of the jury——

Parkyns. My lord, your lordship was pleased to say, you would be my counsel. I am ignorant in matters of indictments, I beg if there be any fault in it, you will let me know it.

L. C. J. Truly I have observed no fault in it; I do not know of any.

Mr. Mountague. Gentlemen, this Indict-

ment does contain as heavy an accusation as can be laid upon any man, for it not only charges the prisoner with a traiterous design of subverting the government, and raising war and rebellion within this kingdom; which was to be done by adhering to the king's enemies, and promoting a foreign invasion, but likewise with a conspiracy against the life of the king, which was to have been taken away by a bloody assassination.

Gentlemen the indictment sets forth, that sir William Parkyns, the prisoner at the bar, did meet several times with Charnock, and other false traitors; and there it was consulted and agreed, how they should procure French forces to land within this kingdom, and then they were to raise rebellion amongst his majesty's subjects, to join with the invaders. Mr. Charnock was sent from the prisoner at the bar and the rest, as a messenger into France, unto the late king James, to acquaint him with this bloody design, and to desire him to borrow of the French king as many troops as he could spare, to make a descent upon this kingdom; and they at the same time were to facilitate the descent, by getting as many men as they could to make the assassination; and the number of forty was pitched upon, who were to be provided for that purpose; of which the prisoner at the bar was to find five, who were to lie in wait with the rest, and set upon the king as he came along in his coach, upon his return from hunting. Some were to assault and attack the guards, while others were barbarously to assassinate and murder the king in his coach: And particularly it charges the prisoner with undertaking to procure and provide five horses and arms, that were to be employed in this bloody assassination; and also with gathering together great quantities of arms and ammunition that were to be used in the insurrection. To this indictment the prisoner has pleaded Not Guilty; if he be not guilty, God forbid he should be convicted! But if he be guilty, and we prove the fact, the nation expects that you will do justice to the king and kingdom, and find him so.

Att. Gen. (sir Tho. Trevor). May it please your Lordship, and you Gentlemen of the Jury; the prisoner at the bar, sir William Parkyns, stands indicted of high treason, for compassing the death of his majesty, and adhering to his majesty's enemies: and the overt-acts laid in the indictment to prove this treason are, That he with others had several meetings and consultations about this design, and sent a messenger over to France to the late king James, to procure French forces to invade the kingdom, to depose the king, and subject the kingdom to a French power: and likewise that he did enter into a conspiracy with several persons for the assassination of his majesty's royal person. These are the overt-acts mentioned in the indictment, to prove this charge of treason against the prisoner.

Gentlemen, the evidence to prove these overt-acts, and which we shall produce, will

be in this manner: it will appear that the prisoner at the bar, sir William Parkyns, has had a commission from king James to raise a regiment of horse; and about May last, he with several others had a meeting at the Old King's Head, in Leadenhall-street, where were present my lord of Ailesbury, my lord Montgomery, sir William Parkyns, sir John Freind, sir John Fenwick, Mr. Charnock, Mr. Porter, and one Mr. Cook; and Goodman came in to them after dinner. And at that meeting it was consulted and concerted among them, how they should bring back the late king James, and depose his present majesty; and in order to that, they did resolve to send Mr. Charnock as a messenger to the late king James, to desire him to obtain from the French king 10,000 men to invade this kingdom; 8,000 foot, 1,000 horse, 1,000 dragoons; and to encourage the late king to this, they did assure him by the same messenger, that they would meet him with 2,000 horse upon his landing; and they did all undertake and agree that they would do it; and Mr. Charnock undertook to go of this message.

Gentlemen, about a week after this meeting, Mr. Charnock not being willing to go upon this errand without a good assurance that they intended to perform what they had resolved upon, they therefore had another meeting of most of the same persons that were at the former, and particularly the prisoner at the bar was one; and that was at Mrs. Mountjoy's, a tavern in St. James's-street. And at that meeting they did all agree, as formerly, and continued in their former resolution, to send Mr. Charnock to assure the late king, that they would meet him, according as they had promised, if he would give them notice where he was to land, and he should not fail of their assistance. And at these meetings they did take notice, that then was the most proper time for such an invasion: for the king was gone to Flanders, most of the forces were drawn thither, and the people were dissatisfied, and so it would be the fittest opportunity to accomplish their design. And they desired Mr. Charnock to make haste to carry this message, and to intreat king James that he would be speedy and expeditious in his coming, that they might not lose this season.

Gentlemen, after these meetings, Mr. Charnock did within a few days go over into France, and did deliver his message to the late king James; who took it very kindly, but said that the French king could not spare so many forces that year, having other work to employ them about: upon which, within a month's time, or less, he came back again, and brought an account of his message to those gentlemen who sent him. This was in May or June last, and so the further prosecution of the design ceased at that time.

But, gentlemen, the last winter it was revived again, and attempted, and carried on very near to the obtaining a fatal success. And you will hear, that the prisoner at the bar, sir

William Parkyns, has had too great a hand, and been a very great instrument in both the parts of this wicked conspiracy and treason; not only in the invasion, which he with others sent the messenger over to procure; but also in the other part, the blackest part, even the assassination of the king's person.

About January last sir George Barclay, a lieutenant of the Guards to king James in France, was sent over into England to engage persons to join in the conspiracy and assassination; and for his assistance there were sent over with him, and before and after him, some 20 troopers of the late king's, that were his guards in France. And sir George Barclay, to encourage the persons that were to join, and whom he had brought over with him, pretended an authority to justify it, that is, a commission from the late king James; and he communicates this design to Mr. Charnock, Mr. Porter, and several others, and amongst the rest to the prisoner at the bar, sir William Parkyns, having a great confidence in him, and did acquaint him he had such a commission, and he shewed it him, and that commission was to levy war against the king's person; which they took to be a sufficient authority for them to assassinate the king's person.

Gentlemen, in order to the accomplishing this horrid conspiracy, there were several meetings and consultations had, at which the prisoner at the bar was present, and very active. Sometimes they met at captain Porter's lodgings, at another time at the Nag's-Head in Covent-Garden, at another time at the Sun in the Strand, and another time at the Globe in Hatton-Garden, in order to accomplish this design: and at these meetings you will hear they did propose several ways and methods for the execution of it; and several persons, particularly one of them that have suffered the punishment of the law for this, were appointed to go and view the ground, where the king's person might most conveniently be assaulted. Mr. King, that was executed for it, was one, captain Porter was another, and one Knightley was the third; and these did go to see the ground. And the day before they went there was a meeting, at which was present the prisoner at the bar, and others, wherein it was concluded upon, that they should go; and they went accordingly to see the most convenient place for it. They went to Brentford, and afterwards to the other side of the water to Richmond, and surveyed all the ground; and the place they pitched upon as the most proper for their purpose, was, when his majesty should return from hunting, to do it in the lane betwixt Brentford and Turnham-Green. And accordingly, when they returned in the evening, they came by appointment to the place where the rest of the accomplices were to meet, at the Nag's-Head tavern in St. James's, and gave an account of their proceedings; and at that meeting likewise was sir William Parkyns, the prisoner at the bar, Mr. Charnock, and several others; and upon the report of captain Porter

and Mr. King's expedition, they did resolve the thing should be done in that place, and that it should be done in this manner.

Sir George Barclay with about eight or ten in his party, who were to be chosen out of all the other parties, were to assault the king's coach, and endeavour to kill the king, and all the rest that were in the coach with him, whilst the others in two parties were to attack the guards; and the number in all was to be about 40. This was fully agreed upon.

And, gentlemen, the first time that they resolved to put this traitorous design in execution, was the 15th of February, which was a Saturday, the usual day that the king was wont to go a-hunting on; but it happened by great providence, that the king did not go abroad that day.

They had contrived further, to make the thing sure, that there should be two persons, whom they called orderly men, who should be placed at Kensington, to give notice when the king went abroad; and Chambers was one, and Durance that was a Fleming was another; and Durance was likewise employed to view the inns about Turnham-Green and Brentford, for the lodging of their men, who were to be placed two or three in an inn, that they might not be observed.

Gentlemen, the first day appointed for the accomplishing this design, which was the 15th of February, being over, and they disappointed; yet they did afterwards resolve to go on and execute it. And the next Saturday, which was the 22d of February, was pitched upon for the time of execution; and accordingly on Friday the 21st of February, the day before, there was a meeting at the Nag's-head in Covent-Garden; and there was present sir George Barclay, capt. Porter, and several others, and amongst the rest the prisoner at the bar was there: they had at first some discourse among them that they were in doubt, because of the first disappointment, whether there had not been some discovery, but that doubt was soon over; for it was said, it could not be so, for then they should not have been there together. That seemed probable, and the disappointment was imputed to some accident; and that gave them new assurance to go on, and they were resolved to do it in the same manner, as they had formerly resolved, on the next day, which was Saturday.

Gentlemen, at that meeting Mr. Porter acquainted them, that he had the misfortune to have some of his horses fallen sick or lame, and he acquainted the prisoner with it; and sir William Parkyns was careful to supply him with other horses, and told him, he could get a note from one Lewis, who I think is major of the horse to my lord Feversham, to get three horses; and accordingly he did send a note for three horses to Mr. Lewis.

Upon the 22d of February in the morning, which was the time for the execution of this bloody conspiracy, they had met together, and resolved to go on with it, and put it in execu-

tion ; and that they had notice from Chambers, that the king did go a-hunting that day, and there was great joy among them all, thinking themselves sure ; and so they ordered all things to be got ready. But afterwards, about one o'clock, there came other news, that the king did not go abroad, but the guards were all come back in great haste, their horses being all of a foam, and the king's coaches were sent back to the Mews ; then they began to be in a great consternation, and they thought the thing had taken air, and was discovered. This, gentlemen, is a short account how it will appear upon the evidence, as to the conspiracy of assassinating the king, and several meetings, and consultations about it ; at which the prisoner at the bar, sir William Parkyns, was present.

But, gentlemen, there will be a little more evidence, if it be necessary, to confirm this former evidence, and to shew the part that the prisoner at the bar had in this treasonable, this barbarous conspiracy ; for it will appear, that as the prisoner had a commission from the late king James to raise a regiment of horse, and had sent a messenger into France to invite the late king over, with 10,000 French ; so he had made great preparation of arms to be ready for that purpose. About Michaelmas last the prisoner at the bar sent a parcel of goods, as he called them, which were put into cases, I think they were about eight small boxes, put into very large cases, and sent down by his order into the country, unto one Haywood. It seems this Haywood had married Mr. Charnock's sister ; and Charnock writ a letter to him, and desired that he would give sir William Parkyns leave to lodge some goods there, which were of great value, and he durst not trust them at his own house in Warwickshire, because his servants were not there to look after them ; and accordingly upon that letter Mr. Haywood did give leave that the goods should be carried thither, and they were so, and there they were locked up privately, and kept till this barbarous conspiracy was discovered ; then you will find, the prisoner at the bar sent his own servant down, the Tuesday after the discovery, and gave him orders immediately (his name is Eubank, and he is the groom, and looks after his horses) to go down to Warwickshire to one Evans, who carried the goods, and desire him with all speed to remove those goods, and to take care to remove them privately, and to secure them, and to hide them. And accordingly on Wednesday he came there, which was Ash-Wednesday ; and acquainted Evans with what sir William had ordered him, and they went that very night with a cart to Mr. Haywood's ; and though it was late, and they were desired to stay till the next morning, they would not ; they said they could stay no longer but would remove the goods immediately, and accordingly they were carried from thence that night, to sir William Parkyns's own house in Warwickshire ; and there they were buried in the garden. These goods that were of this

great value were put into the ground to preserve them. But after this discovery, sir William Parkyns being accused, and his name put in the proclamation, and search being ordered to be made at his house, these goods that lay hid at Haywood's, and upon the removal thence were thus buried in the ground, came to be discovered, and the cases were broken open, and then they did appear to be goods of an extraordinary nature indeed, for you will find they were horse arms for troopers ; there were two and thirty carbines, five and twenty cases of pistols, and about forty odd swords without hilts upon them, but the hilts lay loose by them ; so that this will make it apparent, without dispute, how far the prisoner at the bar has engaged in this conspiracy, and what preparations he had made for the execution of it.

Gentlemen, it will appear farther against the prisoner at the bar, that he hath had a considerable number of horses, that have frequently been brought up from his house in Hertfordshire, to the George-inn in Holborn.

But before we come to that, I would acquaint you with another particular part of our evidence, that is precedent in point of time. About Christmas last, the prisoner did acquaint one Sweet, who is an officer in the Excise, (and I am very sorry that we should have any such officers that should be thought fit to be intrusted with secrets of this nature) sir William Parkyns acquainted this Sweet, and gave him an account that he had long had an assurance that king James would land ; but now he had it under his own hand, that he would land very speedily, and that he had made preparations for that purpose to meet him. That great things were expected from him ; that his own troop was ready, and it consisted chiefly of old soldiers ; and that several persons who had been officers would be volunteers under him. He said he intended to go into Leicestershire, and there he was to meet several gentlemen from the North, and from the West, to consider and settle a correspondence how to meet the late king upon his landing ; and accordingly sir William Parkyns did go ; and you will have an account that he came to Leicester on Friday night, one Scudamore went along with him ; there he staid all Saturday, and a good part of Sunday. There came several persons to him while he was at Leicester, particularly one captain Yarborough, the son of sir Thomas Yarborough, and a parson, who said they came as far as from York to meet sir William Parkyns at Leicester ; and there was great resort thither at that time, as you will hear from the witnesses. Sir William Parkyns came back again from Leicester to Brick-hill that night and returned to his own house on Monday night ; and after his return, he acquainted this Sweet, that he had been his journey to Leicester ; that he met with several gentlemen there from the North, and other places, and had settled a correspondence, and had found them all fully engaged, and well inclined ; all

went well, and there was no danger of any miscarriage at all; and this was about January last, that this expedition was made by the prisoner.

And now, gentlemen, as to that particular about the horses, which were so frequently brought up this last winter from his house in Hertfordshire, to the George-inn in Holborn, there is one very unfortunate circumstance that attends this matter; that is, that these horses were brought to town just the several nights before the king was to be assassinated; for upon Thursday the 13th of February, he being in town, sent directions to his groom to bring up three of his horses on Friday, which was the 14th in the afternoon, and all these horses were furnished with pistols and furniture for troopers; according to those directions his servant brought up the three horses, and he came and acquainted his master that they were brought up according to his order; sir William Parkyns was then at his lodgings, which were in the same house where Mr. Charnock did lodge; when his man had told him the horses were come, he pretended at first that he had some thoughts of going out of town that evening, but that he had changed his mind, and would go in the morning; and he would have the horses ready against the next morning, which was Saturday the 15th, the first day upon which the assassination was intended to be put in execution.

The next morning when his man came to him again, he had changed his mind, and he would not go out of town in the morning, but he would go in the afternoon: and it will appear that he did not go out of town that day, nor the next day, nor till Monday; and then the design had miscarried by the king's not going abroad a Saturday, and the horses were carried back; and when he went out of town upon Monday, one Holmes went along with him, and he went with him to his house in Hertfordshire; and there he staid until Friday after, which was the day before the next time that was appointed for the execution of the assassination. And upon the Friday they came up again, and then there were more horses, four or five, that were brought up that day; and all of them with pistols, and jack-boots, and other furniture and accoutrements for troopers; and these came to the George-inn, where sir William Parkyns gave his man, Eubank, particular orders to be very early the next morning at Kensington; that was the 22d, and he was to go, as he told him, to one Brown, that he said was concerned in the king's kitchen, and lived two doors off the gate that turns up to the king's house; and he was to tell him he was sir William Parkyns's servant, but that he came from a man that lodged at a confectioner's house over against Gray's inn; in which place, by the description of the person, you will find sir George Barclay lodged.

The man went accordingly at eight o'clock in the morning to Kensington, and inquired out this Brown, and met with him, and told

him he was sir William Parkyns's servant, but came from the gentleman that lodged at the confectioner's in Holborn. Brown said he had nothing to say to him, but bid him give him his almanack, and he writ in it, that he would be in town in two hours himself and wait upon him; and bid him carry that to the man that lodged at the confectioner's: And this Brown by the circumstances of the whole must probably be one of the orderly men who lodged at Kensington, to give notice when the king and the guards went out.

Sir William Parkyns's servant came back to the confectioner's house, and there he met with a man that went by the name of Rogers; he will tell you he was a Scotch man, for he spoke broad Scotch, and he will give you a particular description of the man, by which, I believe it will appear that it was sir George Barclay. Sir William Parkyns's servant, after he had delivered his message to this Rogers, came back to his master, and told him he had done his errand according as he was ordered; and sir William Parkyns asked him what Rogers said, and he told him that he bid him tell his master, if he would come to him, he would be ready at home for him. This was upon Saturday morning the 22d of February.

About eleven-a-clock that day sir William Parkyns, and this Lewis that we spoke of before, came to the George-Inn; and there sir William Parkyns asked his servant whether he had received any more than two saddles, for there were two saddles sent in thither, according to an order that had been given, to furnish two other horses that stood there at the George-Inn, and which sir William Parkyns told his groom belonged to two friends of his, and bid him be sure to take care of them, and to see them well fed, and ordered two saddles to be bought for them. Lewis said he did think they had more than two; but you will see by the evidence that this same Lewis had provided thirty saddles for sir William Parkyns; but there seemed to be a controversy between them at that time how many had really been sent in, and Lewis affirmed there was twenty-four; but sir William Parkyns said, I have had but twenty-two of the thirty yet, for I have but two brought in here, and I had twenty before. This you will hear fully proved; and I think it is impossible for any body to believe, but that all this preparation of saddles, pistols, boots, and other things, must convince any body of the prisoner's being so far engaged in this design, that he can never answer it without giving you a very good account what this preparation was for.

Gentlemen, a great part of this will be proved to you by one that acted in it, as a servant to sir William Parkyns, that is, as to the coming up of the horses, jack-boots, pistols, and other arms at that time; and that when on the last Saturday it was disappointed, all the horses, not only those sir William Parkyns brought, but the other two, went away in a great hurry and confusion, and nothing was

ever heard of them more; and that will be proved by the servants in the very inn.

Gentlemen, I have now opened to you the nature and state of the evidence; we will call our witnesses, and make it out very undeniably and substantially, and therefore I will not give you any farther trouble.

Sol. Gen. Call Mr. Porter. (Who was sworn.) Mr. Porter, pray will you give the court and the jury an account of the meeting at the King's-Head in Leadenhall-street; and who was there, and what resolutions and agreements they came to?

Capt. Porter. About the latter end of May last, or the beginning of June, there were two meetings had, the one was at the King's-Head in Leadenhall-street, the other was at Mrs. Mountjoy's near sir John Fenwick's. At the first meeting there was my lord of Ailesbury, my lord Montgomery, sir John Freind, sir William Parkyns the prisoner at the bar, sir John Fenwick, capt. Charnock, Mr. Cook, and myself. Mr. Goodman came in after dinner, and there we consulted which was the best way for king James's coming in; and we all resolved to send a messenger to him, to invite him over, and to desire him to interpose with the French king for the getting 10,000 men to come over with him, 8,000 foot, 1,000 horse, and 1,000 dragoons. It was then considered who should be sent; and all the company agreed Mr. Charnock was the properest person. Says Mr. Charnock, if you send me, pray tell me what errand I shall go upon: We did likewise then agree, that he should assure the king, if he would come over at such a time, we would meet him with a body of 2,000 horse.

Att. Gen. Did Charnock undertake to go upon that message?

Porter. Yes, he did, and to propose this matter to him, that he might propose it to the French king for the getting of the men.

Sol. Gen. Before you go away, I desire to ask of you one thing, did sir William Parkyns, the prisoner at the bar, agree to the message?—*Porter.* Yes, he did.

Sol. Gen. Had you any other meeting about this business, and when was it, and who was there?

Porter. My lord, captain Charnock said at first he would not go of a foolish message; and thereupon we all agreed to be at the head of 2,000 men to meet king James at his landing, and every one should bring his quota.

Att. Gen. When was the second meeting, and where was it, and who was there, and what was agreed upon?

Porter. The second meeting was at Mrs. Mountjoy's, where captain Charnock desired us once more to meet, before he went away, to know whether we kept to our first resolution? And we did agree to what was resolved upon at first, and he said he would go in two or three days time.

Att. Gen. Did the company agree to it then?

Porter. Yes, they did, Sir, all that met at that time.

Sol. Gen. Pray name them over again who they were?

Porter. Sir William Parkyns was actually there, and my lord of Ailesbury, and sir John Freind, and captain Charnock, Mr. Cook, and myself; I cannot tell whether my lord Montgomery was there, or Mr. Goodman.

Att. Gen. Pray when did you see captain Charnock, or speak with him, after that?

Porter. It was when I was in prison about the riot, and he told me he had been there; but there would be nothing done in that matter at present, for king James said, the French king could not then spare so many men, though he thanked us for our kind offer: and he said he had been with my lord of Ailesbury, sir William Parkyns, and the several other people of quality, which he did not name, and had carried them the particular messages that he had in command from the king to carry to them.

Att. Gen. Now, pray tell us, what you know about the design of assassinating the king, and what hand the prisoner at the bar was to have in it?

Porter. About some weeks before I heard of the assassination, I came to lodge in the house in Norfolk-street, where capt. Charnock lodged; and where sir William Parkyns lodged when he came to town. Most commonly we used to go in the evening to the tavern, or drink a bottle of wine at our own lodgings; and one morning I asked Mr. Charnock, if I should see him at night? He said he was engaged in private company for that night, and he could not go with me to the tavern. For, says he, there are some gentlemen that are lately come from France, and there is something to be done for the king's service. If there be so, says I, pray let me be concerned: Says he, they are but newly come, and they will see nobody else but me at present. A little after I fell sick of a fit of the gout, and Mr. Charnock came to visit me, and we fell into discourse, and I asked him about those gentlemen that were come from France, what they came about? He told me it was sir G. Barclay that came from France, and several other officers with him, and that he had a commission from the late king James to levy war against the person of king William, or the prince of Orange, as I think it was named in the commission.

L. C. J. Who told you this?

Porter. It was capt. Charnock: he desired to know how many men I could bring. I desired a little time to consider; but I said there would be a great many would join if the king landed, whom I did not think fit to trust with a thing of this nature before-hand. Some few days after, capt. Charnock came into my chamber, and brought sir George Barclay, and major Holmes that said he was come from France; and there we had little more but a general discourse: But a little after that I got well of the gout, and we had several meetings at several places; at the Globe-tavern in Hatton-garden, at the Nag's-head in Covent-

Garden, and at the Sun in the Strand, where sir William Parkyns was always present. And there we did consult of the best ways to assassinate the king, as he came from Richmond after hunting. Sir George Barclay said, he had received 800*l.* from king James's secretary towards the buying of horses, and furnishing both horses and men for the expedition; and it was considered of how many men it would be necessary to bring. The number agreed upon was about forty, of which sir George Barclay was to provide twenty; I promised to bring seven or eight, sir William Parkyns engaged to bring five, whereof three should be mounted with his own men, and the other two my men were to mount upon.

Att. Gen. Do you know the names of those people that he was to mount?

Porter. I never had the names myself.

Att. Gen. Well, what was done after these consultations?

Porter. I asked captain Charnock one time; if I might not see the commission that king James had given: He said he had never seen it himself, but sir William Parkyns had. I asked sir William Parkyns, one evening as we were smoking a pipe by the fire-side, whether he had seen the commission? He said, he had; and that because king James would not trust any of his ministers, it was written and signed with the king's own hand.

Att. Gen. Pray did he tell you what it was for?

Porter. He said it was for raising and levying war upon the person of the king, but I do not know whether he called him king William, or the prince of Orange; but I suppose it was the prince of Orange.

Att. Gen. Pray then give us an account of your going to view the ground, where it was most convenient to do the business.

Porter. There were several propositions about the place where it was to be done; one was to be on the other side of the water by ambuscade in Richmond Park, the other was to be on this side of the water after the king was landed. Sir G. Barclay was for that that was upon the other side of the water; I thought that it would take up too much time to go over thither, that it was better to be done on this side; but because there was difference of opinions, it was resolved upon that somebody should be appointed to view the ground; and I was appointed for one, Mr. Knightley for another, and Mr. King would needs go with us for a third; and we three did go. We lay all night at Knightsbridge, and the next day went and viewed the grounds on both sides the river; and came back that evening to the Nag's-head according to appointment, where was sir William Parkyns the prisoner, and sir George Barclay, and Mr. Charnock, and we gave an account that we had viewed both places; And upon our report it was resolved, that it should be done on this side of the water, in the lane between Brentford and Turnham-Green,

Att. Gen. Are you sure sir William Parkyns, the prisoner at the bar, was there, at that meeting at the Nag's head?—*Porter.* Yes, he was.

Att. Gen. Did he agree to the resolution?

Porter. It was in general agreed to by all that were there.

Att. Gen. Pray, captain Porter, then give us an account of the days that were fixed for the execution of this design?

Porter. There was Saturday the 15th, and Saturday the 22d, because Saturday was the day the king used to go a-hunting and shooting.

Att. Gen. Were there any men at Kensington, to give you notice when the king went abroad?

Porter. There were two men that had a lodging at Kensington, the one was one Chambers, who belonged to captain Charnock, and the other was a Fleming, one Durance, who came over with sir G. Barclay, and he went every day, and thrust himself among the guards to bring intelligence.

Sol. Gen. What was the reason the design was not executed?

Porter. The first day, Durance brought notice in the morning that the guards were gone abroad; and afterwards there came notice, that the king would not go abroad that day; for which reason we adjourned it to the next Saturday.

Att. Gen. What was the method you was to take in the execution?

Porter. The method agreed upon was this: There was one Rookwood that came from France upon this expedition, he was to command one party, and captain Charnock and myself was to command another party, to attack the guards; and sir G. Barclay was to have four men out of each party to attack the coach while we attacked the guards.

Att. Gen. Well, you say the first day you was disappointed by the king's not going. When was the next meeting?

Porter. The next meeting was upon Friday, the day before the 22d. I was sick all the week, and I do not know whether I lay a-bed all the week, or no; but upon Friday they met, and it was at the Sun-Tavern in the Strand: There was none but sir G. Barclay, captain Charnock, sir William Parkyns, and myself.

Att. Gen. What discourse was there then?

Porter. Sir George Barclay came in, and said, he was afraid the thing was discovered; I told him I fancied not, for if it had, we should not have been in that house at that time. Then, says he, let us go on, and try another day. Sir William Parkyns was asked if his horses were come to town: He said they were come to town that night. Said I, I have had a misfortune with my horses, two of them are fallen lame, and won't be fit for service. Says he, if I had known that, I could have brought more horses out of the country: But, says he, I will send to Mr. Lewis, who was gentleman of the horse to my lord Feversham, and I believe he can help us to more horses; he will be with me to-morrow morning, and I

will get a note from him for two more. In the morning I sent to him, and he sent me a note for two horses to mount my men: and he sent me word Mr. Lewis could help me to two or three others, that they were all three saddled, and one was accoutred with hostlers and pistols, but the other two had only saddles. I did not see sir William Parkyns on Saturday, the 22d, but I met some of my friends, who were to go along with me upon this enterprize; and we had first notice that the guards were gone abroad, and that the king would go, at which all were very glad: But when we had notice that the king did not go, we were afraid the thing was discovered, and I went out of town, and I did not see any of them afterwards till they were taken.

Att. Gen. Pray, captain Porter, have you heard any thing from sir William Parkyns of his having a commission from king James?

Porter. I have heard captain Charnock ask sir William Parkyns, why he did not go along with us in this expedition? He said, he did not go, because he could not go.

Att. Gen. Was he not to be one in the number that was to act in the assassination?

Porter. No; he said he had other business to do, he had a regiment to look after.

L. C. J. How many horses had you from Lewis?

Porter. I had never a one, only sir William Parkyns sent me word, if I wanted I might have three, for I had told him I would not send for them, till I heard whether the king went abroad; and then I had notice that the king did not go.

Att. Gen. Had you a note for them?

Porter. Not for these three horses; but Cranbourne said he had a note for two horses.

Parkyns. Did he say he had a note from me?

Porter. No, I don't say so, sir William; Cranbourn told me, he had a note whither to go for them.

L. C. J. Will you ask him any questions, sir William?—*Parkyns.* No, my lord.

Juryman. My lord, I desire he may be asked, Whether at any of those meetings there was any discourse of the assassination before sir William Parkyns?

L. C. J. What say you to that, captain Porter?

Porter. Yes; he was at all the meetings and consultations.

Juryman. Pray, my lord, I desire to know, whether sir William Parkyns discoursed of it himself, and what he did say about it?

Porter. I cannot say exactly what he did say in particular, only he agreed to it, and was to furnish five horses for it, and said it was necessary to be done; for it would bring the king in more easily, though he could not personally engage in it himself, because he had other business; he was to look after his regiment.

Sol. Gen. If sir William Parkyns will ask captain Porter no questions, we will go on to our next witness, which is one Abraham Sweet,

whom Mr. Attorney mentioned. [He was brought in and sworn.]

Att. Gen. Mr. Sweet, will you give the court and jury an account, what sir William Parkyns said to you about king James's landing?

Att. Gen. Pray, will you give an account what discourse you had with sir William Parkyns, the prisoner at the bar, about king James's returning and landing with French forces?

Sweet. Sir William Parkyns did tell me, that he did expect king James's landing; and he said his own troop was composed of old soldiers.

Att. Gen. How long have you known sir William Parkyns?

Sweet. This three years.

Att. Gen. Pray tell the time when this discourse was. About what time was it?

Sweet. This was since Christmas, about Christmas last.

Att. Gen. Where was it that you had this discourse?

Sweet. It was about his own house.

L. C. J. What discourse?

Sweet. We were talking about king James's coming.

L. C. J. Who told you that king James was coming?—*Sweet.* Sir William Parkyns.

Att. Gen. What did he say?

Sweet. He said he had bought a great many saddles, thirty saddles; and that his own troop was composed of all old soldiers.

Att. Gen. Did he tell you of any assurance that he had of king James's landing?

Sweet. Yes; he said he had the king's word for it?

Att. Gen. Was there any discourse between you about any journey that sir William was to take?

Sweet. Yes; he did tell me he was to go into Leicestershire, and was to meet several gentlemen in Leicestershire; and he did go, and after he came back again, he said he had met his friends, and all was well, and that the west was as much inclined to king James's interest as the north, and that a Lord's brother was concerned.

Att. Gen. What other discourse had you about this matter?

Sweet. Nothing else, as to particulars, that I can remember.

Att. Gen. What orders had you to come up to town in February, and when, and from whom?

Sweet. Sir William Parkyns sent for me, and he sent me a letter about the 11th of February that I should come to him the next day; and I did come the next day.

Att. Gen. Whither did you come? Where did you find him?

Sweet. At his lodgings in Norfolk-street, at the house where Mr. Charnock lodged; and after I had spoken with sir William Parkyns about the letter which he had sent me to come up, he told me, that the business that he had

designed for me, he did not think fit I should do, because of my family.

Att. Gen. Pray, what directions had you from him, what you were to do when you went into the country?

Sweet. When I went into the country, he ordered me to go to his house, and send up three of the strongest horses.

Att. Gen. When was this, do you say?

Sweet. It was in February.

Att. Gen. What time in February?

Sweet. The eleventh or twelfth, which was Wednesday; and at my going away, he told me if I had not a letter from him the Friday following, I should come to town again. I did come to town again, and then he asked me, if I had made provision for my family? I told him, no; then he asked me, why I came up to town? He told me I might go into the country again on the morrow morning.

L. C. J. What did he tell you?

Sweet. He said I might go back again into the country. I came upon the Saturday morning to him.

Att. Gen. Pray, what day was that Saturday?

Sweet. I believe it was the 13th or 14th of February.

Att. Gen. You say, Wednesday was the twelfth?

Sweet. Yes, I believe Wednesday was the 12th, and I came to town the Friday after that 12th, that was the 14th, and on the Saturday I went home again.

Att. Gen. You say you came to him on the Saturday morning, what passed between you then?

Sweet. I went the next morning to sir William Parkyns's lodgings, but he was gone out, and had left word, that I must come again about eleven of the clock: I did go about that time, and he was not come in, and there I met Mr. Chambers, and one Mr. Lee, whom I had seen there the night before.

Att. Gen. And what discourse had you then with them?

Sweet. We had little discourse, for I had only seen them the night before; but I think Chambers told me he had been at Kensington, and I desired to know what news there; and he told me William kept as close as a fox; and he shewed me his wounds, and said those wounds wanted revenge.

Att. Gen. Where did he say he received those wounds?—*Sweet.* At the Boyne.

Sol. Gen. Pray, Mr. Sweet, did he tell you for what use his troop was?

Sweet. He did not tell me positively; but I understood it to be to join king James when he landed.

Sol. Gen. Pray, Sir, where did you dine that Saturday?

Sweet. With sir William Parkyns, and Mr. Charnock, and Chambers, and one or two more that I did not know.

Att. Gen. Will you ask him any questions, sir William?

Parkyns. Did I tell you, Mr. Sweet, that I had a troop of horse?

Sweet. I will tell you your own words, and no other: You said, your own troop was composed of old soldiers?

L. C. J. Pray let me ask you one question; How many horses were you to bid the man to bring up to town?—*Sweet.* Three, my lord.

Att. Gen. And were they not his strongest horses?—*Sweet.* Yes, my lord, they were.

Att. Gen. Did he say any thing to you about volunteers?

Sweet. Yes; he said there were some gentlemen that were captains and old officers that would be volunteers under him.

Parkyns. Pray, where were those words spoken?

Sweet. Either in your house or in the garden, I cannot tell directly which, but somewhere about your house it was.

Parkyns. Where is that house?

Sweet. In Hertfordshire.

Parkyns. Then I am in your lordship's judgment, whether words spoken in Hertfordshire can be an evidence of a treason acted here in Middlesex?

L. C. J. Sir William Parkyns, if there be a design to kill the king, and there are several overt acts to prove that design, and one is in one county, and another is in another county, the party may be indicted in either of the counties, and evidence may be given of both those overt-acts, though in several countries. It is true you being indicted in Middlesex makes it necessary that some evidence should be given of some things done in Middlesex, as there is; as your meeting at Mrs. Mountjoy's, and at the Nag's-head in Covent-garden, and the Sun in the Strand, where were several consultations, which are overt-acts of the same treason; and if treason be committed in several counties, the party may be indicted in any one, and the evidence may be given of facts done in all.*

Parkyns. Then, Mr. Sweet, you do not say that I had raised a troop, or would raise a troop.

Sweet. I told you your own words, that your troop was made up of old soldiers.

L. C. J. But yet I must tell you further, sir William Parkyns, if I remember right, there is evidence given of a discourse you had in Norfolk-street, where you lodged, and that is in Middlesex.

Parkyns. My lord, I did not observe that he said any thing of me about Norfolk-street.

Att. Gen. Yes; that is what he says: You told him you had thought of a business for him, but you would not engage him in it, because of his family.

Parkyns. Pray, Mr. Sweet, did I tell you any thing what you were to do?

Sweet. No, Sir, you did not.

Parkyns. I hope the Jury will take notice

* See the fourth Resolution in sir Henry Vane's Case, and the Note to it, vol. 6, p. 123, of this Collection.

of that: I did not tell him any thing that he was to do.

L. C. J. Well, that was no great matter. Will you ask him any more questions, Sir?

Parkyns. No, my lord.

Sol. Gen. Then our next witness is James Eubank. (Who was sworn.)

Att. Gen. Do you know sir William Parkyns.—*Eubank.* Yes, he is my master.

Att. Gen. What servant was you to him?

Eubank. I was groom to him.

Att. Gen. How long have you been his groom?—*Eubank.* Not a twelvemonth yet.

Att. Gen. Pray, first give an account what journey you took with him.

Eubank. I went into Leicestershire with him.

Att. Gen. Pray tell us what you know of that matter.

Eubank. Yes, my lord, we went from our own house to Stony-Stratford, and there we lay all night.

Att. Gen. What time was this?

Eubank. I cannot tell the day of the month, it was in January.

Att. Gen. What day of the week was it?

Eubank. It was on a Thursday.

Att. Gen. And where did you go from Stony-Stratford?

Eubank. We came the next day to Leicester.

Att. Gen. Who went with him?

Eubank. One captain Scudamore.

Att. Gen. How long did you tarry at Leicester?

Eubank. When we came the next day to Leicester, we staid there till Sunday morning.

Att. Gen. What company came to your master when he was at Leicester?

Eubank. Sir, I am a stranger, I know none them, I was never there before.

Att. Gen. Can you remember whether there was one Yarborough there?

Eubank. There was one that said his name was Yarborough.

Att. Gen. Whence did he come?

Eubank. He said he came out of Yorkshire.

Att. Gen. Who came with him?

Eubank. There was a gentleman in black cloaths, that said he was a minister.

Att. Gen. Did you observe any others that came thither to your master?

Eubank. It was market day, and I had my horses to look after; there were a great many people went up and down stairs; but whether they went to him, or no, I cannot tell.

Att. Gen. When did you come back again?

Eubank. We staid there till Sunday morning, and then we came away.

Att. Gen. To what place did you go that night?

Eubank. To a town called Brickhill, and the night following we came home.

Att. Gen. Who came back with him?

Eubank. None but captain Scudamore, who went with him.

Att. Gen. Whither did you go the next day?

Eubank. We came to Bushy about 8 o'clock on Monday night.

Att. Gen. Well after this, did you bring up any horses to the George-inn to your master, and when?—*Eubank.* Yes, three horses.

Att. Gen. Ay, when?

Eubank. I cannot tell the day.

Att. Gen. What day of the week was it?

Eubank. Upon a Friday.

Att. Gen. What month was it in?

Eubank. Indeed, I cannot say that.

Att. Gen. Do you remember Valentine's-day?—*Eubank.* Yes; it was upon that day.

Att. Gen. That is the 14th of February, a remarkable day, and was then of a Friday, the day before the assassination was to have been executed. Whither did you bring them?

Eubank. To the George-inn.

Att. Gen. How were they furnished? Were there pistols upon them?

Eubank. No; the pistols were in town, and the horses were sent after my master.

Att. Gen. Where were the pistols left?

Eubank. Indeed, I don't know.

Att. Gen. Pray, when you came to town, did you go to your master, and acquaint him with it?—*Eubank.* Yes, Sir, I did.

Att. Gen. Pray, what did he then say to you?

Eubank. He said he thought he should go home that night.

Att. Gen. Did he change his mind?

Eubank. Yes, for he did not go till Monday.

Att. Gen. Did he tell you he should go a Saturday?

Eubank. Yes; he said he thought he should.

Att. Gen. Did you come to him to know his mind, and what did he say?

Eubank. He said in the morning, he would go in the afternoon; but he did not.

Att. Gen. Afterwards when did he go?

Eubank. Upon Monday.

Att. Gen. Who went with him that Monday?

Eubank. One Holmes, a fat, thick man.

Att. Gen. Well, pray when did you come to town again?

Eubank. Upon the Friday following.

Att. Gen. How many horses did you bring up then?

Eubank. On the Friday following we brought up four; my master himself came up with them.

Att. Gen. Who came with him?

Eubank. Mr. Holmes, and I, and another servant.

Att. Gen. How were the horses furnished?

Eubank. Every horse had pistols.

Att. Gen. What did you bring beside? Were there any boots?

Eubank. None but what we rid in.

Att. Gen. Where did you leave those horses?

Eubank. At the George-inn in Holborn.

Att. Gen. What directions did your master give you that night for going the next morning upon an errand, and whither?

Eubank. I had no message from him; but there was a note that I was to carry to Ken-

sington to one Brown; and I was ordered to go to the gentleman that lives within a door or two next the going into the king's gate, I forget his name; but this man where Brown lodged belonged to the court, some officer in the kitchen to the king; either confectioner, or cook, or something; and this man lay there.

Att. Gen. What was your message to him?

Eubank. I was to tell him, that I came to speak with one Brown, and that I came from a gentleman that lay at the confectioner's in Holborn, over against Gray's inn. I know the gentleman by face again, if I see him?

Att. Gen. Well, what did he say to you?

Eubank. He bid me set my horse at the Red lion, and he would come to me presently; and so he did. Says he, I have no business that I need to send; but I will write in your almanack, and you may carry it back and shew it him, that I will come to town betwixt nine and ten o'clock. I did go back and tell that gentleman at the confectioner's.

Att. Gen. What kind of gentleman was it?

Eubank. A lusty man, with a great nose, and a black wig; he speaks broad Scotch, and he was a swarthy coloured man, and he had a wide mouth.

Att. Gen. What age was he of?

Eubank. A middle aged man.

Att. Gen. Pray, what did he say to you?

Eubank. He asked me if I had seen the gentleman? I told him, yes. He asked me what the gentleman returned for answer? I told him, he had writ in my almanack, which I had shewn him, that he would be in town between nine and ten o'clock. He asked me then where I was going? I said, to my master. Says he, tell your master that I will be in my chamber ready for him.

Att. Gen. Did you go to your master, and tell him so?—*Eubank.* Yes, I did.

Att. Gen. And what did he say to you?

Eubank. He said he designed to go home in the afternoon, and therefore bid me go to the inn, and make ready the horses, and know what was to pay for them, and he would come by and bye thither.

Att. Gen. Did he afterwards come to the inn?

Eubank. Yes, Sir, about three or four o'clock in the afternoon.

Sol. Gen. Pray, who came with sir William Parkyns?—*Eubank.* One Lewis.

Att. Gen. Do you know him?

Eubank. I have seen him before with my master.

Att. Gen. What is he?

Eubank. They say he is my lord Feversham's gentleman.

Att. Gen. What did he say to you about any saddles?

Eubank. They asked me what saddles, and how many had been sent in there? And I said but two.

Att. Gen. What said Mr. Lewis?

Eubank. Mr. Lewis said there must be a mistake, because my master said he had but twenty-two, for he reckoned he had more; there should be twenty-four in all.

Att. Gen. Did he say so, or sir William Parkyns?

Eubank. It was Mr. Lewis that said there were twenty-four to the best of my remembrance.

Att. Gen. Where were they sent?

Eubank. Indeed I know not, I never saw any of them but those two.

Att. Gen. Who delivered those two to you?

Eubank. My master, sir William Parkyns.

Att. Gen. Who were those saddles for?

Eubank. They were for two gentlemen's horses that were there.

Att. Gen. Whose horses were they?

Eubank. They were not my master's; but they stood at that place.

Att. Gen. Did your master ever speak to you about them, to look after them?

Eub. He said, if at any time I was there, I should see that the hostler gave them their corn.

Att. Gen. Were they your master's horses, or not?—*Eub.* Not that I know of.

Att. Gen. What time did you go out of town?

Eub. I went out of town with them about four o'clock in the afternoon.

Att. Gen. When did you hear from your master after that?

Eub. Upon Monday I had a letter from him.

Att. Gen. What was that letter for?

Eub. It was to go to my master's house in Warwickshire, to one Richard Evans that was his servant, to whom he sent a letter.

Att. Gen. What were the contents of that letter?

Eub. I did not see what they were, it was sealed.

Att. Gen. Did you carry that letter to Evans?—*Eub.* Yes, I did.

Att. Gen. What time did you come thither?

Eub. I came there a Tuesday at four o'clock.

Att. Gen. What did Evans and you do after you had read the letter?

Eub. We went to fetch some boxes that my master had ordered Evans to fetch home. It was about two miles, or more from home, at a tradesman's.

Att. Gen. What was his name, was it Haywood?

Eub. Yes, I think it was something like that name.

Att. Gen. Did you go with Evans to fetch the boxes from thence?

Eub. They had a man that drove the team to fetch them.

Att. Gen. Where they carried in a team then?—*Eub.* Yes, they were.

Att. Gen. Were you there when the goods were brought back?

Eub. Yes, I was at my master's house.

Att. Gen. What did they do with them?

Eub. They buried them in the garden, Sir.

Att. Gen. What, in the boxes?

Eub. Yes, Sir.

Att. Gen. How many boxes were there?

Eub. Five or six, I think, I know not what was in them.

Att. Gen. You helped to bury them, did you not?

Eub. No; but I was there, I saw them buried.

Att. Gen. Did Evans tell you what they were?

Eub. Evans told me they were choice goods.

Att. Gen. Evans told you so, did he?

Eub. Yes.

L. C. J. What time of the day or night were they fetched home?

Eub. They went away about four o'clock in the afternoon.

L. C. J. How far is it from sir William Parkyns's house to Haywood's?

Eub. I think about three or four miles, I cannot tell how far exactly.

L. C. J. What time did they return?

Eub. About ten or eleven o'clock at night.

Juryman. My lord, I understand he says they buried them immediately; was he there, and did he help to bury them?

Eub. No, I did not help to bury them; but I saw earth put upon them.

Att. Gen. Pray, Eubank, let me ask you one question: the person that lay at the confectioner's, did you observe whether he had a lame arm, or no?

Eub. No, I did not take notice of any such thing.

Sol. Gen. Will sir William Parkyns ask him any questions?

L. C. J. What say you, sir William, will you ask him any questions?

Parkyns. You say one Holmes went out of town with me; pray give an account what Holmes that is?

Eub. It is fat Mr. Holmes, if it please your honour, he lives at the Golden Key in Holborn.

Parkyns. My lord, I observe this to distinguish it, that it was not, as Mr. Attorney opened it, major Holmes that is in the proclamation; it was one that used to be at my house frequently; he was at my house all the summer.

Att. Gen. You did well to ask him that question to explain it.

L. C. J. Will you ask him any more questions?—*Parkyns.* No, my lord.

Sol. Gen. Then our next witness is one Thomas Hipwell. (Who was sworn.)

Att. Gen. Where do you live?

Hip. At in Warwickshire.

Att. Gen. With whom do you live?

Hip. I live of myself, Sir.

Att. Gen. Do you know of any goods that were carried from Mr. Haywood's house to sir William Parkyns's house?

Hip. I came from Litchfield fair upon Ash-Wednesday, where I had been to carry goods for my master.

Att. Gen. Did not you say you lived of yourself? I asked you before, who you lived with? Who is your master?—*Hip.* Mr. Haywood.

Att. Gen. You said you had no master.

Hip. That is, when he pleases to employ me, I work for him.

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Att. Gen. Pray tell what you carried from Haywood's house, and who came for them?

Hip. There were, to the best of my remembrance, either seven or eight boxes.

Att. Gen. Who came for them?

Hip. There was one of sir William Parkyns's men, one Richard Evans, that was his servant, and one Whetstone, that was tenant to sir William.

Att. Gen. Well, how did they come, and what did they do?

Hip. They brought a waggon and two mares.

Att. Gen. About what time was it?

Hip. It was about nine or ten o'clock at night when they went away.

Att. Gen. What orders had you from your master?

Hip. It was near upon seven o'clock, when the waggon came, and my master wished me to go to borrow a mare of —, at —; I did so, and I brought the mare I had borrowed with me home.

Att. Gen. What was that mare borrowed for?—*Hip.* I know not.

Att. Gen. What use was she put to afterwards? What did you see more?

Hip. Why, before the team came (about a quarter of an hour before) to fetch these goods, my master told me, that sir William Parkyns's men were to come to fetch some bedding and other goods, what they were he knew not; and he ordered me, when they knocked at the gate, to let them in; and I did so.

Att. Gen. Well, friend, did they carry away any goods, and what were they?

Hip. They were in boxes at first, in three boxes; and then sir William Parkyns's servant did knock off the outside lining, which was a deal board, and he drew the nails, and took out of two boxes three boxes a-piece, and two out of another: to the best of my remembrance I think there were eight, but I am not sure whether there were seven or eight.

Att. Gen. Did they carry them away that night?

Hip. Yes, sir Wm. Parkyns's man Richard and the tenant carried them to the waggon, and I lighted them down with a lanthorn, according to my master's order.

Att. Gen. When, what day was this?

Hip. It was Ash-Wednesday at night.

Att. Gen. Then set up Mr. Haywood, (who was sworn before). Pray give my lord an account, when sir William Parkyns's goods were brought to your house, who brought them, and what directions were given about the careful keeping of them.

Haywood. My lord, about Michaelmas last, sir William Parkyns's man came to me with a letter from one Mr. Charnock, and the effect of the letter was, to desire the favour of me to lodge some goods of sir William Parkyns at my house; for he was taking his servants from his house, and he was loth to leave his goods in an empty house, and he desired me to let them lie at my house, which I did.

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Att. Gen. How were they put up?

Haywood. I think in three chests, pretty big chests, nailed up and tacked; and there was a bed and bedding, and a piece of tapestry or two.

Att. Gen. Pray, did that letter come from Mr. Charnock?—*Haywood.* Yes; Evans, sir William Parkyns's man, brought it me.

Att. Gen. Pray, Sir, how are you related to that Mr. Charnock? What kin is he to you?

Haywood. I married his sister.

L. C. J. You took the goods into your custody upon that letter from Charnock?

Hayw. Yes, my lord, I did.

Att. Gen. Pray, will you give an account, whether you were in town before this discovery, and had any discourse with Mr. Charnock or sir William Parkyns about these goods? When did you see Mr. Charnock afterwards?

Hayw. I came up to London the 16th day, and I was in London the 17th, 18th, and 19th; I think those three days; and I went to see Mr. Charnock at his lodgings, but I was hardly with him a quarter of an hour; I told him sir William Parkyns had sent some goods to my house, and I desired to know when he would fetch them away. Says he, I cannot say when I shall see him again. Said I, I shall have some business at the Temple, and I will meet you at the Temple coffee-house. Says he, I will meet. And bring sir William Parkyns with you, if you can, said I. He came about eight or nine o'clock on Tuesday morning; says he, sir William Parkyns is at my lodgings, just a-going out of town, and would desire to see you. So I went up, and sir William Parkyns was ready to go out of town. I told him I had some goods of his at my house, and I desired to know how he would dispose of them; what he would do with them. He would take them away, he said, the first opportunity, or to that effect.

L. C. J. When was this? What month?

Hayw. It was in February last.

L. C. J. What day?

Hayw. I think it might be about the eighteenth day.

L. C. J. It was you that desired to have them taken away, it seems, was it not?

Hayw. I asked him when he would take them away, or what he would do with them.

L. C. J. And what answer did he make?

Hayw. He said he would take them away the first opportunity, as soon as he could dispose of them, or to that effect.

Att. Gen. Now, when you came home, tell us who came for those goods, and when?

Hayw. I think it was upon a Shrove-Tuesday that I came home, and my wife said sir William Parkyns had sent for his goods, and desired to have them away; but that she had made answer, I was not at home, but should be at home soon, and then he might have them away. The next day I came home from Litchfield fair, about five or six o'clock at night: it was Ash-Wednesday at night when I came home, and the man came to me be-

tween six and seven, and told me his master desired to have the goods away. I told him he might have them when he would; he said he would have them away that night. I told him it was an unseasonable time: but, says he, the waggon is a-coming, and I desire you would give me leave to take them away; which I did: then he said he had but two horses, and he desired me to lend him a horse; which I did, and he took the goods, and went away with them; but for what he did afterwards with them, I know nothing at all of it.

Sol. Gen. Then swear Mr. Whetstone, [which was done.]

Att. Gen. Pray, Sir, do you give an account when you went with Evans to Haywood's house, and what happened.

Whetstone. His man came to me—

Att. Gen. Whose man?

Whetstone. Sir William Parkyns's man, to desire me to go to Mr. Haywood's to fetch some goods of sir William Parkyns, some bedding, and some odd things, which I did; and said he, I will go the next way to the house, and I will meet you before you can get thither; and he did meet me half a mile off the house, and told me I must stay, and not come to the house till it was night, till it was later.

L. C. J. Who told you so?

Whetstone. Sir William Parkyns's man told me so; so he went forwards to the gate, and then came back, and called me to come in; then we went to the house, and loaded the waggon with boxes and bedding that was there.

Att. Gen. How many boxes were there?

Whetstone. I cannot tell whether there were seven or eight.

Att. Gen. Whither did you carry them?

Whetstone. We carried them to sir William Parkyns's house.

Att. Gen. What was done with them?

Whetstone. There they were put into the ground by the wall side, where they were found.

Att. Gen. Why, was you present when they were found?

Whetstone. Yes, I saw them dug up.

Att. Gen. Then you can give us an account of them: What were they?

Whetstone. They were arms.

Att. Gen. How many were there? What quantity?

Whetstone. Truly, I cannot tell.

Mr. Baker. Where is the constable, Thomas Watts?—*Watts.* Here am I. (He was sworn.)

Att. Gen. Are you the constable?

Watts. Yes, Sir, I am the constable, and searched sir William Parkyns's house, and upon searching in the garden I found some arms there.

Att. Gen. Pray what quantity of arms did you find there?

Watts. Four dozen of swords, thirty-two carbines, twenty-five brace of pistols.

Att. Gen. What kind of swords were they?

Watts. They were broad swords, two-edged swords.

Att. Gen. Were there any hilts to the swords?

Watts. No; but there was a box of hilts that I suppose was prepared for them.

Att. Gen. Where did you find them?

Watts. In a border under the wall by the wall side.

Juryman. Did you see the boxes broke open, Sir?

Watts. Yes, Sir, I took them and broke them open my own self.

Juryman. Was Whetstone by, pray, Sir, when they were broke open?

Watts. He was not there by at the first, when we dug them up; but I brought them to my own house, and there I broke them open, and there we saw them.

Att. Gen. Will you ask him any questions, sir William?—*Parkins.* No, Sir.

Sol. Gen. Then call Turton, Freeman, Fielding. (Who were all sworn.)

Att. Gen. Pray set up Mr. Freeman. (Which was done.)

Att. Gen. Where do you live?

Freeman. At the George Inn in Holborn.

Att. Gen. What are you?

Freeman. I am hostler there.

Att. Gen. Pray do you give an account what horses were kept there of sir William Parkyns, and how many.

Freeman. He was a guest to the house all this last summer, sometimes more, sometimes less.

Att. Gen. How was it last winter about February last, how many horses had he then?

Freeman. He had sometimes three came in, sometimes four; the most that ever he had was five.

Att. Gen. What time was that that he had five, pray?

Freeman. To my best memory, it was just the week before the disturbance, before the Plot broke out.

Sol. Gen. Before the proclamation, you mean?

Freeman. Yes, before the proclamation.

Att. Gen. When was it? What day of the week was it?

Freeman. They came in on Friday night.

L. C. J. Holt. What, did five come in then?

Freeman. Yes, I think so.

L. C. J. Holt. Who was with him?

Freeman. I only saw his groom and another servant.

Att. Gen. How were they accoutred?

Freeman. Four with holsters and small pistols, one was a led mare with a portmantau; and in a horse cloth wrapped up there was one or two pair of jack boots, and, I think, a collar in one; I cannot tell whether there was one bridle or two.

Att. Gen. When did they go away?

Freeman. On Saturday in the afternoon.

Att. Gen. Did you observe any persons to come there on Saturday morning?

Freeman. There were two men that were there that rid out between two and three hours;

they rid out between nine and ten, and they came in again between twelve and one; where they had been I cannot tell; but they had rid pretty hard for the time they were out, for the horses came in in a sweat.

Att. Gen. Before this time that you now speak of, what horses came up? Can you remember how many horses came up the week before?

Freeman. The week before there were some, but how many I cannot remember; they very rarely stayed above a night.

Att. Gen. What do you know of any other horses that were left there?

Freeman. There were three horses that were at our house a week, that were very good horses; but I do not know whose horses they were, nor the names of the gentlemen that owned them. The gentlemen that brought them in paid for the horses, only the groom told me his master, sir William Parkyns, had ordered him to see the horses fed. I never received a farthing of sir William Parkyns, but always of the groom.

Att. Gen. Pray, did you observe any particular horse that was brought in there, a roan horse?

Freeman. Yes, there was one horse brought in.

Att. Gen. From whence did that horse come?

Freeman. As was told me, from Mountague house.

Att. Gen. I believe you mistake the place; recollect yourself a little.

Freeman. Somerset house, I mean; a porter brought it.

Att. Gen. Are you sure it was Somerset house?—*Freeman.* Yes, it was.

Att. Gen. Do you know one Lewis?

Freeman. I do not know him; perhaps the tapster does.

L. C. J. Holt. How many horses came from Somerset house?

Freeman. Only the roan gelding, and a very fat man mounted him, and rid out with sir William Parkyns.

Parkyns. Pray, Sir, what sort of horse was that bay gelding that you say the fat man rid upon?

Freeman. I say he rid upon a little roan gelding about fourteen hands high.

Parkyns. But the bay gelding, how high was that?

Freeman. About fourteen hands high.

Parkyns. There's your mighty horse for service!

Freeman. They were no great sized horses, none of them.

Parkyns. And have not you known these horses to have been mine a great while?

Freeman. Yes, I have known them to be yours a good while.

L. C. J. Holt. What, was the roan gelding sir William Parkyns's?

Freeman. No, not the roan, but the others; they were no strange horses, they were fre-

quently there all last summer; there was no new strange horse but the roan.

L. C. J. Holt. Will you ask him any more questions?—*Parkyns.* No, my lord.

Sol. Gen. Then set up Mr. Turton. (Which was done.)

Att. Gen. Pray will you give an account what you know of horses that were standing at the George Inn in Holborn?

Turton. I have known sir William Parkyns to have used the inn this four or five years, ever since the inn was built; and in last February he came to town with three horses the first time.

Att. Gen. What day of the month was that;

Turton. I cannot say what day of the month, but it was about the week before his last coming there, which was just before the discovery of the plot.

Att. Gen. Do you know what day of the week it was?

Turton. No, truly I do not, for I keep no account of horses going in or out. The last time of his coming was with about four or five horses to the best of my knowledge, and that was upon the Friday before the Plot broke out; and then upon that Friday, sir William Parkyns gave order to his groom to get the horses ready against Saturday morning.

Att. Gen. Did he go out with his horses on Saturday morning.

Turton. He did not go out with all the horses according as he had given order; but two gentlemen rid out with two of the horses, and staid out about two or three hours, and came in again, as if they had rid pretty hard, the horses being in a sweat; and in the afternoon they all went fairly out of town, and gave out that they expected to be in town on Sunday or Monday following, but they did not return; but then came down one Mr. Lewis, I know not that that is his name, only when I formerly belonged to my lord of Oxford, I knew him to be gentleman of the horse to my lord Feversham, but I did not know his name.

Att. Gen. Had you not seen him there before: What time did he come?

Turton. I do not know that I ever saw him there before; he was on Saturday in our yard.

L. C. J. Holt. You are asked when Lewis came?

Turton. The first time I see him was on Saturday, in the yard, asking for sir William Parkyns.

L. C. J. Holt. What time on Saturday was that?

Turton. It might be three of the clock in the afternoon, about an hour or thereabouts before sir William Parkyns's horses went away; and asking for sir William Parkyns, and he not being there, he returned back again; and after they were gone, he came again, and I told him they were gone; but the groom had acquainted me, and given me an account, that he would be there again on Sunday or Monday. On Sunday in the afternoon, about five or six, Mr.

Lewis came to enquire if sir William Parkyns's horses were come to town; I told him no; and so he came again upon Monday morning betwixt eight and nine of the clock, and asked me if I heard nothing of his coming to town; I told him no, I did not hear of his coming again.

Att. Gen. The horses that came up on Friday night, how were they accoutred?

Turton. Two or three of them had holsters; I cannot say but for pistols they had four or five case.

Att. Gen. Had they no carbines?

Turton. No; but only horse pistols.

Att. Gen. Did you not observe any other arms, or other furniture?

Turton. I did see a pair or two of jack-boots that they rid in, but I did not see any more.

Att. Gen. Were there any that were wrapt up in a horse-cloth?

Turton. No, I did not see any, there were not brought into the house.

Mr. Cowper. Do you know what time the horses were saddled that day?

Turton. No, I did not.

Parkyns. You observed, and said there were two or three cases of pistols, did not I always ride with pistols?

Turton. Yes; you seldom came without two or three pair when you came with servants.

Parkyns. And as to the jack-boots, you said we rid in them.—*Turton.* I suppose so.

Parkyns. We alighted at Mr. John's house, and so our boots were sent thither: And these were small horses all of them; pray will you tell the court what sized horses they were; was there ever a great horse among them?

Turton. Never a one, I believe, that exceeded above fourteen hands and a half, some under fourteen.

Sol. Gen. Did you see the roan gelding? What size was that?

Turton. A small pad, that might be about thirteen and a half.

Att. Gen. Did you ever see him come with so many horses before?

Turton. I have seen more at the Sword and Buckler, when I lived there; and he used to inn there.

Att. Gen. How many have you seen at the Sword and Buckler?

Turton. I have seen four or five at a time; but this is many years ago, seven or eight years ago, when he used to keep his coach and four horses, and come up with several saddle horses with him.

Att. Gen. How long have you lived at the George inn?—*Turton.* About two years.

Att. Gen. Did you observe any other horses that stood there?

Turton. There were two that were pretty sizeable horses larger than any of sir William's own.

Att. Gen. Whose were they?

Turton. I cannot tell.

Att. Gen. Did any body own them?

Turton. I don't know who owned them; there was one that paid for their meat, and took them away.

Att. Gen. Who is that?

Turton. Truly, Sir, I cannot tell; I do not know who he was; I never saw him in my life.

Sol. Gen. Has sir William Parkyns any more questions to ask him?—*Parkyns.* No, Sir.

Att. Gen. Then, my lord, we shall call no more witnesses, unless he gives further occasion; we leave it here till we hear what he says to it.

L. C. J. Sir William Parkyns, Mr. Attorney General and the king's counsel have done; now is your time to make your defence.

Parkyns. My lord, I rely upon your lordship for my defence; for I am ignorant of these proceedings; I rely wholly upon your lordship, to give a true account of them to the jury; I hope your lordship is so just, that you will repeat the evidence to the jury as it is, and no otherwise. But I do not observe, that as to the assassination there is more than one witness, and that is captain Porter: There is not a tittle more! and as to that, I suppose your lordship will declare to the jury, that I was not concerned in it; and captain Porter declares, I was to have no hand in it, only I was to furnish five horses, and accidentally I was at some meetings, but he does not declare that I was to do any thing in particular.

L. C. J. Yes, yes, you agreed upon the debates to the several resolutions of assassinating the king, and said, that it was necessary and fit to take him off.

Parkyns. Still, that is but one witness, I deny it utterly; and the law says positively there shall be two witnesses.

L. C. J. Not to every overt-act, there is no law says so.

Parkyns. As to the assassination there is but one, no other but he; and so as to the regiment, he did not say that I was to raise a regiment; but that he was told by a gentleman that I had been desired to be in the matter, but I would not, because I had engaged in another business, about a regiment; but this was all but hear-say.

L. C. J. Yes; he said you owned you had a regiment. Besides, it is said you owned you had your saddles, and your troop consisted of old soldiers.

Parkyns. No, captain Porter never said so.

Att. Gen. That was Sweet.

L. C. J. You told Porter, you had a regiment to look after.

Parkyns. Captain Porter is here, I desire he would explain himself.

L. C. J. Yes, and you told Sweet, that your troop consisted of old soldiers, and that you had bought thirty saddles.

Parkyns. My troop, aye! But still there was nothing of a regiment; nor did they say I had raised a regiment, or a troop, or was to raise a regiment.

Sweet. You told me your troop consisted of

old soldiers. I did not say that you had said you had raised or would raise, but it did consist of old soldiers.

L. C. J. He says that which makes it plain, that you were to have a troop, or had a troop, consisting of old soldiers, besides volunteers that had been officers: and that you had bought a great many saddles, thirty saddles; and you were to go into Leicestershire; and accordingly you did go, and upon your return, you did give an account that all was well, and the west as well inclined to king James's interest as the north.

Parkyns. That I went into Leicestershire, and met several gentlemen, and that they were all well inclined; I hope that is no evidence of treason against me: every body ought to be well inclined.

L. C. J. Aye! but they were all well disposed or inclined to king James's interest.

Parkyns. He did not say so; if your lordship pleases to call him again.

L. C. J. Call him again. (Sweet was set up again.)

Sol. Gen. What did sir William Parkyns tell you of his journey into Leicestershire?

Sweet. He said he had been there, and had met his friends, and all was well.

L. C. J. What did he say? Did he name king James?

Sweet. He did not name king James to me at that time.

L. C. J. What was the discourse about, that they were all well inclined to?

Sweet. He always named it the king's interest, and did not name king James; but I understood it, and always took it to be king James he meant.

Mr. Mountague. What did he say of the North and West?

Sweet. He said that the West was as well inclined to the king's interest as the North.

Att. Gen. What did he say before he went?

Sweet. He told me he was to go into Leicestershire to meet some of the King's friends.

Parkyns. Pray, recollect yourself, and consider what you say.

Sweet. He said, some gentlemen rid as far to him, as he did to meet them.

Att. Gen. Was that the time he talked about the troop?

Sweet. No, that was before this time. I cannot remember the particular time; it was at his own house, and captain Scudamore was with him.

Att. Gen. When was the discourse about king James's landing?

Sweet. He told me that he believed now that king James would land, he said he had his own word for it; it was about Christmas.

Att. Gen. What did he say about preparation for it?

Sweet. He said his own troop was to consist of all old soldiers.

L. C. J. Did he tell you he had a troop?

Sweet. I speak his own words; he said, My troop consists of all old soldiers.

L. C. J. Was it 'consists', or will 'consist', though I think there may be no great matter of difference in this case?

Parkyns. Yes, my lord, but there is a great deal, sure; for 'will consist' shews nothing yet done, and all is but words.

L. C. J. Sweet, answer to sir William Parkyns's question.

Sweet. I tell your lordship, I repeat his own words, My troop consists or is composed of all old soldiers.

Mr. Cowper. What did he say of volunteers?

Sweet. He said, there were some gentlemen that would go along with him as volunteers, that had been old officers.

Mr. Cowper. Pray let me ask another question? when he discoursed of the present King, by what name did he use to speak of him?

Sweet. He called him by the name of the prince of Orange.

Parkyns. Pray, recollect yourself, Mr. Sweet, and think of what you say: since he was declared king, did I ever call him prince of Orange; I am upon my life, and pray speak nothing but the truth.

L. C. J. Consider, and answer the question, What did he use to call him?

Sweet. Truly, my lord, I am not positive as to that, I understood it so. I never knew that he allowed him to be king of England.

Parkyns. Did you ever hear me call him prince of Orange, since he was king?

L. C. J. Look ye, Sir, how long have you been acquainted with him?

Sweet. About three years, my lord.

L. C. J. Well, that is long since his Majesty was declared king; have you ever heard sir William Parkyns call this king prince of Orange?

Sweet. I am not positive in that, but I understood he did not allow him to be king.

Sol. Gen. You frequently discoursed with him about the government, it seems; pray, what did he use to call him?

Sweet. I have heard him call him king William, and the little gentleman.

Parkyns. When ever did you hear me call him the Little-gentleman? Mr. Sweet, pray, when you are upon your oath consider well, and recollect yourself, and do not answer rashly and suddenly, but think of what you say. I always expressed myself, when I had occasion to speak of him, and called him king William, as other people use to do, I never used the words, little-gentleman, nor prince of Orange neither.

L. C. J. Did you ever hear him call him otherwise than king William?

(He paused a while.)

L. C. J. Pray speak the truth and no more.

Sweet. I have heard him call him prince of Orange.

L. C. J. But you have heard him call him king William too?—*Sweet.* Yes.

Mr. Cowper. But pray, when he spoke of the king, what king did you understand by it?

Sweet. I used to understand king James.

Parkyns. What is that to me what he understood?

L. C. J. But I would observe to you one thing, when you came from Leicestershire, you talked how well disposed they were to the king's interest; he says, he understood that king to be king James, and you said the West was as well disposed as the North; pray, now, were you employed by king William to see how the gentlemen stood affected to him?

Parkyns. No, nor by king James neither.

L. C. J. Why then should you concern yourself for the king's friends in the West and the North?

Parkyns. I never was in the West in my life, and therefore cannot tell why I should tell him any thing about the West.

Att. Gen. Pray, Sir, when was it that sir William Parkyns spoke about the king's landing?

Sweet. It was about Christmas, he said he believed he would land.

Parkyns. Did I tell you positively it would be so then?

Att. Gen. He tells you he said you did believe it, for you had it from his own mouth.

Parkyns. That shews it is not probable I should tell him so; that I should have it from his own mouth, carries such an improbability with it, that the evidence is *felo de se*, it destroys itself.

Sol. Gen. He does not say you had it from his own mouth, but that you had his word for it; and this being about Christmas, long after our king was returned, it could mean no other king but king James.

L. C. J. Look you, sir William Parkyns, there is another thing I would observe, Why did you send your man to Kensington to one Brown? Who is that Brown? and what was the man that lodged at the confectioner's in Holborn?

Parkyns. I cannot tell who it was, I know neither Brown nor the other man; but I sent my man at the request of Mr. Charnock, who lodged in the same house with me; he desired he might go upon an errand for him to Kensington, and I directed him to go upon such an errand, for he was formerly Mr. Charnock's servant, and I desired him to go of the errand if he requested it. Who these men were, I know not, neither of them, nor any of their business.

L. C. J. But he was bid by the man that lodged at the confectioner's to tell his master that he would stay within for him.

Parkyns. That might be Mr. Charnock, for he was his servant once.

L. C. J. But he says he carried the message to you, and you received it. Well, have you any more to say?

Parkyns. My lord, I think there is but one positive evidence of any one overt-act.

L. C. J. Yes; what do you think of the design of bringing in king James, and consulting about it, and assisting in the invasion, and preparing a troop, and providing arms and

horses? Are not these overt-acts? Do you think your having a troop of old soldiers is no overt-act?

Parkyns. There is no positive proof of any troop or any arms.

L. C. J. It is proved there were arms sent by you at Michaelmas last to Mr. Haywood's, Charnock's brother in law, and these lay there till Ash-Wednesday last, after your name was in the proclamation; and then they were removed in the night, and buried at your house, and were taken up there; and here is an account given what arms they were, four dozen of swords, twenty-five pair of pistols, thirty-two carbines.

Parkyns. First it does not appear when these arms were brought, nor for what intent they were brought from Haywood's.

L. C. J. But what use had you, a private man, for so many arms? And then your going into Leicestershire to meet some gentlemen, and your giving an account how they stood affected to the king's interest, whether that be understood for the interest of king James, I must leave to the jury, since you give no account that you were employed by king William.

Parkyns. My lord, I went upon my private occasions, and then talked of news as other people do.

L. C. J. But when you returned back again, you declared all was well, and gave an account how persons were disposed in the West and North.

Parkyns. Is there any persons named, or particulars? Can it be an overt-act of treason for me to discover my acquaintance?

L. C. J. But your going with that design to engage in an interest against the king, and for the late king.

Parkyns. He does not say I discovered my design. I went to meet with some friends of my own.

L. C. J. Did he not tell you he was to go to Leicestershire?

Mr. Sweet. Yes, he did so.

L. C. J. Did he tell you to what purpose?

Sweet. He said he was to go to meet some of the king's friends.

Parkyns. Did I tell you who?

Sweet. No.

L. C. J. But there was a lord's brother, what did he tell you of that?

Sweet. He said all things were well, and the West was as well inclined as the North.

L. C. J. To what?

Sweet. To the king's interest.

L. C. J. Treby. You spoke of a lord's brother that was concerned?

Sweet. He said several persons of quality in the West were concerned, and a lord's brother was among them.

Juryman. My lord, I desire he may be asked, when he said the king would land, what king he meant, whether he named the late king, or king James?

L. C. J. Well, answer that; when he dis-

coursed to you of the king's landing, did he name the late king James? or did he say the late king James?

Juryman. Was he mentioned in the discourse?

Sweet. He never used to mention king James to me, but only the king, which I understood always of king James.

Att. Gen. Pray what time was it that he spoke of the king's landing?

Sweet. It was about Christmas.

Att. Gen. Therefore no other king could be meant but king James, for there was no other king to land at that time; and he said he had the king's word for it. I suppose he cannot pretend he had king William's word for it.

Parkyns. I hope, to talk of the king's landing is no treason; it is but words: If I tell an idle story of what I think may come to pass, shall that be reckoned treason? Then for him to say, I had it from the king's own mouth, it is impossible to be true, and is no overt-act, being only words, and cannot be reputed treason. And then as to the other two parts of the charge, the consultations with my lord of Ailesbury, and those other persons, there is but one witness; nobody but Porter; neither is there any more but he for the assassination; his evidence is but a single proof, and there ought to be two positive witnesses, by the law, to each overt act.

L. C. J. Holt. No: there ought to be two witnesses to each species of treason, that is all.

Parkyns. There ought to be two witnesses to both these parts of the treason.

L. C. J. Holt. I must tell you, sir William Parkyns, if any person does design and contrive that the realm should be invaded, or the king deposed, and another set upon the throne, that conspiring to invade the realm, or depose the king, are overt-acts of high treason, within the statute of 25 Ed. 3, and the same species of treason as designing to assassinate him is. It is compassing, designing, imagining his death and destruction. Now the question is, whether there is not another witness, besides capt. Porter, to prove another overt-act of this design?

Parkyns. I don't find there is; for all the rest is only discourse.

L. C. J. Holt. Yes, for what? Do you think providing arms for that purpose is only discourse?

Parkyns. The witnesses do not say for what purpose the arms were bought.

L. C. J. Holt. Nor do you tell us of any other purpose.

Parkyns. My lord, it does not appear when they were bought.

L. C. J. Holt. Aye, but what occasion had you for such a quantity of arms?

Parkyns. My lord, I did not buy them, after all. I found them. If I had had liberty to have sent down for witnesses, I could have proved that these arms were in boxes all rusty in my house when I first came to it.

L. C. J. Holt. Aye: But why were they

buried, just at the time when the Plot was broke out, and the whole design discovered?

Parkyns. I cannot tell, my lord, how to help it, if they will make an ill interpretation.

L. C. J. Holt. What interpretation would you have us make?

Parkyns. My lord, it is very easy to imagine, people do not care to be found with arms at such a time; but, however, the having of arms is no treason. They are as much a commodity as any thing else.

Att. Gen. And then the horse coming to town just at such a time, and the saddles.

Parkyns. I have not bought a horse this two years, and I travelled in no other manner than I used to do. So the groom tells ye, I used to come to town with three or four horses always. I never kept less than six or seven horses this twenty years; sometimes a great many more; and they were very little horses, pads, no way fit for the service they are presumed to be for.

L. C. J. Holt. Have you any thing more to say, Sir?

Parkyns. I hope, my lord, as to the assassination I am clear: Perhaps the world would imagine, I have had some inclinations to king James's service, and perhaps they may not think amiss; but I never did any thing, nor had an opportunity to do.

L. C. J. Holt. God be thanked you had no opportunity!

Parkyns. And I hope my life shall not be taken away without proof; I hope it will be rather thought, that every one should be taken to be innocent; and it would better please the king, that I should be acquitted, than to let me be found guilty upon slight grounds and imaginations, of which little or nothing can be made.

L. C. J. Holt. No question of it: It will please the king and every body else, that you should be found innocent.

Parkyns. Then I hope, my lord, you will not strain the law to take away my life; according to the rule, That it is better five guilty men should escape, than one innocent man suffer: For the blood of a man may lie upon every body, if it be causelessly shed; and it is very severe to strain the law to take away any man's life.

L. C. J. Holt. Look ye, sir William Parkyns, I must tell you, you may be under a very great mistake: You may think it necessary to have two witnesses to every overt-act, but that is not so; for if there be one witness to one overt-act, and another witness to another overt-act of the same species of treason, that is all that the law requires.

Parkyns. Here are two species of treason, levying war is one species, and assassination is another.

L. C. J. Holt. Your design was, originally, the restoring of king James, and in order to that the dethroning of king William.

Parkyns. That appears but by one witness, which is not according to law, which requires two.

L. C. J. Holt. One way of effecting your design was by assassination, the other by invasion, or by force.

Parkyns. Still, my lord, here is the same witness, and that is but one.

L. C. J. Holt. Yes, there are two.

Parkyns. None but captain Porter.

L. C. J. Holt. What, not as to the restoring of king James, which tends to the dethroning king William?

Parkyns. In what particulars, my lord?

L. C. J. Holt. Your providing arms, and going to Leicestershire, and sending Charnock on that errand into France. As to the assassination, indeed, there is but one positive witness, besides other circumstances, which have their weight; but as to the other, you said the king would come——

Parkyns. It was my opinion, that's all.

L. C. J. But you said you had his word for it.

Parkyns. Does not that answer itself, my lord? Is it possible it should be true, that I who was in England, should have the word of one that is at such a distance beyond sea?

L. C. J. And then your buying of saddles, for what purpose were they?

Parkyns. My lord, does he say it was in order to it? I am sure he does not, and I hope I shall not be presumed out of my life.

L. C. J. When you talked of the king's landing, and said, you had his word for it; you likewise said, your troop was made up of old soldiers, besides volunteers that had been officers.

Parkyns. Still there is nothing done; he does not say there was one man raised.

L. C. J. And your going into Leicestershire upon such an errand, as you told him you went upon.

Parkyns. Well, my lord, I must leave it to your lordship. I hope you will consider well of it.

L. C. J. We must do that which is right between the king and his subjects.

Parkyns. And, I hope, my lord, the conversion of subjects is more acceptable than the destruction of them: and the government is more concerned to save the innocent, than to stretch the law to punish the guilty.

L. C. J. It will be more acceptable, and, indeed, the king and kingdom are very much concerned in this matter, and at this time, sir William; and the government ought to take care to preserve itself. Have you any more to say, Sir? If you have, pray speak it.

Parkyns. I have no more. I submit it to your lordship; I think there is but one witness, and all the other is but conjecture and nonsense; and one witness is not sufficient, by the law of England, for by the statute there must be two.

L. C. J. I have told you my opinion.

Parkyns. Besides, your lordship has known me this many years, and you know that my education was not to war and fighting, but the gown; and your lordship knows how peaceably I have lived.

L. C. J. I have known you heretofore, sir William, while you kept your profession and your gown.

Parkyns. And now in my old age, my lord, I am grown lame, and have lost the use of my hands with the gout, and scarce able almost to go on my feet. Therefore it cannot in reason be thought probable, that I should engage in such a business as this; and therefore I hope you will interpret all things in a milder sense, in favour of life, rather than for the destruction of it, and the ruin of a man's fortune and family.

L. C. J. I tell you, you have had my opinion concerning the number of witnesses. I suppose my lord and brother will declare theirs.

L. C. J. Treby. My lord chief justice, it seems, does please to have us deliver our opinions; I think we ought to be very tender in a case of blood: I think the life of sir William Parkyns is at stake, and we ought to be careful that he have no wrong done him. But I think in the cases of treason, especially of this nature, the life of the king, and the lives of all the innocent people of the kingdom are also at stake; and we must be indifferent in this case, and by the grace of God we will be so. The question that sir William Parkyns proposes, is, Whether there are two witnesses upon this evidence, to this matter of which he is indicted, which is, the compassing and imagining the king's death? one witness, at least, does positively prove, that you sir William Parkyns did agree to the design of assassinating the king's person, and promise to provide and contribute horses and arms to that purpose. Now suppose this is proved but by one witness, and the evidence had gone no farther, then your objection would have had a very good ground, that this could not be a legal proof of treason; but I must tell you, that this treason of compassing and imagining the king's death may be made evident by other overt-acts, besides that of assassination: to conspire with a foreign prince to invade the realm, to provide arms, to join with invaders, and to make an insurrection against the king, these are overt-acts of imagining the king's death. For it cannot be supposed, but that he that would have an invasion and an insurrection against the king's person, does intend the destruction of the king; he that would take away all his defence, which he might have by the assistance of his subjects, and leave him exposed to his mortal enemies, cannot but be presumed to design the king's ruin and murder. Therefore, sir William, such things being in their nature a compassing and imagining the king's death; your providing arms and a troop are evidences and overt-acts of this treason; and so will your going up and down and meeting people in order to rise, if that were your business, in Leicestershire, &c. as it seems by the evidence it was.

Parkyns. But that is not said, my lord, I humbly beg your pardon for interrupting you; it is not said, that I met them to rise, by no evidence whatsoever; and therefore, pray, my

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lord, do not enforce it beyond what the evidence has proved; he said, I went to meet my friends: was there any thing said it was in order to a rising?

L. C. J. Treby. I think you mistake your own words, as you spoke them to the witness, if I did take them, as I think I did, right, for they were several times repeated. I will do you no wrong, sir William, I assure you. You went into Leicestershire, and you say, it was to meet your friends; the witness says, it was to meet the king's friends; by the king, it is very plain, you meant not king William, but king James; for you spoke before of the king's landing, which was at Christmas last, when every body knows king William was in England. These coupled together—

Parkyns. I beg your pardon, my lord; those two things are not both to be joined together; the discourse of the king's landing was at Christmas, as he says; the other thing, my journey into Leicestershire, was a month afterwards, and therefore they cannot be coupled together.

L. C. J. Treby. The coupling of them, that I meant, was only to shew who was understood to be spoken of by you, when you named the king; so the question is, Whether you did not mean the same person in January that you meant in December, by the word king, especially since, as a discovery you had made, you said farther, the West was as well inclined to the king's interest as the North, and a lord's brother was concerned in it? If by the king you had meant king William; how impertinent and insensible had been all this discourse, that the west was as well inclined as the north, and that a lord's brother was concerned in it; concerned in what? In being inclined to king William; to what purpose could that be said?

Parkyns. It may as well be interpreted that way as the other.

L. C. J. Treby. I must leave that to the jury. And I confess, if there was not somewhat more in the case, you might the better argue upon this as to the interpretation. But laying aside the consideration of your riding into Leicestershire, &c. here is this providing of arms, proved by four or five witnesses, and the serving of them in that manner; and there is no account given by you, that they were provided for the service of the government, or that you were employed so to do. Certainly it is not lawful to provide arms, especially for a whole troop, as for aught I perceive here was, though indeed I am not skilful enough in those businesses, to know how many make up a troop; but it is plain here was an insurrection intended, when the invasion was made; and that is an evidence that these arms were to be employed upon that account, for no other use was to be made of them, nor is pretended. If you had found those arms in your house, as you say, it had been your duty to have delivered them up, or disposed of them to the use and service of the government, which service too, could only be

when you had a commission from the government, and not of your own head. And then, besides all this, you acknowledge that you had a troop of old soldiers.

Parkyns. It is but slidingly that; for he only tells you, that a troop would be composed of old soldiers.

L. C. J. Treby. How can that be? when he says, he repeats your own words, My troop consists of old soldiers; can any body say, that his troop consists of old soldiers, without having a troop?

Parkyns. Pray, Mr. Sweet, speak; my life is at stake, did I say to you, it did consist, or it was to consist? Recollect yourself, and consider well before you speak.

L. C. J. What was it that he did say? It did consist, or it would consist?

Sweet. He said, his troop was composed all of old soldiers.

Parkyns. But does it appear by any evidence, that I had a troop? If I had, who were they? None of these men do appear. Does this troop consist of men in the air? that I should list men that are all in *nubibus*, and not one of them to be known. Suppose I should tell him a lye, or make some brags, is this treason? Here is no person proved to be listed or named.

L. C. J. But arms were found in your house for a troop.

Parkyns. But where they were bought, and when they were bought, and made ready, it does not appear; and I affirm to your lordship, if you would give me but one day's time, I would prove, that they were at my house in Warwickshire when I first came down thither, which is two years ago. And I will fully make it out to your satisfaction, or I will be crucified or any thing in the world. I can prove it by a great many witnesses, by my friends, and all the servants that belonged to me, they were there long before this discourse was had or thought of.

Just. Rokeby. If your lordship expects that I should deliver my opinion, I am ready to do it. As to this matter of law that sir William Parkyns has proposed, he says, There are not two witnesses to the same overt-act, and therefore no evidence of treason; truly, I take it, and always did, that the law is, there need not be two witnesses to the same overt-act; but if there be two witnesses, one whereof speaks to one overt-act, and another to another overt-act of the same species of treason, these are two witnesses within the law. Now, I think, there are two overt-acts in the indictment of this treason. The treason is compassing the death of the king; the overt-acts are first, the particular design of the assassination upon his person, and the other is, the bringing in of a foreign force, and preparing horses and arms to meet that foreign force here: All to the same intent and purpose, the compassing and imagining the king's death. Now, besides that of the assassination, there are a great many witnesses that prove there were arms

prepared; for there were found a great quantity, when they opened the boxes; which boxes, it is plain, he himself sent down to Haywood's house: For though Charnock writ a letter, yet it was by his direction, as he owned to Haywood, when he was here in town. And then his servant fetched them away from this place, and this I take to be another overt-act, and proved by several witnesses. Sir William Parkyns speaks of his being a gown-man; but I do not know what a gownman has to do with such a quantity of arms.

Parkyns. If you will give me leave to send for some people, I will demonstrate it as clear as the sun, that they were in the house two years ago, when I came first thither.

Just. Rokeby. There were preparations two years ago, it appears, for the destruction of the king and kingdom; however, the men that were accused of it, had the luck to escape and be acquitted.

Parkyns. My lord, I hope I shall not be interpreted out of my life, I desire the statute may be read.

Just. Rokeby. What statute do you mean?

Parkyns. The 25th of Edw. 3, and the new statute too,* let them both be read to the jury, that they may consider of it.

The Statute of the 25th of Edw. 3. was read.

Parkyns. There is nothing of two witnesses there.

L. C. J. No; but there is another Statute of the 5th of Edw. 6. cap. 2. that may be more for your advantage: Will you have that read?

Parkyns. Yes, if you please; I know there is another Statute that does direct it, and I expected to have found it in this Statute.

Cl. of Ar. This is an act made in the 5th and 6th years of king Edw. 6.

The Statute was read to these words, "Unless without Trial he shall confess the same."

Parkyns. There is enough.

L. C. J. You have heard the Statute read, would you infer any thing from it?

Parkyns. I infer that there ought to be two witnesses, and here is but one.

L. C. J. There are two witnesses.

Parkyns. Not direct to the same thing.

L. C. J. I shall leave it to the jury, whether this evidence does not prove an overt-act, to demonstrate a design against the king; if the design be to depose him, and that is manifested by two overt-acts, undoubtedly that is treason within the Statute of 25 of Edw. 3.

Parkyns. That I agree, but yet there must be two witnesses of it.

L. C. J. Suppose dethroning the king be the main design that strikes at his life, and you resolve it shall be done one way or other. One

* 7 and 8 W. 3, c. 4, s. 5, not then, as it seems, in force, but if it were, yet it does not require it, but only that there must be two to the same treason. Holt's Rep. 683.

way by assassination, the other by insurrection; or by invasion and joining with a foreign army.

Parkyns. My lord, I conceive there ought to be two witnesses for each.

L. C. J. No, no: for that very last act that is to take effect in a few days, declares it is sufficient, if there be one to one overt-act, and another to another; but still it must be of the same head or species of treason; and deposing the king and assassinating of him, and preparing to raise an army against him, or to excite an invasion, are but one sort of treason.

Parkyns. It may be so, if they were overt-acts of one sort of treason; but rising in arms, and assassination are as different things as can be in the world, and therefore there ought to be two witnesses to each of them.

Just. Rokeby. That which I delivered as my opinion was, that one witness proving one overt-act, and another witness proving another overt-act of the same sort of treason, are two good witnesses, according as the law requires. And I am the more fully confirmed in it, by the clause that is in this new act of parliament, made for trials in cases of treason, that a man shall not be convicted of treason, but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt-act, or one of them to one, and the other of them to another overt-act of the same treason.

Parkyns. Of the same treason, aye.

Just. Rokeby. And here it is the imagining the death of the king, that is the treason.

Parkyns. Then you may say every thing else is so; but if you please to let the whole Statute be read.

L. C. J. You shall have it read if you will; but this is all that is in it concerning this matter. Now a design to depose the king, which is manifested by some overt-act, is an overt-act to prove the design of the death of the king.

Parkyns. Then it must be manifest, and not by interpretation; and all these things are by interpretation, except it be what Porter swears.

L. C. J. If by overt-act it be proved, that you designed his deposition, that is an overt-act to prove your design of his death.

Parkyns. They are very different things, death and depositions. We have seen a king deposed, and yet he is alive.

L. C. J. Treby. I am sure we have seen a king agreed to be assassinated, and yet, God be thanked, he is still alive.

L. C. J. It is not the succeeding in the design, but the design itself that is the treason. God forbid that it should have success to make it treason.

L. C. J. Treby. But whenever people will agree together to bring in foreign forces, or to prepare men and arms against the king that is in possession, this is reckoned an overt-act of a design against his life, and has always been reckoned so by my lord chief justice Hales, my lord chief justice Coke, and by all those men that have been reputed the most tender in cases

of this nature: For any act that expresses an intent of dethroning the king, by means of an invasion by a foreign force, and an insurrection against the king, is a proper proof of a design of his destruction; and if not, then agreeing to shoot him is not an overt-act. Men may say also, that there need be actual shooting to make out the overt-act in that case.

Parkyns. If your lordship pleases to have the act read, I shall submit to your lordship's judgment.

L. C. J. Let it be read.

Parkyns. If you please to read the act, the preamble of it.

Cl. of Ar. This is an act made in the 7th year of our sovereign lord the king: Is that the act? It is an act for regulating of trials in cases of high treason, and misprision of treason. Is that the act?

Parkyns. Yes, yes. (The act was read.)

Just. Rokeby. I believe if you look into the great case in parliament, the case of my lord Stafford, you will find it was declared for law, that one witness to one overt-act, and another witness to another overt-act of the same treason, they were two witnesses within the law, and this was a solemn resolution in parliament in the House of Lords.

Parkyns. I believe it has been done; but here is a beneficial law made, which if my trial had been put off a few days, I should have had the benefit of it.

L. C. J. It would have been the same thing as to this matter, for this act declares the very same thing, as to the two witnesses.

Parkyns. And then, my lord, I could have had witnesses to have taken off a great part of this evidence, and the law comes to take effect within one day, and it turns here upon this matter of Sweet, who is not a good evidence: for it is manifest he has contradicted himself, and it is manifest he has sworn what cannot be true.

L. C. J. Wherein?

Parkyns. That I should say the king would land here, for I had his word for it.

Just. Rokeby. You might have his word, and not delivered by his own mouth; there are other ways to convey a man's word, besides speaking.

Parkyns. But then we do not call it his word, that's hearsay.

Just. Rokeby. If a man write his note that he will do such a thing, we may very well say, we have his word for it.

L. C. J. It is not impossible but that you might speak with him.

Parkyns. It is impossible I should speak from hence to France.

L. C. J. You might have been over with him; I believe a great many others have, and it is proved Mr. Charnock went over.

Just. Rokeby. If any man should have said at the latter end of the last month, I believe that there was an assassination intended against the king, because I have his word for it, merely from reading his speech to the parliament,

wherein he affirms that he had several proofs of it, that had been a proper expression, though he did not hear the king speak it.

Parkyns. Yes, if he had the speech to produce.

Just. Rokeby. Then if it come by letter, or message, or common fame, he might send you word by particular messenger.

Parkyns. Yes, if there was any such authority as that it were true. But he has manifestly contradicted himself, and captain Porter swears for his own life, and I must leave it to you, whether they are to be believed.

Just. Rokeby. Captain Porter's testimony has been sufficiently confirmed by the acknowledgment of dying persons.

L. C. J. Well, have you any more to say, sir William Parkyns?

Parkyns. No, my lord, I submit it to your lordship's direction.

L. C. J. Then what say you to it, Mr. Attorney, or Mr. Solicitor?

Sol. Gen. May it please your lordship, and you gentlemen of the jury, I am of counsel for the king in this matter, and it is my turn to sum up the evidence against the prisoner at the bar; he stands indicted for compassing the death of the king, for designing to depose the king, for promoting a foreign invasion, for intending an insurrection here at home, and for aiding and abetting the king's enemies, and for doing what he could to procure the subjection of his own country to foreigners and strangers.

Gentlemen, some of these crimes run into one another; designing the death of the king by assassination, and designing to depose the king, amount to one and the same thing with compassing and imagining the death of the king.

My lords the judges have given you their opinion in that point of law, and I think it is agreeable to all the resolutions that have been since the making of the statute of 25 of Edw. 3. I think that it has been explained so in the time of Richard the 2d; but this I am sure of, that it was so resolved in the time of Harry the 4th, when there was a design to set up Richard the second again, and it was adjudged to be high-treason in compassing and imagining the death of the king. For deposing the king, is destroying him in his politic capacity, as much as assassination and murdering of him is destroying him in his natural capacity; and the conspirators in such cases know what the great end is they aim at, to subvert the government as it is established by law, whereby every man enjoys his own property, and the freedom of his person; and those that will be quiet may have their liberty and property preserved entire to them; but some people are so very impatient of submitting to the law, that they cannot be content to be in servitude themselves, but they must needs do all they can to bring it upon their fellow subjects. And it were very well if that those who were in love with slavery, would but go to some other

places, where they may have enough of it, and not bring it upon those who are so little desirous of such a thing, as we are, and I hope always shall be.

Gentlemen, to prove sir William Parkyns Guilty of this treason, whereof he stands indicted, we have produced several witnesses; and first there is Mr. Porter, and he tells you sir William Parkyns told him he had seen a commission from king James, written with his own hand, for making war against the person of king William.

Parkyns. Sir, I beg your pardon, for interrupting you, but there was not one word of that said; here is Mr. Porter, pray ask him, if ever I saw a commission from king James.

L. C. J. Porter did say so, if I remember any thing Porter said; you told him you had read the commission, and it was written with his own hand.

Parkyns. All that I heard of it was, that when I was desired to make one in the assassination, I refused it because I said I was busy about the matter of my regiment.

Att. Gen. Pray call Porter again. (Capt. Porter came in.)

Sol. Gen. Pray, capt. Porter, will you give the court and the jury an account what you heard sir William Parkyns say about the commission that came from king James?

Porter. I asked Mr. Charnock why I might not see the commission, and he told me he had never seen it himself, but sir William Parkyns had. I did ask sir William Parkyns, whether he had seen it, and he told me he did see it, and read it, and it was to raise war against the person of the prince of Orange.

Att. Gen. Whose hand was it in did he say?

Porter. It was written with king James's own hand.

Parkyns. This was my mistake, I thought he had said I told him I had a commission for a regiment.

Mr. Montague. Did he give any reason, why it was written with king James's own hand?

Porter. We used to say amongst ourselves, it was, because he would not trust any of his ministers with it.

Sol. Gen. I would not do sir William Parkyns any wrong, but only sum up what is material in the evidence given against him. I remember very well Mr. Porter said, Mr. Charnock told him sir William Parkyns had seen the commission, but I would not offer that as evidence against the prisoner what another told him, but he says besides that sir William Parkyns told him himself, that he had seen it, and that it was written with king James's own hand. He says that they had several meetings together, sir William Parkyns, and a great many others; and he names the places, the Nag's-head in Covent-Garden, the Sun Tavern in the Strand, and the Globe tavern in Hatton-Garden; he tells you particularly that it was agreed that King (who was executed), and Knightley, and himself, should go and view a place that should be proper for the as-

sassination, and to give a report to the prisoner, and the rest of the conspirators, what they thought the most proper place; and that accordingly they did view the place, and came home at night, and met the company, whereof sir William Parkyns was one; and they gave an account how the place was viewed, and which was thought most proper, and then all the company agreed to it. He says indeed, that sir William Parkyns was not one that was to execute it in his own person, but one Scudamore was to be the man employed by him; and he did say it was a thing that was very necessary to be done, and would facilitate the introduction of king James, and the bringing him back again: And there is likewise this concurring evidence of Mr. Porter's with what I shall observe by and by, that sir William Parkyns was to procure five horses, three whereof he was to mount himself, and two he was to send captain Porter to mount; and if there were further occasion he could procure more from Mr. Lewis, gentleman of the horse to my lord Feversham; and accordingly we have produced to you two witnesses, Freeman and Turton, the one a tapster, the other an hostler that lived at the George-inn in Holborn, who give you an account that upon Friday before the first day that was designed for the assassination, there did come three horses to town, for sir William Parkyns; but it being put off upon the disappointment, they were sent out of town again. Upon the Friday afterwards, the day before the discovery, then there were four horses brought to town, and a 5th was of Mr. Lewis, which was a roan gelding.

Parkyns. Pray, Sir, will you please to observe what sort of horses they were; and particularly the height of them, that it may be known how fit they were for this business.

Sol. Gen. I will do you no wrong, sir William, if I can help it. The Jury have heard the evidence; and by and by they will hear my lord's directions: but they do say there were four brought to town, and a fifth was sent, a roan gelding; first, the witness said the horse came from Montague-house, but then presently he recollected himself, and acknowledged the mistake; and afterwards said it was from Somerset-house. So there were the five horses, three whereof sir William Parkyns was to mount, and 2 captain Porter, as he himself says; and these facts I instance in, as making a concurring evidence, and very near to two witnesses to prove this part of the conspiracy.

Then, gentlemen, captain Porter goes further, and says, that he had heard (but sir William Parkyns did not tell him so himself) that sir William Parkyns had a commission to raise a regiment of horse, and was preparing so to do, against the time of the invasion, to join with the forces that were to come from abroad. To confirm which, we have called Mr. Sweet to give you an account that he had been acquainted with sir William Parkyns for three years, and that he had often talked with him

about the king, that is, his present majesty, whom he called the prince of Orange, and the little gentleman; and about king James, whom he used to call always king; and he said the king was to land very speedily, and that he had a troop which consisted of old soldiers, and that there were several volunteers that were officers; he said he was to take a journey into Leicestershire, and accordingly he went; and when he returned back again he said, the west and the north were very well inclined to the king's interest, or to that purpose. And to strengthen his evidence we prove, that he did go accordingly into Leicestershire, and we prove it by his servant that went with him, where he met with several persons, particularly one Yarborough, and a parson; what they did transact the servant cannot prove, but he is a concurring witness to prove, that he went into Leicestershire; and we have all the reason in the world to believe that he went on that errand that he spoke of before, that is, to meet the king's friends, as he called king James. And then there is a further concurring evidence, his having a regiment, or a troop, it is not material, whether it be one or the other; and that is the matter of the arms, 4 dozen of swords, 32 carbines, 35 cases of pistols, that were hid in the garden of his house: And these arms we have traced further, he sent them from his house to Haywood's house; there he thought they would not lie safe, and therefore sir William Parkyns sends for them privately; they were to come away at night, and be brought back to his house, and they were accordingly brought back in the night to his house, and there they were buried; and the same person saw them taken up afterwards, which brought them to sir William Parkyns's house, and proves they were the same boxes that were buried, and which upon opening proved to be these arms, that were first sent to Haywood's and afterwards brought back to his own house.

So that this, gentlemen, is a concurring evidence both to what Sweet says, and to what Porter says; and those are the two witnesses to this part of the treason, that there was a provision of arms and men for this purpose, which he said he had a commission for.

Now, gentlemen, against all this he makes but a very small objection.

As to the matter of two witnesses to every overt-act, that has been over-ruled by the court; and as to the arms, he says he found them at his house when he first came to it; and then they were old rusty arms, but of this he gives you no manner of evidence. But if they were there when he came to the house, how came he at this time of day to hide them, and secrete them? Why might they not be as public now as they were before he came, which he has had time enough to prepare to prove since the finding of them? And he does not give you so much as any colourable reason why he so secreted them. And therefore it is a most just and violent suspicion, that they were for the purposes that the witnesses have

given you an account of; and you have reason to believe they were provided for to arm that number of men, which he was to raise to assist the French when they came to land here. So that if you believe what the witnesses have sworn, you cannot say but that he is guilty of the treason charged upon him; and we doubt not you'll find him so.

Mr. *Cowper*. May it please your lordship, and you gentlemen of the jury; I am of the same side of counsel for the king. Sir William Parkyns has given us a good caution, which I shall take care to observe: and that is, not to strain either fact, or law, to his prejudice. But, my lord, when such a matter as this, a crime of this nature, is so far proved against the prisoner at the bar, that nobody can in his private judgment reasonably acquit him; then I think it a good piece of service to the public to make the matter so plain, that it may be put beyond all manner of doubt, both for the ease of the jurors, and for the satisfaction of all others that hear this trial.

My lord, sir William Parkyns has truly divided his indictment into two parts, the one that accuses him of being concerned in the assassination, and the other that accuses him of being concerned in inviting the French into the kingdom, and engaging to meet them with an armed force.

My lord, as to the first part, I must do sir William Parkyns that right, that there is but one positive evidence as to the assassination; but that evidence tells ye he agreed to it at several meetings; nay, that he was one who said it was necessary to be done, in order to the other design he was engaged in, the facilitating the landing of the French, and king James his descent and restoration. There is, I say, indeed, but one witness of that matter, but the evidence of that one witness is confirmed by many concurring circumstances; by his sending for horses to town the day before the first Saturday, when this execrable treason was to have been executed; by sending them out of town again that day upon the disappointment; by sending for them again the Friday before the second Saturday that the king was to have been assassinated; by his having more horses than were usual with him that day; by his taking care then of three horses that were none of his own, and one of them brought very suspiciously from Somerset-house; and that all these eight horses should be immediately hurried and carried away upon the disappointment the second Saturday, and nothing ever heard of them afterwards. I say one of them was brought very suspiciously; for, my lord, you observe it came from Somerset-house, and was sent by Lewis according to the prisoner's promise to captain Porter, which Lewis, it is apparent by all the witnesses of this matter, was privy to this design.

My lord, there is another circumstance besides this, which, I think, has not been observed; and that is, his sending for Sweet up to town before the second time that the king

was to have been assassinated; he came up indeed before both the times: the first time he was told by the prisoner, he had once designed to have used him in a business; but upon second thoughts he had compassion for his family. And when he came the second time, he was first asked what condition he had left his family in, whether he had provided them money. He said, No; and there upon he was chid: and the prisoner said, he might then as well have staid at home. All these circumstances, besides the one positive evidence, savour strongly of his having a great hand in the design of assassinating the king.

But then, my lord, as to the other part; his inviting the French, and preparing to meet them, that is positively proved by two witnesses. Captain Porter tells you, that the prisoner was at the two meetings in Leadenhall-street, and St. James's-street, where it was expressly resolved by all that were present, and the prisoner among the rest, to send Charnock over to invite the French to invade this kingdom, and to promise to meet king James at his landing with two thousand horse. He swears, That sir William Parkyns did particularly agree to what was resolved upon at both the consults. And Sweet tells you, that he had prepared for the same design; for that sir William Parkyns told him the king would land, he had his word for it; and he himself had a troop of old soldiers. 'My troop does consist' (he spoke it in the present tense; for it being a doubt, sir William Parkyns did himself that right as to examine the witness again, and he repeated it as his words) 'My troop consists of old soldiers, or is composed of old soldiers;' and he was to have several volunteers that had been officers.

My lord, these two positive witnesses are evidence that goes to the same species of treason, nay, to the same design, the raising a rebellion, and the deposing the king, which is killing him in his politic capacity; I say, these two go home to the same design.

And, my lord, this evidence upon this branch of the indictment, is corroborated too by very strong circumstances. There is a journey to Leicester, which Sweet speaks of, that sir Wm. Parkyns told him he would undertake: this journey it is proved by his servants that he did undertake: that he met there with several persons, and came back and made his report to Sweet of the success of his journey, and how well disposed the king's friends were, by which name he always meant king James; for when he spoke of our present king, he called him the Little Gentleman, or sometimes king William, and sometimes, as the witness at last said positively, the prince of Orange: but when he spoke of the king, without any thing else, he always meant king James; and besides, he spoke of a king that was beyond sea at Christmas last, which could not be king William, who was then, and had been in England so long before.

My lord, the prisoner in his defence says, that

this servant of his that went with him into Leicestershire, had been formerly Charnock's servant, and was sent by Charnock with the message to Kensington, and not by him. Yet I must observe, that the evidence swore positively he was sent by sir William Parkyns, his master, and brought the note in the almanack back to the person to whom he was directed to carry it, who lodged at the confectioner's house; and when he had so done, that the person that lodged at the confectioner's did not remit him to Charnock, but to his master sir William Parkyns, with a message that he would be at home, and stay there ready, whenever he should have occasion for him: and this was upon the very Saturday the king was to have been assassinated.

My lord, sir William Parkyns has complained, that if he could have had his evidence here he could have proved the arms had been two years in his house, and that he found them there when he came thither first. If we should admit that matter, we might confess, and avoid it; for it is apparent that these arms were on this occasion put up in a suspicious manner in boxes, and sent to Haywood's (who is a suspicious person, by reason of his relation to Charnock, upon whose letter and recommendation they were received), and concealed till the plot was disappointed; and then they were carried away from that place, and buried in sir William Parkyns's own garden. This was just after the breaking out of the plot; and they were buried for the better securing them as choice goods. And whereas the prisoner says they were old and rusty when he found them, it now appears they were clean and new-furbished arms, and the hilts were off the swords, and packed together.

My lord, he has recourse to another argument in the last place, the most moving, I must confess, of all, and that is the argument of pity; he has spoke of his education in the profession of the gown, of his infirmities, his age, and his family. Arguments of pity I am very unfit to give an answer to, and should be very unwilling to extinguish any motions of it; but this I must observe, even by way of answer to that argument, that the time was when he should have pitied himself, and not engaged in such an abominable and merciless a design; that he should have had pity upon his country, which he plotted to bring under the greatest confusion and desolation; that he should have had pity upon the best of kings and the best of men; but then there was no pity, when they thought they had laid their designs so that they had him in their power, but they resolved barbarously to murder him, and persisted in the resolution of assassinating him after they were once disappointed; that it seems, did not discourage them, but they undertook it a second time, and it does not appear that they ever had any remorse at last for it; but the plot broke out, and so their design was frustrated.

My lord, this is the sum, I think, of his

defence; I have, as well as I was able, given an answer to the objections made to it, and I must now leave it with you, gentlemen of the jury: and though these considerations that I have mentioned may not quite remove all compassion, yet they may serve to confirm you in a resolution of doing the king, and kingdom, and yourselves justice; and that is all we ask of you.

L. C. J. Gentlemen of the jury, sir William Parkyns is indicted of high-treason, for designing, imagining, and compassing the death of the present king. There have been several witnesses produced that have given evidence upon this indictment; the first of them is Mr. Porter, who has been a witness heretofore against several upon the like occasion; and he gives you this account, that about the latter end of May, or the beginning of June last, there was a meeting of divers persons at the Old King's-head tavern in Leadenhall-street, in the city, where they dined together; and there was sir William Parkyns, captain Porter himself, sir John Fenwick, sir John Freind, and divers others that he has mentioned to you. At that meeting they did consult together, which way the late king James might be restored, and it was thought very necessary that there should be a French force sent over hither to join with others for his restoration. And they did among themselves agree and determine, what number of forces might be convenient for that purpose; they did propose 10,000; 8,000 foot, 1,000 horse, and 1,000 dragoons; and that a message should be sent over to king James, to persuade him to solicit the French king to furnish him with such a number of men, to be sent over into England. Mr. Charnock, that was then in the company, was the person agreed upon among them to be the messenger to be sent upon this errand; which employment he did undertake, upon their promise, that they would raise among themselves 2,000 horse for to meet the late king at his landing.

This being at that time determined, and Mr. Charnock having accepted this employment, he did make preparation to go upon this errand. In some time after (a week or a fortnight, or thereabouts) there was another meeting, at which were several of the same persons that were present at the former, and among them sir William Parkyns was one: and this meeting was at one Mrs. Mountjoy's, that keeps a tavern in St. James's-street, where they did discourse of what they had formerly agreed upon, and did again consider, whether they should proceed to send Mr. Charnock with that message; to which they all agreed, that Mr. Charnock should go, and he accordingly went: and captain Porter met him about five or six weeks after the meeting at Mrs. Mountjoy's; and Charnock told him he had been with the several persons who had sent him, and had acquainted them with the answer of king James; which was, that at that juncture of time the French king had such occasion for his forces, that he could not spare them, or furnish him

with so many to come over here. This is the first matter that Porter gives you an account of.

But then captain Porter tells you farther, how the design of assassinating the king was set on foot about the latter end of January, or the beginning of February last; about which time sir George Barclay was sent over with a commission from the late king James; which seems to have given great encouragement to that party of men: For sir George Barclay, captain Porter, and sir William Parkyns, with divers others, had several meetings at the Globe tavern in Hatton-Garden, the Nag's-Head tavern in Covent-Garden, the Sun tavern in the Strand, and other places. And at these meetings they entered into consideration, what was the best way to restore the late king James to the throne; and it was agreed among them, that the best means for the effecting that restoration would be to kill king William, which they resolved to undertake; and at these debates and resolutions sir William Parkyns, the prisoner at the bar, was present. Captain Porter being asked whether sir William Parkyns, at these consults, did consent to the king's murder, he said they did all agree to the assassination of the king; and sir William Parkyns said, he thought it was very necessary to be done, to facilitate the restoration of the late king.

Gentlemen, this design of assassinating the king being thus resolved upon, the next thing considered among them was, how it might be effected. There were several ways proposed: One was by an ambuscade; for the king having a house in the country by Richmond, his Majesty used to go once a week a-hunting thereabout, and to return at night; and therefore an ambuscade on that side of the water, near the house, was proposed. Then another proposal was made to fall upon the guards on this side the water, and at the same time that the king's coach was to be set upon. And these two places being proposed, there was some difference of opinion among them; whereupon it was agreed that some persons should be sent to view the ground on both sides the water, which persons were captain Porter, King that was executed, and one Knightley: And so some days before the 15th of February they did go on both sides the water, and viewed the ground, and returned in the evening to the Nag's-head tavern, according to agreement; where were met together sir George Barclay, Mr. Charnock, and the prisoner at the bar sir William Parkyns. And there they made their report of their view of the ground; upon which both the proposals were debated; and at last they did all agree that the attack should be made upon the king on this side of the water, in a lane that was between Brentford and Turnham-green; and the attack upon the guards was likewise to be made thereabouts.

Sir William Parkyns was to furnish five horses, whereof three of them were to be mounted by men of his own providing; the

other two were to be mounted by men of captain Porter's providing; Mr. Porter, Mr. Charnock, and one Rookwood were to be principally engaged in attacking the guards. The number of men agreed upon for the whole were about forty, or few more, and sir George Barclay was to have a party out of them all, of about eight; and as those others went to fall upon and charge the guards, sir George Barclay with his party of men, was to attack the king in his coach, and by shooting into the coach to kill the king and all that were with him.

The time agreed upon for putting this design in execution was on Saturday the 15th of February. That day it was expected the king would go a hunting. And two men were planted at Kensington to give notice when the king went; and upon such notice these men were to march out in small parties, and to lodge in the inns and public-houses about Brentford and Turnham Green, upon notice of the king's return from the other side of the water, and sir George Barclay was to be in readiness to set upon the coach in the lane, and the other party to attack the guards.

But this horrid design was very happily discovered, which prevented the king's going abroad on that day; and though they were disappointed for that time, yet the design was not at an end: But their resolutions continue to make the like attempt when they could have another opportunity. And for that purpose there was another meeting, as captain Porter tells you, upon the Friday following at the Sun tavern in the Strand, at which sir William Parkyns, sir George Barclay, Rookwood, and Charnock, and captain Porter, were present; and they did agree to attack the king and the guards the next day, in the same place and manner that they had formerly agreed upon. But by good providence the king had notice of it, so that he did forbear to go abroad that day; whereby these conspirators were totally disappointed of their barbarous and villainous design which they had resolved upon, and had made such preparations to compass.

It is true, captain Porter does tell you, sir William Parkyns was not to be one that should be actually present at the assassination; but he was to furnish five horses; three of them to be mounted by men of his own providing, and two by men that captain Porter was to provide. And you are told positively that captain Porter, at this last meeting, did complain that two of his horses were fallen lame, and acquainted sir William Parkyns with it; and he promised to help him to two more by the means of one Lewis that was gentleman of the horse to my lord Feversham.

Then you are told, that sir William Parkyns sent to Sweet to come to town the 11th of February, and Sweet comes to town accordingly on Wednesday the 12th of February; and then he had discourse with sir William Parkyns at his lodgings; where sir William told him, that because of his family, he would not employ

him in the business he intended for him, and therefore bid him go home again; and withal directed him to return to town the Friday following, and order his groom to bring his horses to town; he mentioned three horses which should be the strongest he had. The groom brought up the three horses, and Sweet came to town with him, and staid till Saturday. Sir William Parkyns said, he thought to go out of town in the afternoon, but did not, but staid till Monday, when he went out of town.

But upon the Friday following the horses of sir William Parkyns were brought to town again, which now were four, and were set up at the George-inn in Holborn; and it appears that Mr. Lewis furnished one horse; for there were five horses upon the account of sir Wm. Parkyns, of which a roan horse was one, which came from Somerset-house. This is proved by the ostler; and that Lewis himself came in on Saturday in the afternoon to inquire for sir Wm. Parkyns; but he was gone, and the horses were taken away, and he once came with sir William Parkyns to the inn. These are circumstances that do concur with and confirm captain Porter's evidence concerning the providing horses for this design.

Then there is another particular of captain Porter's evidence concerning the commission from king James, which is remarkable: it was told you, that he asked Charnock whether he had seen the commission: he said, No, but sir William Parkyns had: and sir Wm. Parkyns was asked by Porter, as they were sitting by the fire-side, whether he had seen the commission; and sir William Parkyns answered, that he had seen it, and had read it, and it was written with king James's own hand; and that the substance of it was to make war upon the person of the present king, who was called in the commission, as you may suppose, the prince of Orange. So that, gentlemen, as to the design of the assassinating the king, and of this commission, which was understood by them to be for that purpose, this is the sum and substance of Porter's evidence, so attended with and confirmed by these circumstances, as you have heard.

Besides, the other witness, Sweet, who was a great acquaintance of sir William Parkyns, tells you, That about Christmas last he was informed by sir William Parkyns, that the king would come, which he understood to be meant of king James. He asked sir William Parkyns, how he knew it? and he said, He had his word for it; and that his troop consisted of old soldiers, and he had thirty saddles; and besides, there would be some volunteers, which were old officers. Then he said, He was to go into Leicestershire, and he did go with one Scudamore; and this was in January, about the latter end, as I remember. They lay that night at Stony-Stratford, and the next night at Leicester, and Scudamore went with him; and afterwards one Yarborough, and a parson, came to him out of Yorkshire: and when he came back he said, He found all

there to be very well; and the west was as well inclined to the king's interest as the north; and a lord's brother was concerned.

Then in the next place you are told, That at Michaelmas last Mr. Charnock did write a letter to one Haywood, who had married his sister, and lived near sir William Parkyns in Warwickshire, to desire him to receive some goods into his house that were to come from sir William Parkyns's, and lay them up very carefully; for they were choice goods, which sir William durst not leave in his own house, because he had left it. And accordingly there were these boxes and chests sent to Haywood's, and received by him into his house, where they continued till the latter end of February. Haywood about this time, when the design of the Assassination was on foot, met with sir William Parkyns in town, and asked him how he would dispose of those goods? Thereupon sir William Parkyns sent his servant into the country; and notice was given on Ash-Wednesday, the Wednesday after the first proclamation that issued upon the discovery of this conspiracy, that these goods should be removed: and a man, in the evening, went to Haywood's house with a cart and horses, and removed these chests; they were three in number; and those being opened, there were eight lesser ones taken out, and carried away about nine or ten o'clock at night to sir William Parkyns's house in Warwickshire, where they were buried in the garden, and afterward were dug up; which was at the searching sir William's house upon the breaking out of the plot; and when they were opened, it did appear what sort of goods they were: they were arms, a considerable quantity of them; four dozen of swords without hilts, twenty-five pair of pistols, and a great number of carbines, thirty-two as I remember, and a parcel of hilts packed up in a box by themselves. This, gentlemen, is sworn to you by the persons that were present at the digging them up, and opening the boxes.

Then, gentlemen, you are told, That though sir William Parkyns pretends they were arms that he found in the house when he came thither, yet they were not old rusty arms, as he pretends, but they were very bright, and fit for use and service.

There is one circumstance more that seems to affect sir William Parkyns, about the business of the assassination; and that is proved by Eubank, sir William's own servant. There was a note sent upon Saturday, the 22d of February in the morning, to one Brown at Kensington, by sir William Parkyns's man; and this Brown writ in the servant's Almanack, that he would be in town himself in a little time, and bid him carry it to a man that lodged at a confectioner's over against Gray's-inn gate in Holborn: sir William Parkyns's man accordingly goes to this confectioner's, and speaks with the person there that he was directed to go to; and he says he was a Scotchman, and talked broad like a Scotchman, and he bid him go and tell his master, that he

would stay within for him till he came: and he did accordingly.

Gentlemen, This is the sum and substance of the evidence that is given against sir Wm. Parkyns. Now you are to consider what sir William says for himself: he does admit, and agree, That what Porter says is very positive and full; but that is but the evidence of one witness: for, says he, by the law no person ought to be convicted of high-treason upon the testimony of one witness. As to the matter of law he is in the right: no man ought to be convicted of treason upon the testimony of a single witness. Now, first suppose the design to assassinate the king had not been proved; consider then whether there be not two witnesses besides. Porter proves, that Charnock was sent into France, by sir William Parkyns, and others, upon that errand; to which, if you add the testimony of Sweet, that swears, that sir William Parkyns told him the king would come, and he had a troop, and had bought saddles; and what is said concerning his going into Leicestershire, and his having a quantity of arms: if all which be understood in pursuance of the design against his present majesty, then there are at least two witnesses of several overt acts of the same treason.

For, gentlemen, I must tell you, though there had been no evidence of a design to assassinate the king, but the design and purpose had been to depose him, and set the late king upon the throne, or join with a force to invade the realm, that is high-treason within the statute of 25 Edw. 3, as being a designing the death and destruction of the king. There hath been a full proof by two witnesses, if what Sweet, and the other witnesses besides Porter say, to prove sir William Parkyns to be concerned in that design, which shall be considered further of by and bye.

But in the next place, suppose that the meetings at the King's-Head in Leadenhall-street, and at Mountjoy's, had not been proved; but the design to assassinate the king is proved by one witness, and the providing men and arms to fight against him is proved by one other witness; this is a proof of the same treason: for though the overt acts be several, yet they both tend to the same end, the destruction of the king, though in a different manner; and though the law requires two witnesses to the same sort of treason, yet it does not require two witnesses to any one overt act. For if one witness prove one overt act at one time, and another witness prove another overt act at another time, these are two witnesses within the meaning of the law; and so it has been always practised, and never denied to be law that I know of.

Besides, it is observable upon this point, which my brother has mentioned, that this new act of parliament, which does not yet take effect, provides, that there shall be either two witnesses to one overt act, or one witness to one, and another to another of the same species of treason; and you have had the opinion of

all of us now that are here, that these are overt acts of one and the same species of treason.

But then sir William Parkyns objects, That Sweet does not prove any overt act. Now for that, you are to consider the force of Sweet's evidence, who tells you the discourse of sir William Parkyns, about Christmas last, of the king's coming, of his saddles, and of his troop consisting of old soldiers, and volunteers that were old officers. But says sir Wm. Parkyns, this is only words, and words are not treason. But then consider, that they are words that relate to acts and things. You hear he had a great quantity of arms, beyond what he, as a private man, could have occasion for, or would use. He does not give you any account what he was to do with those arms, or to what purpose he should keep them, nor why he caused them to be removed in the night, after they had lain privately in Haywood's house, and caused them to be carried back to his own house, and buried them in the ground, and at such a time when there was a plot, and after the plot was discovered, and a proclamation out for his own apprehension.

Sir William Parkyns's discourse with Sweet, of king James's coming, and his troop consisting of such men, plainly shews what those arms were for. For, gentlemen, men's discourses and their words explain their actions; and an indifferent action in itself may be so explained by words, that it will be unlawful. It is lawful for a man to buy a pistol; but if it can be plainly proved from his words or his speeches, that the design of buying it was to use it against the person or life of the king, that will be an overt act. Now, when sir Wm. Parkyns said, The late king would come, and that he had a troop which consisted of such soldiers; then these arms being found in that manner, I must leave to your consideration whether it is not a proof, for what purpose he did provide them, and to what use he intended to put them; especially since he gives you no account, what use or occasion he had for them. He says, indeed, he found them in the house two years ago; how probable that is, you may consider.

Then there is another thing, his going into Leicestershire with Scudamore, and his meeting there with Yarborough and other people in that private and hasty manner. He went out on the Thursday, and came home again upon Monday night; and then he meets with Sweet, and tells him that all was well; and the West was as well inclined to the king's interest as the North. What king must he mean? He had no commission from king William to go into Leicestershire to discourse with people, to see how they stood affected to his interest. Sweet comes and tells you, that when sir William Parkyns spoke of the king, he understood he meant king James. I must leave it to your consideration, how you will interpret these words.

It is true, gentlemen, it is not fit there should be any strained or forced construction put upon

a man's words or actions, when he is tried for his life. You ought to have a full and satisfactory evidence to convince you, that he is guilty, before you pronounce him so; but, however, you are to consider the nature of things, and the circumstances that attend them. If you can suppose that he went into Leicestershire to king William's friends, and that he was of opinion, the West was as well affected to king William as the North; then you make a different construction from Sweet, who tells you, that always when he spake of the king, he understood it of king James; and at Christmas, when he spoke of the king's coming, it must be meant king James; for king William was here before, and he pretends not he had any authority to raise a troop for king William.

So that, gentlemen, I must leave it to you upon the whole matter; if you are satisfied, that sir William Parkyns is guilty of the matters of which he stands charged, you will find him guilty; you have heard the evidence, and will consider of it; and if, upon the whole, you are not satisfied that he is guilty of the matters charged in this indictment, then you are to acquit him.

Then an officer being sworn to keep the Jury according to custom, they withdrew to consider of their verdict, and in less than half an hour returned into court.

Cl. of Ar. Gentlemen of the Jury, answer to your names. William Northey—

Mr. Northey. Here. (And so of the rest.)

Cl. of Ar. Gentlemen, are you all agreed on your verdict?—*Jury.* Yes.

Cl. of Ar. Who shall say for you?

Jury. Our foreman.

Cl. of Ar. Sir William Parkyns, hold up thy hand. [Which he did.] Look upon the prisoner; how say ye, is he Guilty of the high-treason whereof he stands indicted, or Not Guilty.—*Foreman.* Guilty, my lord.

Cl. of Ar. What goods or chattels, lands or tenements, had he at the time of the high-treason committed, or at any time since?

Foreman. None to our knowledge.

L. C. J. Jailor, look to him, he is found guilty of high treason.

Cl. of Ar. Then hearken to your verdict as the court has recorded it. You say that sir William Parkyns is guilty of the high-treason whereof he stands indicted, but that he had no goods or chattels, lands or tenements, at the time of the high-treason committed, or at any time since, to your knowledge, and so you say all?—*Jury.* Yes.

Cl. of Ar. Gentlemen, the court discharges you, and thanks you for your service.

While the Jury was withdrawn to consider of the verdict, sir John Freind was brought from Newgate to the bar, in order to his being called to Judgment, and after the verdict, he addressed himself to the court thus:

Freind. My lord, I humbly beseech your lordship to give me leave to read this Paper.

(To which the Court gave no answer.)

Freind. My lord, will your lordship give me leave to read it?

L. C. J. Ay, if you will.

Freind. (Reads.) My lord, I humbly move in arrest of judgment, that I am not convicted of treason by two witnesses, as I ought to have been within the statute of the 25th of Edw. 3: for Mr. Porter swears, That I, with others, in May or June last, sent to the French king to invade England; he is the only witness to that matter. Mr. Blair swears, That I shewed him a commission in Surrey-street, about two years since, signed by king James, and counter-signed Melford, to be a colonel of horse, and that I gave him some monies for the cherishing of the men. My lord, here is no levying of war sworn by Mr. Blair; and conspiring to levy war not being treason, I am convicted by one witness, and therefore I pray counsel may be assigned me, to plead this matter.

L. C. J. Sir John Freind, that which you move now is not in arrest of judgment; it is matter that does arise upon the evidence, and what you now say, arraigns the verdict, and the proceedings upon your trial. There were two witnesses against you, that is plain. You were not indicted for levying war, but for compassing and imagining the death of the king; and we told you the design of the invasion, and conspiring to depose the present king, and restore the late king, was an overt act of that high treason. The commission was not so much stood upon, but the advancing monies upon this account, to Blair your lieutenant colonel, to give to the men, that was a plain overt act, and so there were certainly two witnesses against you.

Freind. My lord, I hope I can clear myself: I thank God, I am as innocent as the child unborn, of the assassination of the king. I would not have the people think that I am such a man.

L. C. J. But you remember, it was sworn you knew of it, and we have told you, that the design of restoring the late king by force, and deposing the king, are overt acts of imagining his death, if such an intention be proved, as it was in your case, and the jury have found it so.

Freind. My lord, I humbly beseech you, because I do not understand matter of law, and am advised to move this in arrest of judgment; I desire my counsel may be heard to it.

L. C. J. We cannot hear counsel, but upon a matter that arises upon the record itself, that is, the indictment. We cannot enter into any examination of this matter that you now speak of; you had a long trial yesterday.

Freind. My lord, I am sorry to give your lordship any occasion of trouble; but I humbly beseech you, if it may be, that I may be heard by my counsel, for the satisfaction of the world; pray, my lord, hear what they can say.

L. C. J. They cannot say any thing; no counsel in the world that understand them-

selves, can argue any thing against what has been so often settled and always practised.

Freind. My lord, if it be to be granted, I beseech your lordship to grant it.

L. C. J. It cannot be granted; besides, the matter you now move upon is improper; it was all considered upon your trial. It was told you, we did all agree, that a conspiracy to levy war to depose the king is treason, or to invade the realm is treason. All this was considered at your trial, and that is now over.

Parkyns. My lord, if your lordship pleases, I desire I may have the liberty of some friends and relations, and a minister to come to me.

L. C. J. Yes, yes, by all means.

Parkyns. If your lordship pleases, that they may come and be private with me, and pray let me have a rule of court for it, otherwise I shall not have any benefit of it.

L. C. J. Yes, yes, it is very fit you should have it; there shall be an order of court for it; see that the keeper take care it be done with safety.

Freind. My lord, I desire the same liberty of a minister, and my relations and friends to come to me; that for what time I have to live, I may make the best use I can of it for my soul, which I hope God will enable me to do.

The Court was adjourned until five o'clock on the afternoon, and about six the justices returned, and the court was resumed.

Cl. of Ar. Set sir John Freind to the bar: (which was done.) Sir John Freind, hold up thy hand, (which he did.) Thou standest convicted of high-treason, for traitorously compassing and imagining the death of our sovereign lord king William the 3rd. What canst thou say for thyself, why the court should not give thee judgment according to the law?

Then being made to kneel, he afterwards stood up.

Freind. I have said already, what I have to say in arrest of judgment.

Com. Serj. Sir, you have heard the judgment of the court, as to what you have said; if you have nothing else to offer, the court must proceed to judgment.

Cl. of Ar. for Middlesex. Sir William Parkyns, hold up thy hand, (which he did). Thou standest convicted of high-treason in compassing and imagining the death of the king, and adhering to the king's enemies. What canst thou say for thyself, why the court should not give thee judgment to die, according to the law?

He was made to kneel, and rise up again.

Parkyns. I have nothing more to offer.

Cl. of Ar. Then, cryer, make proclamation.

Cryer. O yes; all manner of persons are commanded to keep silence, while judgment is giving, upon pain of imprisonment.

Which Proclamation was made on both sides the court; and then Mr. Common Ser-

jeant sitting with the rest of the court upon the bench, pronounced the sentence.

Com. Serj. You the prisoners at the bar, sir John Freind and sir William Parkyns, you have been indicted for high-treason, in compassing the death and destruction of the king: for your trial, you have put yourselves upon the country, which country has found you guilty. The offence is the greatest in the judgment of the law that a man can commit; and it is justly and reasonably so. For robbery and murder are injuries to private persons, but compassing the death of the king, is compassing the destruction of the father of your country, and letting in rapine, death, and desolation upon thousands of people. And even this, the heinousness of offences, is capable of aggravation; for there have been always excuses, and sometimes justifications for rebellion: and as to murder and private revenge, there may be somewhat said in mitigation from the violence of men's passions. But to sit, and conspire, and consult, and debate the destruction of a prince; no man yet ever had the confidence to make an excuse for it. I would not add to your affliction; I am sensible of the severe judgment that is to follow, and which you have brought upon yourselves, and cannot but pity you for the great burden of guilt that you have laid yourselves under. I only say this to offer it to your serious consideration, in the few moments you have to prepare for another world, and another judgment. All that remains for me, is to pronounce the judgment of the law in these cases, and the court does award it.

'That you, and each of you, go back to the place from whence you came, and from thence be drawn on a hurdle to the place of execution, where you shall be severally hanged up by the neck, and cut down alive; your bodies shall be ripped open, your privy-members cut off, your bowels taken out and burnt before your faces; your heads shall be severed from your bodies, your bodies respectively to be divided into four quarters, and your heads and quarters are to be at the disposal of the king: and the Lord have mercy upon your souls.'

Then the prisoners were carried back to Newgate.

On Friday, April 3, 1696, sir John Freind and sir William Parkyns were drawn on sledges from Newgate to Tyburn, where they delivered the following Papers to the Sheriffs:

SIR JOHN FREIND'S PAPER.

Knowing that I must immediately give an account to God of all my actions, and that I ought to be specially careful of what I say in these last hours, I do solemnly profess, that what I here deliver is from my very soul, with all the heartiness and sincerity of a dying Christian.

The cause I am brought hither to suffer for,

I do firmly believe to be the cause of God and true religion, and, to the best and utmost of my knowledge and information, agreeable to the laws of the land, which I have evermore heard do require a firm duty and allegiance to our sovereign; and that as no foreign, so neither any domestic power can alienate our allegiance. For it is altogether new and unintelligible to me, that the king's subjects can depose and dethrone him on any account, or constitute any that have not an immediate right in his place. We ought, I think, not to do this; and surely, when it is done, to assist him in the recovery of his right, is justifiable, and our duty. And however things may seem at present, I do believe, I am sure I heartily pray, that he shall be one day restored to his rightful throne and dominions.

As for any sudden descent of his majesty upon these his dominions, in order to the recovery of them, I declare I had no certain knowledge of it; nor can I tell what grounds there was to believe it, so little reason had I to be in a present preparation for it. I suppose it is not expected I should here endeavour to clear myself of the Assassination, which was not the thing alleged against me; however, it was mentioned, through what means I know not. As it was insinuated to my disadvantage, I forgive such as were therein instrumental; and I do also, from the very bottom of my soul, freely forgive, and beg of God to do so too, such as were any ways accessory towards the taking away my life, which I really look upon to be their misfortune more than mine.

I profess myself, and I thank God I am so, a member of the Church of England, though, God knows, a most unworthy and unprofitable part of it; of that church which suffers so much at present for a strict adherence to loyalty, the laws and Christian principles; for this I suffer, and for this I die.

Though I have a perfect charity for people of all professions, and do heartily wish well, and would endeavour to do so to all my fellow-subjects, of what persuasion soever. And indeed I have met with a great deal of uprightness and sincerity among some people of very different opinions in religious matters.

And I hope and desire it may not be taken as an uncharitable censure, or undue reflection, that I objected to the legality of popish evidence, being advised so to do for my better security, upon the foundation of a statute-law.

Having owned myself a member of the Church of England, I must take this opportunity, and I do it for God's glory, to apply myself to you that are royalists of that church, and of the same faith and principles with myself: and I beg of you, for God's sake, and the love of your souls, to be very constant and serious in all religious offices, and holy duties, of divine worship and service, which I have too much neglected, as I own to my great sorrow: let no excuse, no dangers, prevent or hinder you in the most necessary and serious matters; and be, I beseech you, very careful and cir-

cumspect in all your actions, behaviour, and conversation, as I earnestly exhorted all that came to me.

I have, I thank God, a great deal of satisfaction in my present sufferings, and have found it so ever since I have been under them: And blessed be God it doth continually increase upon me. And I do now lay down my life with all cheerfulness and resignation, in sure and certain hope of a resurrection to eternal life, through our Lord Jesus Christ, through whose merits alone I hope for the pardon of my sins, and the salvation of my soul.

And so, O Lord! into thy hands I commend my spirit; for thou hast redeemed me, O Lord! thou God of truth!

And I do heartily and humbly beseech the Almighty God, and my most gracious Father, to forgive and bless this sinful nation; deliver it from the guilt of rebellion, blood, and perjury, that is now on all sides more than ever, and from all those other heinous sins which cry aloud. Preserve and bless this Church. Comfort our distressed king; restore him to his right, and his mis-led subjects to their allegiance: bless also his royal consort, our gracious queen Mary; his royal highness the prince of Wales, that he may grow in stature, and in favour with God and man; support and strengthen all those that suffer in any kind for a good cause; give them patience under all their afflictions, and a happy deliverance out of them. Forgive all mine enemies.

Pardon my former neglect and remissness in religious worship, and holy duties, and all the sins I have been guilty of to this very moment. Consider my contrition, accept my tears; and now thou art pleased to take me hence, take me into thy favour, and grant that my soul may be without spot presented unto thee, through the merits of thy most dearly beloved Son, Jesus Christ our Lord. Amen. JOHN FREIND.

SIR WILLIAM PARKYNS'S PAPER.

It hath not been my custom to use many words, and I shall not be long upon this occasion, having business of much greater consequence to employ my thoughts upon. I thank God I am now in a full disposition to charity, and therefore shall make no complaints, either of the hardships of my trial, or any other rigours put upon me. However, one circumstance I think myself obliged to mention, It was sworn against me by Mr. Porter, that I had owned to him that I had seen and read a commission from the king to levy war upon the person of the prince of Orange. Now, I must declare, that the tenour of the king's commission, which I saw, was general, and directed to all his loving subjects, to raise and levy war against the prince of Orange, and his adherents; and to seize all forts, castles, &c. which, I suppose, may be a customary form of giving authority to make war; but I must confess I am not much acquainted with matters of that nature: but as for any commission par-

ticularly levelled against the person of the prince of Orange, I neither saw nor heard of any such.

It is true, I was privy to the design upon the Prince, but was not to act in it; and am fully satisfied that very few, or none, knew of it but those who undertook to do it.

I freely acknowledge, and think it for my honour to say, that I was entirely in the interest of the king, being always firmly persuaded of the justice of his cause: and I looked upon it as my duty, both as a subject, and an Englishman, to assist him in the recovery of his throne,

which I believe him to be deprived of contrary to all right and justice; taking the laws and constitutions of my country for my guide.

As for religion, I die in the communion of the church of England, in which I was educated.

And as I freely forgive all the world, so whoever I may any ways have injured, I heartily ask them pardon.

WILLIAM PARKYNS.

Jeremy Collier, a Nonjuring Minister, publicly absolved them at the gallows. After which they were executed according to their sentence.

386. The Trial of AMBROSE ROOKWOOD, for High Treason: At the Sessions of Oyer and Terminer for the County of Middlesex, sitting in the Court of King's-Bench at Westminster: 8 WILLIAM III. A. D. 1696.

THE Court being sat, at which were present the lord chief justice Holt, the lord chief justice Treby, Mr. justice Nevil, Mr. justice Powell, and Mr. justice Eyre; the Court proceeded in this manner:

Cl. of Ar. Cryer, make proclamation.

Cryer. Oyez, oyez, oyez: All manner of persons that have any thing more to do, at this Sessions of Oyer and Terminer, holden for the county of Middlesex, draw near and give your attendance. God save the king.

Then the Grand Jury were called over, and the appearances marked, and witnesses being sworn in court, to give evidence to them upon a bill of indictment against Alexander Knightley, they in a little time after withdrew to hear the evidence.

Then the keeper of Newgate was ordered to bring his prisoners to the bar, (which he did); to wit, Robert Lowick, Ambrose Rookwood, and Charles Cranburne; who were thus arraigned:

Cl. of Ar. Robert Lowick, hold up thy hand, (which he did); Ambrose Rookwood, hold up thy hand, (which he did); Charles Cranburne, hold up thy hand, (which he did.)

You stand indicted in the county of Middlesex, by the names of Robert Lowick of the parish of St. Paul Covent-garden, in the county of Middlesex, gentleman; Ambrose Rookwood of the same parish, gentleman; and Charles Cranburne of the same parish and county, yeoman; for that you, together with one Christopher Knightley, of the same parish and county, gentleman, not yet taken; not having the fear of God in your hearts, nor weighing the

duty of your allegiance, but being moved and seduced by the instigation of the devil, as false traitors against the most serene, most illustrious, most clement, and most excellent prince, our sovereign lord William the 3d, by the grace of God, king of England, Scotland, France and Ireland, defender of the faith, &c. your supreme, true, rightful, lawful, and undoubted lord, the cordial love, and true and due obedience, fidelity and allegiance, which every subject of our said lord the king that now is, towards him our said lord the king should bear, and of right ought to bear, withdrawing, and utterly to extinguish, intending and contriving, and with all your strength resolving, designing, and conspiring the government of this kingdom of England, under him our said sovereign lord the king that now is, of right, duly, happily, and well established, altogether to subvert, change, and alter, as also our said lord the king to death and final destruction to put and bring, and his faithful subjects, and the freemen of this kingdom of England, into intolerable and most miserable servitude to Lewis the French king to subjugate and inthral, the 10th day of February, in the seventh year of the reign of our said sovereign lord the king that now is, and divers other days and times as well before as after, at the parish of St. Paul, Covent-garden, aforesaid, in the county aforesaid, falsely, maliciously, devilishly, and traitorously, did compass, imagine, and contrive, resolve, design, and intend, our said lord the king that now is, to kill, slay, and murder, and a miserable slaughter among the faithful subjects of our said lord the king, throughout this whole kingdom of England, to make and cause, and the same your most impious, wicked, and devilish treasons, and traitorous compassings, contrivances, and purposes aforesaid, to fulfil, perfect, and bring to effect, you the said Robert Lowick, Ambrose Rookwood, and Charles Cranburne, together with the said Christopher

* See Holt, 683. East's Pleas of the Crown, c. 2, s. 7. 46. 48, 49, 50. 57, and the authorities there cited. See, also, in this Collection, the Trials of the Regicides, vol. 5, p. 947.

Knightley, and very many other false traitors, to the jurors unknown, afterwards, to wit, the same 10th day of Feb. in the year abovesaid, at the parish aforesaid, in the county aforesaid, and divers others days and times, as well before as after, there and elsewhere in the same county, falsely, maliciously, advisedly, secretly, traitorously, and with force and arms, did meet, propose, treat, consult, consent and agree, him our said lord the king that now is, by lying in wait, and guile, to assassinate, kill and murder; and that execrable, horrid, and detestable assassination and killing the sooner to execute, and perpetrate, afterwards (to wit) the same day and year, and divers other days and times, at the parish aforesaid, in the county aforesaid, traitorously did treat, propose, and consult, of the ways, manner, and means, and the time and place, where, when, how, and in what manner, our said lord the king, so by lying in wait, the more easily you might kill; and did consent, agree, and assent, that forty horsemen, or thereabouts, whereof the said Christopher Knightley, you the said Robert Lowick, Ambrose Rookwood, and Charles Cranburne, should be four; and every one of you traitorously took upon himself to be one, with guns, muskets, and pistols, charged with gunpowder and leaden bullets, and with swords, rapiers, and other weapons being armed, should lie in wait, and lie in ambush, our said lord the king in his coach being, when he should go abroad, to invade, and that a certain and competent number of those men, so armed, should set upon the guards of our said lord the king then attending him, and being with him, and should fight with them, and overcome them, whilst others of the same men so armed, our said lord the king should assassinate, slay, kill, and murder; and you the said Robert Lowick, Ambrose Rookwood, and Charles Cranburne, together with the said Christopher Knightley, the treason, and all the traitorous intentions, designs, and contrivances aforesaid, to execute, perform, fulfil, and bring to effect, afterwards (to wit) the aforesaid 10th day of February, in the seventh year abovesaid, at the parish aforesaid, in the county aforesaid, divers horses, and very many arms, guns, pistols, swords, rapiers, and other weapons, ammunition and warlike things, and military instruments, falsely, maliciously, secretly, and traitorously did obtain, buy, gather together, and procure, and cause to be bought, obtained, gathered together, and procured with that intention, then in and about the detestable, horrid, and execrable assassination, killing, and murder of our said lord the king that now is, as aforesaid to be used, employed, and bestowed; and the same premisses the more safely and certainly to execute, do, and perform, the aforesaid Christopher Knightley, with one Edward King, late of high treason, in contriving and conspiring the death of our said lord the king that now is, duly convicted and attainted, by the consent and agreement of divers of the traitors and conspirators aforesaid, the said 10th day of February, in the

seventh year abovesaid, went and came to the place proposed, where such intended assassination, killing, and murder of our said lord the king by lying in wait, should be done, performed, and committed, to see, view, and observe the convenience and fitness of the same place for such lying in wait, assassination, and killing, there to be done, performed, and committed: and that place being so viewed and observed, afterwards, (to wit) the same day and year, their observations thereof to several of the said traitors and conspirators did relate and impart, (to wit) at the parish aforesaid, in the county aforesaid: and you the aforesaid Charles Cranburne, the same day and year there, in order the said execrable, horrid, and detestable assassination, and killing of our said lord the king, by the traitors and conspirators aforesaid, the more readily and boldly to execute, perform, and commit, advisedly, knowingly, and traitorously did bring and carry between divers of those traitors and conspirators, forward and backward, from some to others of them, a list of the names of divers men of those who were designed and appointed our said lord the king so as aforesaid by lying in wait to kill and murder; against the duty of the allegiance of the said Christopher Knightley, you the said Robert Lowick, Ambrose Rookwood, and Charles Cranburne, and against the peace of our said lord the king that now is, his crown and dignity, and against the form of the statute in such case made and provided.

How sayest thou, Robert Lowick? Art thou guilty of the high-treason whereof thou standest indicted, or not guilty?

Lowick. Not guilty.

Cl. of Ar. Culprit, How wilt thou be tried?

Lowick. By God and my country.

Cl. of Ar. God send thee good deliverance.

How sayest thou, Ambrose Rookwood? Art thou guilty of the high-treason whereof thou standest indicted, or not guilty?

Rookwood. Not guilty.

Cl. of Ar. Culprit, How wilt thou be tried?

Rookwood. By God and my country.

Cl. of Ar. God send thee good deliverance.

Charles Cranburne, How sayest thou? Art thou guilty of the high-treason whereof thou standest indicted, or not guilty?

Cranburne. Not guilty.

Cl. of Ar. Culprit, How wilt thou be tried?

Cranburne. By God and my country.

Cl. of Ar. God send thee good deliverance.

Cranburne. My lord, I desire your lordship would grant me the favour for my wife to come to me in private, and that I may have pen, ink, and paper.

L. C. J. (sir John Holt). Pen, ink and paper, you must have; but as to the other, we must consider of it. Keeper of Newgate, What has been usual in those cases?

Keeper. My lord, we let nobody come to them in private but their counsel.

L. C. J. That's provided for by the act that allows them counsel; but has it been usual

heretofore to permit any body else to be with them in private; the wife, or any other relations?—*Keeper*. It has not.

L. C. J. It is very dangerous if it should; therefore let him have his wife come to him in the presence of the keeper.

Cranburne. And pen, ink, and paper, I hope, my lord?

L. C. J. Yes, yes, that you shall have.

Cranburne. You don't deny me, my lord, that I may have my wife come to me?

L. C. J. No, we do not, but she must not be in private with you, for fear of an escape.

Rookwood. I beg the same favour, my lord, to have my brother come to me, and pen, ink, and paper.

L. C. J. You shall have the same rule; but you, keeper, must have especial care whom you do permit to come to them, and be private with them; for it is still at your peril if any ill accident happens by your indulgence to them: and yet it is fit they should have all that is reasonable for preparing for their defence at their trials.

Lowick. And I desire, my lord, I may have my sister come to me, and the liberty of her being in private with me.

L. C. J. Your friends may come to you at seasonable times, in the presence of the keeper; you shall have any thing that is reasonable, but the safety of the government must be looked after. Therefore, keeper of Newgate, take back your prisoners, and bring them here this day se'nnight at seven o'clock in the morning, without any other order.

[They staid at the bar about half an hour, the Judges consulting among themselves about the precept for the petty jury upon a late act of parliament, which has appointed six days for the jury to be summoned before they appear to try any cause, and upon the last Act in Regulating Trials in Cases of High Treason; which requires that the prisoner shall have a copy of the pannel of the jury duly returned, at least two days before his trial.]

Then the Prisoners were carried away, and the Grand Jury withdrew to consider of the evidence against Knightley, and in a quarter of an hour came back, and being called over, delivered in a bill to the court.

Cl. of Ar. Gentlemen, you are content the court shall amend matter of form, or false Latin in this indictment, without altering any matter of substance without your privity.

Jury. Yes.

Cl. of Ar. Then, gentlemen, you may go for this time; and you are to take notice if there be occasion at any time to call you together, you shall have sufficient warning given to you beforehand. This is *Billa Vera* against Alexander Knightley for high treason.

[Then the Judges resumed the debate among themselves, and at last resolved that there should go three several Venires for the petty jury, returnable this day se'nnight; one to try

between the king and Robert Lowick, the second to try between the king and Ambrose Rookwood, and a third between the king and Charles Cranburne; because, though the indictment be against them jointly, yet it was a several offence in every one of them, and they might sever in their challenges, and that would be troublesome, and therefore it was thought best to sever them in their trials; and therefore the court adjourned for an hour or something more, while the precepts for the jury were preparing, and according to the adjournment met, and signed and sealed the precepts, and then adjourned the Sessions of Oyer and Terminer until this day se'nnight, at seven in the morning.]

Die Martis Vicesimo primo Aprilis, Anno Regni Regis Willielmi Tertii Octavo, Annoq; Dom. 1696.

The court sat about eight o'clock, at which were present a great number of noblemen, and persons of quality, who were in the commission, and seven of the judges; to wit, the lord chief justice Holt, the lord chief justice Treby, the lord chief baron Ward, Mr. justice Nevil, Mr. justice Powel, Mr. justice Eyre, and Mr. baron Powis.

Cl. of Ar. Cryer, make proclamation.

Cryer. O yes, O yes, O yes. All manner of persons that have any thing more to do at this Sessions of Oyer and Terminer, adjourned over to this day, draw near and give your attendance. And God save the king.

Cl. of Ar. Cryer, make proclamation.

Cryer. O yes, Sheriffs for the county of Middlesex, return the precepts to you directed, upon pain and peril will fall thereon.

The Under-Sheriff returned the Precept.

Cl. of Ar. Mr. Baker, pray, whom do you intend to begin with?

Mr. Baker. With Ambrose Rookwood.

Cl. of Ar. Cryer, make proclamation.

Cryer. O yes, You good men of the county of Middlesex, summoned to appear here this day, to try between our sovereign lord the king, and the prisoners that are, and shall be at the bar, answer to your names, as you shall be called, every one at the first call, and save your issues.

The whole pannel was called over, and the appearances of those that answered recorded; and the defaulters were again called over.

Cl. of Ar. Keeper of Newgate, set Ambrose Rookwood to the bar, (which was done). You the prisoner at the bar, Ambrose Rookwood, those men that you shall hear called, and personally appear, are to pass between our sovereign lord the king and you, upon trial of your life and death; if therefore you will challenge them, or any of them, your time is to speak unto them as they come to the book to be sworn, before they be sworn.

Sir Bartholomew Shower. If your lordship pleases, we have a doubt or two to propose to your lordship, in respect of the trial this day: but before I offer it, we beg your favour for a word in behalf of ourselves.

My lord, We are assigned of counsel, in pursuance of an act of parliament, and we hope that nothing which we shall say in defence of our clients shall be imputed to ourselves. I thought it would have been a reflection upon the government and your lordships' justice, if being assigned we should have refused to appear; it would have been a publication to the world, that we distrusted your candor towards us in our future practice upon other occasions. But, my lord, there can be no reason for such a fear; I am sure I have none; for we must acknowledge, we who have been practisers, at this bar especially, that there was never a reign or government within the memory of man, wherein such indulgence, such easiness of temper, hath been shewn from the court to the counsel, as there always hath been in this. Never was there such freedom and liberty of debate and argument allowed to the bar, and we thank your lordship for the same.

My lord, We come not here to countenance the practices for which the prisoner stands accused, nor the principles upon which such practices may be presumed to be founded; for we know of none, either religious or civil, that can warrant or excuse them. But the act of parliament having warranted the appearing of counsel for persons accused to make defence for them, we hope your lordship will give us leave to make what objections we can on their behalf.

L. C. J. Holt. Look ye, sir B. Shower, go on with your objections; let us hear what you have to say.

Sir B. Shower. My lord, It appears to be a doubt to us, upon this act of parliament, whether this cause can be tried this day: and if it be a doubt, we hope, though it should not have that weight with the court, that we apprehend it has: yet your lordship will excuse us, and settle it according to your judgment. The act requires, That all that shall be accused and indicted for high-treason, whereby any corruption of blood may, or shall be made to any such offender or offenders, or to any the heir or heirs of any such offender or offenders, or for misprision of such treason, shall have a true copy of the whole indictment; and afterwards shall have copies of the pannel of the jurors who are to try them, duly returned by the sheriff and delivered unto them; and every one of them so accused and indicted respectively two days at the least before he or they shall be tried for the same. Now if your lordship will please to cast your eye upon this *Venire Facias*, and it will appear to be returned but this day, and that is not according to the intent of this law. And it is impossible then, if it be as we apprehend it, and put it, that this trial should go on at this time; and that this construction should be so as we say, not only the words, but, as we take it,

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the intent and meaning of the act of parliament too are for us, that there ought to have been a copy of the pannel after the return two days before the trial. For in the first place, my lord, the words are plain: it must be a copy of the pannel duly returned by the sheriff. Now, though it be a copy of the array of the pannel which we have delivered to us, yet it is not a copy of the pannel of the jurors returned; for it is no return till it come into court. And the king's counsel must admit, that in the case of all writs returnable, it cannot be said that there is a return, where there is a writing upon the back, or a label annexed, till it be actually returned into court. As in the case of a *Fieri Facias*, or a *Mandamus*, an action for false return cannot lie till the writ be actually returned. For such action must be brought into the county of Middlesex, where the court resides, before whom the return is made, and not in the county where the sheriff lived that made the return; for it is not a return till filed in court. Now here the words of the act are; 'He shall have a copy of the pannel of the jurors who are to try him, duly returned by the sheriff two days before the trial.' Now, we humbly insist that the words 'duly returned' must be antecedent to the having the copy, or else he cannot be said to have a copy of the pannel duly returned. The act of parliament does not say which shall be duly returned; and therefore there does arise a doubt, whether your lordship will not direct us to have a copy after the return made, which is but this day.

Mr. Phipps. If your lordship pleases to spare me a word of the same side: We take it, that by this act of parliament the jury must be duly returned before the pannel is delivered to us. Now the return is the answer that is indorsed upon the writ with the pannel annexed, and delivered into court; for the return is to the court, and till it be delivered into court, it cannot properly be said to be a return. We acknowledge the copy of this pannel has been delivered unto us, two or three days ago. But the *Venire* being not returned till to-day, we think we have not a copy of the pannel within the intent of, and according to the act of parliament. And I desire to put your lordship this case: this act of parliament does likewise provide, that the prisoner should have a copy of his indictment five days before his trial, to enable him to consult with his counsel how to plead and defend himself; suppose then a copy of a bill that is intended to be presented to the grand jury, be delivered to the person accused five days before the grand jury are to meet, and they afterwards meet, and find it, and the party is brought immediately, and arraigned upon it: this is a true copy of the indictment, yet certainly the intent of the act of parliament is not answered, for it was not a true copy of the indictment at the time it was delivered. And I take this case to be under the same reason. This is not a pannel duly returned, till now; and therefore by consequence we have not that advantage

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that this act of parliament intended to give us; for which reason we humbly apprehend we ought not to be tried to-day; which we submit to your lordship.

L. C. J. What say you to it, Mr. Attorney?

Att. Gen. (sir Thomas Trevor). My lord, with submission, this objection will receive a very plain answer. If I understand it aright, they say that they ought to have a copy of the pannel after it is returned, and that it cannot be said to be duly delivered, according to the provision in this act of parliament, till after the *Venire Facias* be duly returned into the court, and then they are to have it two days before they are tried. They say the *Venire Facias* is returned but to-day, and so the copy delivered to them, is not pursuant to the act of parliament; and so they cannot be tried to-day: this I take to be the objection. But with submission, my lord, it will be plain both by the words of the act, and the reason and intention of it, that there is no occasion at all, nor no necessity of having the writ returned before the copy of the pannel be delivered. The words of the act of parliament are these: 'That every person and persons who shall be accused, indicted, and tried for treason, or misprision of treason, after the 25th of March, 1696, shall have copies of the pannel of the jurors who are to try them, duly returned by the sheriff, and delivered to them two days before they be tried.' Now, first, my lord, I think it is apparent what the meaning and design of the act of parliament was, that the prisoner should know two days before the trial, who were the jury that were to pass upon him, that he might have an opportunity to consider how he should make his challenges as he thought fit, and time to enquire into the qualifications of them, that if there were any particular ground of challenge, he might not lose that benefit; so that if he has a copy of the pannel arrayed by the sheriff, which is afterward returned by the sheriff into court, and there is no variation of that pannel afterwards; then certainly the end and intent of the act is entirely pursued: for by that means the prisoner has the names of all the jury returned, and are afterwards called, and has a full opportunity of making such challenges as he thinks fit. And as the reason and intent of the act is answered by this construction, so the very words of the act are answered: for it is not said in the act, that he shall have a copy of the pannel after it is returned, but it is said a copy of the pannel duly returned by the sheriff; that is, when the sheriff has arrayed a pannel, then he is to have a copy of that pannel; and if afterwards the sheriff return the same pannel into court, is not this a copy of the pannel duly returned? With submission it is, and sufficient to answer both the words and intention of the act of parliament. It is true, my lord, if the act of parliament had said he should have a copy of the pannel after it was returned, then we could not have said but that the objection would hold. But when the words are general, and it is most reasonable

to be interpreted that the copy is to be delivered when the array is made, because that answers the intent and end of the act of parliament, which was to enable the prisoner to make his challenges, we take that to be sufficient; and if another interpretation should be made, it would render the trial in such cases liable to all the mischiefs in the world, and make it impracticable that any person should be tried; at least it would introduce a new method of proceedings that never was practised, nor ought to be introduced, unless this act of parliament by express words had appointed and constituted such a new method; and we suppose your lordship will never make any such construction, that the act intended a new method, unless expressly declared; for if it were, as they would have it, that the copy of the pannel was not to be delivered till after the return of the writ, then the prisoner cannot be tried upon the return of the writ; for upon the return of the writ, the jury must be brought to the bar, the prisoner must be brought to the bar, and adjourned over to a further time, that in the mean time a copy may be delivered to them. I believe that they can never shew any precedent that there was such an adjournment of a jury of life and death, over to another day, for a person to have a copy of the pannel, to enable him to make his challenges; and either that must be the consequence, or else the jury must not come upon the return of the *Venire Facias*, but there must go a *Habeas Corpora*, and the prisoner tried upon that *Habeas Corpora*: for first there must be the return of the writ, then the copy of the pannel delivered, then the *Habeas Corpora* returnable another day; and upon that the trial must be had: but I believe there can be no instance given of a trial for treason upon a *Habeas Corpora*. Now if the parliament had intended that they would not have the copy of the pannel delivered till after the return of the *Venire Facias*, they would certainly have expressed and provided how the method of trial should have been; that is, that either the jury should have been adjourned over till another day, or else brought to the bar upon a *Habeas Corpora*; which is the only way that can be thought of. Indeed, my lord, I do agree, that if the sheriff should give a copy of the pannel, and afterwards should vary that pannel, though but in one name, that would not answer the end of the act of parliament, because the prisoner is deprived of the opportunity of knowing the name of the person that he so altered, in order to his making his challenges against him: but if the sheriff do return the same persons that are in that copy delivered to the prisoner, then we do, to all intents and purposes, answer the end of the act of parliament, and avoid the absurd construction that they would make of this act for the changing the method of trials, and nobody can well tell what method should be pursued: but certainly if the act of parliament intended a new method should be pursued, they would have described and settled what it should be.

Sol. Gen. (sir John Hawles). If your lordship pleases to spare me a word of the same side; my lord, this is an objection that has been foreseen, and I think has been prevented; for, with submission, I take it, the act has been sufficiently answered both as to the words, and as to the intent of it, in the prisoner's having the copy of the pannel before the jury be returned; there must be such a thing as a pannel arrayed before the jury be summoned, and therefore it is sufficient that the prisoner have a copy of that pannel so many days before his trial; which was only intended for that particular reason, that he might be provided sufficiently to make his legal challenges. Certainly within the intent of the act of parliament it is well enough if he had but a copy of the pannel two days before the return of the writ, provided the jury was not altered that was arrayed, nor any other names put in but those that he had a copy of before: now, my lord, I think this act of parliament must be taken according to the intent and meaning of it, or else it will bear hard upon the prisoner, and harder sure than it was designed it should: this act says, he shall have a copy of his indictment so many days before his trial; now I would fain know whether they would have it construed, that the copy does not need to be delivered till after issue joined, which must be if their doctrine holds true, that the act is to be construed according to the strict letter of it, for that trial is the trial of the issue; what if the indictment be delivered five days before the trial, though after issue joined, it is well enough according to such an exposition, for the arraignment of the prisoner is no part of the trial, and yet it was the intent of the parliament that he should have a copy of the indictment five days before he was arraigned, and that for this reason, because he might have several pleas to plead, and objections to make before he pleaded the general issue; he might have pleas in abatement, which after plea pleaded of not guilty he could not have the advantage of, nor could he afterwards move to quash the indictment, which he might otherwise have good reason for, if he had the copy before he was put to plead, so that I take it the act is to be interpreted every where according to the intention of it, and the prisoner at the bar, according to the intention of the act, has had a copy of this indictment five or six days before his arraignment, and therefore we have acted according to the purpose and meaning of the parliament; and likewise he has had a copy of the pannel of the jurors that are to try him, which is duly returned by the sheriff, which is likewise according to the act of parliament. As for what they say that even a copy of the indictment before it be found would not be good according to this act; that is true, but the case is not the same, nor the reason of the case alike between that and the pannel of a jury, because it is sufficient in law to make it a good pannel if it be arrayed by the sheriff before the jury be summoned, for the sheriff must array and com-

plete his pannel to let his bailiff know who must be summoned; but in the case of an indictment, though a bill be first formed by the clerk, yet it is not looked upon as a formal indictment in point of law, till it be found by the jury as their verdict, and preferred to the court; and it is not necessary that this indictment should be formed for the jury before they find it, for they are properly to make their own presentments themselves; and the ancient practice was, that they only presented the fact, and the matter was put into form afterwards by the court, and in many cases it is so at this day, as we have had some instances lately; but as to the arraying of a pannel it always was so, and always must be so arrayed by the sheriff before the jury summoned, and there is the difference between the giving a copy of an indictment and the copy of a pannel, the one is taken notice of in point of law to be necessary, the other is not. This giving a copy of the pannel, my lord, we say, is within the intent of the act, which was only to enable persons accused to make their just challenges, and that they may as well do when a copy is delivered after it is arrayed by the sheriff, as when it is returned by the sheriff, and being so done, with submission, it is well done within the words, and within the intent of this act of parliament.

Mr. Conyers. My lord, the words of this act of parliament are, 'That they shall have a copy of the pannel of the jurors who are to try them, duly returned by the sheriff, and delivered to them, and this, two days before the trial: my lord, that this is the pannel of the sheriff of the jurors that are to try them, as soon as it is arrayed, has been observed already; now it would be a forced construction to construe these words that follow, 'duly returned by the sheriff,' to be meant, that a copy should be delivered after the jury is returned, because that would be a delay of justice, and keeping off the trial longer than was intended by this act of parliament, and more than will answer the end of this law; for the end of it was to give the prisoner all benefit and advantage of exceptions against any of those that were to try him, and if he has this pannel two days before his trial, he has that benefit the law intended him. Now, my lord, as to what has been said of an indictment, which by this law, he is to have a copy of too, that is plainly quite another case; for it is not an indictment till it be found, and so answers not the words nor intention of the act till found by the grand jury; till then it is not a copy of his charge, and therefore by no construction can it be called a copy of the indictment. I think I need not trouble your lordship any further in this matter, because this objection was foreseen, and has been already considered of by the court upon the prisoner's arraignment.

Sir Barth. Shower. My lord, in answer to what Mr. Solicitor has said, that there is as much reason to expect that the copy of the indictment should not be delivered till after plea pleaded, as that the pannel should not be delivered till after the jury returned, because in the

case of the indictment it is said so many days before the trial, and the trial cannot be till issue joined, there can be no weight in that objection at all; for the words of the act are quite differently penned in the case of the indictment from what they are in the case of the pannel; for though it be said it should be done five days before the trial, yet it is added, 'in order to the advising with counsel how to plead;' which must be before plea pleaded, and therefore it must be absolutely necessary to be done before the arraignment. My lord, I have proposed my doubt, it may have consequences on the one side and the other, we submit intirely unto your lordship's judgment; it is a new law, and never has received any opinion; the words of it are, 'duly returned by the sheriff,' and the question is, Whether a copy of the pannel upon the array before it be returned be a copy of the pannel duly returned, though the same pannel be afterwards duly returned.

Mr. Phipps. My lord, Mr. Attorney General owns, that the pannel after it is arrayed may be amended and altered by the sheriff; and it was never intended by this act of parliament, that any copy of the pannel should be delivered to the prisoner but of those men that were really returned; so that we take it, we ought to have it two days after the return and before the trial; for certainly it must be a copy of the men returned, which if the sheriff may alter at any time before the return, the intent of the act of parliament can never be answered by any copy but what is a true copy of the return. Mr. Conyers would answer the objection that I made about a copy of the indictment by this, that it is not an indictment till it be found by the jury; but I think it is no answer to our objection at all, though it be but a copy of the bill intended to be presented to the grand jury, yet if the grand jury afterwards find it, it is as true a copy of the indictment as this is a copy of the jury intended to be returned, and afterwards returned. As to what they say, that this will introduce a new method of trial, contrary to all form or proceedings, that can be no objection neither; for if it be so, we cannot tell how to help it, the parliament have thought fit to have it so, and we must submit to take it as the law has made it: if there be a necessity for a Habeas Corpora upon the provision made in this act, so it must be, for we must take the law as it is. We submit our objection to your lordship; we think we have not had the benefit of this law.

Mr. Cowper. Surely, my lord, what Mr. Phipps has now said has no weight in it; that because the sheriff had it in his power to alter the pannel before it was returned, therefore this is not now a true copy of the pannel of jurors who are to try the prisoner, duly returned by the sheriff; which are the words in the act. It is true, if the sheriff had in fact altered the pannel from what it was, and returned it so altered into court, no doubt of it, the prisoner would be very well intitled to make this objection, that he had not a copy of the pannel,

or the names of the jurors that were summoned to try him; but now we can aver, that we have pursued this act of parliament literally; for in answer to their objection, we may ask this question of them upon the words of the act, Have you not had a true copy of the names of those that are to try you, and are duly returned by the sheriff for that purpose? and was not that copy delivered unto you above two days ago? They cannot say they have not had it so, and if they cannot say so, then both the words and meaning of the act of parliament are in every respect answered; if when the jury come to be called the prisoner finds the pannel to be altered, he has reason to object, and will have the benefit of the objection, that he has not that advantage which the law intended him, but till that prove to be the fact, we think here is a full compliance with this law.

Sol. Gen. Sir Barth. Shower mistakes my objections about the copy of the indictment; for we say, if the intent of the act of parliament be complied with, it is sufficient, especially where the words are any way doubtful; according to the words of this act of parliament a copy of the indictment need to be delivered but five days before the trial; but it appearing that the intention of these law-makers was, that he should have a copy of the indictment to enable him to plead to it if he had cause, therefore though the words be 'before the trial,' we have taken it that he should have a copy five days before his arraignment, and so we have complied with the meaning of the law in that point, as we have also in this, which was, we take it, only to enable the prisoner to make his challenges, and if that be done two days before his trial, with submission, it fully answers this law.

L. C. J. Have you done, gentlemen?

Couns. Yes, my lord.

L. C. J. Then look you, sir B. Shower, as to this point that you now insist upon, we have had it under consideration heretofore; we were here this day se'nnight, and then we did consider in what method we should proceed, so that the prisoner might have the benefit intended him by this act of parliament: the act of parliament does design, in the first place, that every prisoner that is to be tried for high-treason should have a copy of his indictment, at least five days before the trial; that, I think, was all the makers of this act of parliament intended at the first; but then there being subsequent words, which shew the reason why they gave him the copy so long before the trial; which is, that he might advise with his counsel what to plead; these words, we conceive, have given the prisoner a further time than what was originally intended, therefore we have thought it necessary that the prisoner should have a copy of his indictment five days before he be arraigned, which is five days before he was put to plead; and your client, the prisoner at the bar, has had the benefit of this act in that respect before we arraigned him; then after he has pleaded, the question was, when he was to have a copy of the pannel?

Now the design of this act of parliament was, That the prisoner should have a copy of the pannel two days before his trial, in order that he might consider of the persons that were to try him; that he might inform himself of their qualities, tempers, and dispositions; that so he might make use of the benefit the law gives him of challenging five and thirty, without shewing any cause, if he did not like the men, and as many more as he should think he had good cause to challenge: now in this case, the whole design of this act of parliament is answered, for he has had a copy of the pannel, as you yourselves acknowledge, two days before the day of his trial, so that he has the full benefit that the act of parliament intended; he is by this copy as well enabled to make his challenges as the law designed he should be, and has had the same time allowed him, that the act of parliament meant he should have; then supposing the design of this act of parliament be fully answered and complied with in the case, the next question is, Whether the words of the act are satisfied? For we would be very loth, in a case of this nature, where an act of parliament intends a favour to a prisoner that stands at the bar for his life, to abridge him of any part of that favour which the very words of the act would allow him, though the intent of the act of parliament were answered otherwise: now in the first place it is observable, that the act of parliament does not say, that the prisoner shall have a copy of the return; nor does it say, he shall have a copy from the court, but he shall have a copy of the pannel of the jurors duly returned that are to try him; now if the sheriff array his pannel several days before the trial upon the *Venire Facias*, and does give him a copy of that very pannel, which pannel is afterwards returned in court, has not he then a copy of the pannel duly returned? Does not this answer all the words of the act? For you yourselves say that it is not said in the words of the act, that the copy shall be delivered after the pannel returned, nor does there need a copy of the very return. Surely we must not carry it farther than the words, if the meaning be complied with, and we think this answers both words and meaning: it is a copy of the pannel, and a copy of that pannel that is duly returned. Now to make another construction would indeed not only alter the usual course of trials, but be contradictory to the very process itself. We are by the course of law to award process to summon a jury to appear at a certain time, to try the issue joined between the king and the prisoner; and yet when we have done this, and the jury thereupon are summoned and do appear, they may go as they came; for the issue cannot be tried, because after the return, the prisoner must have a copy of the pannel two days before he can be tried. I do think the design of the act of parliament, and the very words of the act are fully satisfied in giving a copy of the pannel two days before the return. We had this matter under our consideration before, and upon debate among ourselves, we

did think fit to award the precept returnable this day, and resolved to try the prisoner this day, unless better reasons were offered us to alter our opinion, and we are not satisfied that any such better reason has been given, but that this trial ought to go on, the prisoner having the full benefit that was designed him by this act of parliament. And the giving a copy of the pannel that is returned, though before the return, sufficiently satisfies the words of the act: no other construction can be made without great absurdities: this is my opinion.

Sir B. Shower. My lord, I hope we shall be excused for our client, we have another doubt to propose to the court.

L. C. J. You have had my opinion upon this point, if my lords and brothers are of another opinion, they will tell you.

Judges. No, my lord, we are all of the same opinion.

L. C. J. My Lord Chief Justice of the Common Pleas, and my brothers are all of the same opinion.

Sir B. Shower. My lord, we say we have another doubt to propose upon this act of parliament: it is a new one, and never put in practice till now, and therefore we hope your lordship will please to excuse us, if we offer our objections, because there has yet never been a determination about it, and we are assigned of counsel by your lordship.

L. C. J. Never make apologies, sir Bartholomew, for it is as lawful for you to be of counsel in this case, as it is in any other case where the law allows counsel. It is expected you should do your best for those you are assigned for, as it is expected in any other case that you do your duty for your client.

Sir B. Shower. My lord, our exception is this, we say that this trial cannot go on at this time, upon this act of parliament, because we have no true copy of the whole indictment; it does not appear, in the copy we have delivered to us, before whom it was taken, or whether it was taken at all, or in what place it was taken; it says only 'Middlesex' in the margin, and then 'Juratores pro Domino Rege presentant:' that might be before the justices of the peace at the quarter sessions, or it might be at the monthly sessions at Hicks's-Hall, or it might be at the Sessions at the Old Bailey, or it might be before commissioners of Oyer and Terminer, as perhaps it really was; but *non constat* where it was taken, nor how it comes hither: it might be before your lordship here, as we believe it was, but this copy not letting us know where and how it was taken, we think we have not the benefit of this law; for the party accused is by this act of parliament to have a copy to advise with counsel, that he may be enabled to plead. And that is the reason why the words of this act are so penned, that he shall have a copy of the whole indictment, which we cannot plead to, unless we know where it was taken, if we should have occasion to plead any special matter. And besides, my lord, there is another reason why we

should have the whole indictment to enable us to plead, because if we had the Caption, it might perhaps appear, that the indictment was taken before the time of the fact alleged in the indictment, and then that would make it vicious; it might be before the 9th of February, when this treason is said to be committed, and then we ought not to be brought to trial. Now the design of this act of parliament, in giving the prisoner a copy of the indictment so long before the trial, was not only to enable him to make his defence upon the trial, but also to advise with counsel to plead; for so the words are, 'the better to enable him to plead.' Now we say, to answer this end, it is necessary we should have a copy of the whole indictment, as it stands before your lordship in court. And another reason is this, it is no indictment, unless it be presented by the jury, as their inquiry upon oath, unto some court that has jurisdiction of the matter: what we have delivered to us is only a copy of a bill as to be delivered to a grand jury to be found; *non constat*, that it is found. Now the intent of the act of parliament being to give the prisoner this advantage to enable him to plead, he may have several pleas, of which he might take a legal advantage if he had a copy of the whole, which he knows not how to come at now; and in truth it is very necessary, because if he be tried upon an indictment found in another county, then these commissioners have not a legal authority to try him; and if the trial should go on, and he be acquitted, he is subject to be indicted and tried again, and never can relieve himself by the acquittal upon such an indictment before persons that had no authority to try him. I doubt he can never plead the acquittal, because he cannot make out, that he was duly tried and acquitted: and for these reasons we humbly submit it to your lordship, whether we have had the benefit of this law, in having a copy of the whole indictment to enable us to plead; and if we have not, till we have that benefit, we humbly conceive this trial ought not to go on.

Mr. Phipps. My lord, the question is, Whether the style of the court, the persons before whom it was taken, and to whom the presentment is made, the time when it was taken, and the place where, ought not to appear in the indictment? this law requiring that the prisoner should have a copy of the whole indictment to enable him to plead; for if it should happen, that the indictment was taken before persons that had no jurisdiction, then I believe it will not be denied but that the prisoner might plead to the jurisdiction, and there might be several other pleas that he might take advantage of. I would desire to know of the king's counsel, whether ever they saw a copy of an indictment given in evidence, or pleaded without the Caption. It is not a true copy without it; there ought to be the time, the place, and the style of the court before whom it is taken.

Att. Gen. Truly, my lord, I think I need say no more to this objection, than it does not come at a proper time; for, with submission,

if the prisoner will upon this act say he has not had a copy of his indictment to enable him to plead, he ought to have taken the advantage of it before he did plead; that is the proper time for him to object this matter to the court; for if, after he has had such a copy as this prisoner has had, he does submit to plead, with submission it is too late to come at his trial and make this objection, he cannot be received to make it after.

L. C. J. That is a full answer, Mr. Attorney.

Att. Gen. I think it is, my lord, with submission, not that we would wave giving other answer to it, if it were in a proper time; but the method of proceeding must be, and we think we have no occasion at this time to say any thing more to this objection.

L. C. J. No, no, that is a full answer in this point: for look ye, you that are of counsel for the prisoner, when once you have pleaded, you admit you have had a copy; for the copy was given you to enable you to plead, and when you have pleaded, you have passed by all advantage that you could have from the copy, as to any plea that you can make: for it is taken for granted ye had a copy to enable you to plead, and to advise with your counsel about it; since you did plead, and did not insist upon it at the time of your arraignment that you had not such copy.

Sir B. Shower. My lord, we have proposed one doubt; we humbly submit it to the court.

Sol. Gen. It was their own fault, that this objection was not made in time.

L. C. J. That doubt of yours may serve at another time, but now certainly it is quite out of time.

Sol. Gen. Nay, my lord, even upon the arraignment that would not serve their turn neither.

L. C. J. We will not enter upon that now, pray go on to swear the jury.

Cl. of Ar. You, the prisoner, look to your challenges, as I told you before. Cryer, call sir Jeremy Sambrook.

Cryer. Vous avez.

Sir B. Shower. Mr. Rookwood, you are to make your own challenges.

Rookwood. I do not challenge him.

Cl. of Ar. Then hold sir Jeremy the book.

Sir Jer. Sambrook. My lord, I am incapable of serving upon this jury, for I have been deaf these several years, these dozen years; I cannot hear what is said in court, though I am now so near the court; I could not hear what your lordship said, nor what was said at the bar. I have a certificate here, if your lordship please to have it read; and most of the persons of quality about the court know it to be true.

Att. Gen. My lord, I am afraid it is so.

L. C. J. Nay, if it be so, it is not fitting that he should be upon the jury, when he cannot hear what is said: you must excuse sir Jeremy Sambrook. Go on to the next.

Cl. of Ar. George Ford.—Cryer. Vous avez.

Cl. of Ar. Look upon the prisoner.

Rookwood. I challenge him.

L. C. J. Mr. Ford, you must not go away, for you are upon another pannel, wherein you may be employed, though you are now challenged.

Cl. of Ar. William Underhill.

Rookw. I challenge him.

Cl. of Ar. William Withers.

Rookw. I challenge him.

Cl. of Ar. Samuel Powell.

Rookw. I do not except against him.

Cl. of Ar. Then swear Mr. Powell.

Cryer. Look upon the prisoner. You shall well and truly try, and true deliverance make between our sovereign lord the king, and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to your evidence. So help you God.

Cl. of Ar. Thomas Trench.

Rookw. I challenge him.

Cl. of Ar. John Wolse.

Rookw. I challenge him.

Cl. of Ar. James Bodington.

Rookw. I challenge him.

Cl. of Ar. John Raymond.

Rookw. I challenge him.

Cl. of Ar. Richard Marsh. [He did not appear.]

Cl. of Ar. George Haws.

Rookw. I challenge him.

Cl. of Ar. Francis Barry.

Rookw. I challenge him.

Cl. of Ar. Arthur Baily.

Rookw. I except not against him. [Sworn.]

Cl. of Ar. John Webber.

Rookw. I do not except against him. [Sworn.]

Cl. of Ar. Thomas Glover.

Rookw. I challenge him.

Cl. of Ar. Dormer Sheppard.

Rookw. I challenge him.

Cl. of Ar. George Tredway.

Rookw. I do not except against him. [He was sworn.]

Cl. of Ar. Matthew Bateman.

Rookw. I challenge him.

Cl. of Ar. Timothy Thornbury.

Rookw. I challenge him.

Cl. of Ar. James Partherich.

Rookw. I challenge him.

Cl. of Ar. Thomas Freeman.

Rookw. I challenge him.

Cl. of Ar. Joseph Blithit.

Rookw. I challenge him.

Cl. of Ar. Timothy Lennoy.

Rookw. I have nothing to say against him. [He was sworn.]

Cl. of Ar. John Harris.

Rookw. I do not except against him. [He was sworn.]

Cl. of Ar. John Billers.

Rookw. I challenge him.

Cl. of Ar. Richard Bourne.

Rookw. I challenge him.

Cl. of Ar. George Carter.

Rookw. I do not except against him. [Sworn.]

Cl. of Ar. Francis Chapman.

Rookw. I challenge him.

Cl. of Ar. Alexander Forth.

Rookw. I challenge him.

Cl. of Ar. Thomas Playsted.

Rookw. I challenge him.

Cl. of Ar. William Etley.

Rookw. I do not except against him. [He was sworn.]

Cl. of Ar. John Marsh.

Rookw. I have nothing to say against him. [He was sworn.]

Cl. of Ar. Samuel Hooper. (He did not answer.)

L. C. J. Did Mr. Hooper appear?

Cl. of Ar. Yes, my lord; he is marked as appearing.

L. C. J. Then you ought to call him again, and set a fine upon his head.

Cl. of Ar. Cryer, call Samuel Hooper.

Cryer. Samuel Hooper, come into court and give your attendance, upon pain of ten pound, for the court has recorded your appearance.

Cl. of Ar. John Hall.

Rookw. I challenge him.

Cl. of Ar. Nicholas Roberts.

Rookw. I challenge him.

Cl. of Ar. William Partridge.

Rookw. I challenge him.

Sir B. Shower. How many has he challenged, Mr. Hardesty?

Cl. of Ar. I will tell you, sir Bartholomew.

—He has challenged 24.

Sir B. Shower. Well then, go on, sir.

Cl. of Ar. Peter Laveane.

Rookw. I challenge him.

Cl. of Ar. Thomas Moody.

Rookw. I challenge him.

Cl. of Ar. Richard Bealing.

Rookw. I challenge him.

Cl. of Ar. Thomas Evans.

Rookw. I challenge him.

Cl. of Ar. Thomas Rammage.

Rookw. I challenge him.

Cl. of Ar. Edward Townshend.

Rookw. I challenge him.

Cl. of Ar. William Gunston.

Rookw. I challenge him.

Cl. of Ar. Samuel Freebody.

Rookw. I do not except against him. (He was sworn.)

Cl. of Ar. Philip Wightman.

Rookw. I challenge him.

Cl. of Ar. There are now thirty-two challenged.—John Wyberd.

Rookw. I challenge him.

Cl. of Ar. William Strowd.

Rookw. I challenge him.

Cl. of Ar. Daniel Byfeild.

Rookw. I do not except against him. (He was sworn.)

Cl. of Ar. Benjamin Noble.

Rookw. I have nothing to say against him. (He was sworn.)

Cl. of Ar. Cryer, count them. Samuel Powell;—

Cryer. One, &c.

Cl. of Ar. Benjamin Noble.

Cryer. Twelve good men and true, stand together, and hear your evidence.

The names of the twelve sworn were these : Samuel Powell, Arthur Bailey, John Webber, George Tredway, Timothy Lennoy, John Harris, George Carter, William Atley, John Marsh, Samuel Freebody, Daniel Byfeild, and Benjamin Noble.

L. C. J. Look ye, Mr. Phipps, your objection upon the indictment slipt me, and therefore I would speak to it now : You said it might be as well a copy of the indictment before it be found, as well as this a copy of the pannel before it be returned. Now that cannot be, for an indictment is not an indictment till it be found, it is only a writing prepared for the ease of the jury, and for expedition ; it is nothing till it is found, for the jury make it an indictment by finding it, they may alter what they please, or refuse it absolutely. And if the jury, upon examining the witnesses, would only present a matter of fact with time and place, the court might cause it to be drawn up into form, without carrying it to the jury : again, there needs no *Billa vera* ; for that is only the jury's owning that which the court has prepared and drawn up for them : but a pannel is a pannel when it is arrayed, before it be returned, and a copy of the pannel given before it be returned, is a copy of the pannel returned, if it be afterwards returned, as it must.

Sir B. Shower. But, my lord, that notion strengthens our objection that we last made, that makes it necessary that we should have a copy of the Caption, as well as the other part, to make it a true copy of the whole indictment.

L. C. J. That is another thing, we will talk of that another time ; but I speak of this only as to his objection, which slipt my memory, because I would have nothing remain unanswered.

Mr. Phipps. My lord, when the Bill is found, the copy that we delivered before is as much a true copy of the indictment as our copy of the pannel is a copy of the jury returned.

L. C. J. A pannel is a pannel, when it is arrayed, but a bill is not an indictment till it be found ; one cannot say a man *indictatus existit*, till it be found ; all that we say of it before it be found is, that there was *quædam Billa* preferred to the grand jury, and if the jury bring it in *Ignoramus*, whereby they disown the presentment, it is cancelled, and there is no record of it, nor nothing, only a memorandum in the clerk's book perhaps, that such a thing was. Well go on.

Cl. of Ar. Cryer, make Proclamation.

Cryer. O yes, If any one can inform my lords, the king's justices of Oyer and Terminer, the king's serjeant, the king's attorney general, before this inquest to be taken, of the high-treason whereof Ambrose Rookwood, the prisoner at the bar stands indicted, let them come forth, and they shall be heard ; for now the prisoner stands at the bar upon his de-

liverance, and all others that are bound by recognizance to give evidence against the prisoner at the bar, let them come forth, and give their evidence, or else they forfeit their recognizance.

Cl. of Ar. Ambrose Rookwood, hold up thy hand, (which he did). You that are sworn, look upon the prisoner, and hearken to his cause. He stands indicted by the name of Ambrose Rookwood, of the parish of St. Paul, Covent-garden, in the county of Middlesex, gent. for that he, together with Christopher Knightley, not yet taken, Robert Lowick, and Charles Cranburne, and divers others, false traitors, &c.—*prout* in the indictment, *mutatis mutandis*, and against the form of the statute in that case made and provided. Upon this indictment he hath been arraigned, and upon his arraignment hath pleaded not guilty, and for his trial hath put himself upon God and his country, which country you are ; your charge is to enquire, whether he be guilty of the high-treason whereof he stands indicted, or not guilty ; if you find him guilty, you are to inquire what goods or chattels, lands or tenements he had at the time of the high-treason committed, or at any time since : if you find him not guilty, ye are to inquire whether he fled for it ; if you find that he fled for it, you are to inquire of his goods and chattels, as if you had found him guilty : if you find him not guilty, nor that he did fly for it, you are to say so and no more : and hear your evidence.

Mr. Mountague. May it please your lordship, and you gentlemen of this jury, this indictment that has been read to you, does charge the prisoner with high-treason for compassing and imagining the death of the king, for endeavouring to subvert the government, and to subject the people of England to the slavery of Lewis the French king ; and for this end the indictment sets forth, that the prisoner at the bar did privately meet with several false traitors, to consult how they might compass the death of the king, and commit those other treasons ; and that the 10th of February, at Covent-garden, in this county, it was agreed among them, that they should get together forty horsemen, whereof the prisoner at the bar was to be one, and they were to lie in ambush, and set upon the king in his coach upon his return from going abroad ; some were to attack the coach, others to attack the guards, and there were some to kill the king in the coach : and the indictment does likewise charge the prisoner with gathering together horses, and providing arms for this purpose. To this indictment, gentlemen, he hath pleaded not guilty ; we shall call our witnesses, and prove the fact, and when we have so done, we do not at all doubt but you will do your duty.

Sir B. Shower. My lord, before the witnesses are called we have a doubt to propose to your lordship upon this act of parliament, and that is, whether we are to take our excep-

tions to this indictment before the evidence be opened or given?

L. C. J. It should properly be before the jury is sworn.

Sir B. Shower. The words of the act, my lord, are "before the evidence given."

L. C. J. That act provides, That if you do not take the advantage of it before the evidence given, you shall not move that in arrest of Judgment.

Sir B. Shower. It only says before evidence given, and no evidence has yet been given.

L. C. J. But you are certainly very irregular in point of practice, nobody ever took exceptions to an indictment after the jury was sworn.

Sir B. Shower. If your lordship pleases to let the words be read of the act of parliament, they are these: That no indictment shall be quashed, unless exception be taken in the court where the trial shall be, before any evidence given in court upon that indictment. Which, we say, strongly implies, that the law-makers thought it might be done at any time before the evidence was given in open court, besides that the law takes notice that after conviction it should be of no avail; it would have been a very improper expression before evidence given in open court, if it had meant before the jury were sworn and charged; for the word evidence supposes the trial commenced; if they had intended it otherwise, that is, that it should be before the jury is sworn, they would have expressed it to be done at the arraignment: but mentioning it to be done in the court where the trial is to be, before evidence given, that supposes the indictment to be at issue before the party needs to make his exceptions. Therefore, my lord, we hope we are regular in offering our exceptions now.

L. C. J. Pray, what say you to it, Mr. Attorney?

Att. Gen. Truly, my lord, I think they are no way regular; for, with submission, I take it, that though this Act of Parliament has indulged them with several things which were not allowable by law before, yet as to this part they are not allowed to take exceptions to the indictment, otherwise than they could before this act was passed: nay, so far from that, that if your lordship looks into the act, you find they are restrained in this point from an advantage that they had before, that is, they shall not move any such things as are there mentioned, after verdict in arrest of judgment: so that this part is restrictive to the prisoner, and takes away some advantage that he had before; which was, moving in arrest of judgment after verdict; but it leaves the making exceptions as to any time before the verdict as it was before, which was before plea pleaded, but not after the jury sworn: for it cannot be denied that in point of practice, such a thing as this that is now offered could not have been done before the act. I would be glad to know whether they can shew any pre-

cedent of any such thing as they now contend for. They say, the words of the act are, exception must be taken before evidence given; but that must be taken at such a time as they might by the course of law do it before: for when the jury is sworn, they must give a verdict, and I do not know how they can be discharged without giving a verdict; therefore unless the act had given directions for a particular manner of proceeding in this matter, which it has not done, your lordship will not, I presume, do it in any other manner than as it was before the act made; and if there be no precedent to be shown of any such thing as this, of taking exception to an indictment after the jury sworn and charged with the prisoner; then there is no power in this Act of Parliament, given to them to take exceptions to this indictment at this time; we take it the motion is very irregular upon all accounts.

Sol. Gen. My lord, we first say, that it is not proper for them to make any such motion as this upon this Act of Parliament, till they tell us what their exception is, that we may see whether it be within the words and meaning of this Act of Parliament. The only thing now that is proper for us to consider, is the issue joined, and the inquiry whether the prisoner at the bar is guilty of the high-treason of which he is indicted, to which indictment he has pleaded Not Guilty: that is the thing that is now before your lordship to be tried, they have room for exceptions to the indictment afterwards, for some exceptions I mean, (I do not know what their exceptions are) but if they be such as may be taken after the verdict, then I am sure they are irregular now in their motion, and they can shew no precedent, when it was done after plea pleaded and issue joined, as it is in this case.

Mr. Conyers. The advantage that the act gives the prisoner, of having a copy of his indictment so long before trial, is to enable him to plead, or to take exceptions to quash it; but I never heard a motion to quash an indictment after a jury is charged to hear the evidence. Certainly they ought to do it before plea pleaded, and not now to come to make a motion to quash the indictment, after they have pleaded, and the jury sworn: therefore we submit it, upon the constant practice in like cases, to the judgment of the court.

Sir B. Shower. In answer to that which Mr. Attorney hath said, that it is an improper time; I thought truly I had moved it for the advantage and ease of the king's counsel, that they might not proceed upon this trial, when perhaps after all their trouble, the foundation, which is the indictment, may fail. I have a great many exceptions to the indictment; they say we should name what our exceptions are: I will acquaint them with them as fast as I can; if your lordship please, the indictment is very loose and uncertain.

L. C. J. Certainly the motion is irregular in point of practice.

Sir B. Shower. My lord, we were afraid, we

should be excluded from taking these exceptions after the evidence given.

L. C. J. So you are by the express words of the act.

Sir B. Shower. Then certainly we may do it before the evidence given.

L. C. J. But the act does not say, ye shall do it any time before the evidence given, especially in such an irregular manner, after issue joined and the jury sworn. Suppose Mr. Attorney had given some evidence.

Sir B. Shower. Then, my lord, I agree we had been without the words; therefore I now move it before the evidence, because the Act of Parliament has given me liberty to do it before the evidence given: for the law having given this liberty to the prisoner, to make such exceptions within such a time, your lordship will not restrain us from making use of that liberty further than the law has restrained, but we may make use of our exceptions before the evidence given, either to induce your lordship to quash the indictment, or the jury to find us Not Guilty, as we hope your lordship will direct them to do: for what is more common upon indictments after the jury are sworn, than if facts appear upon the record not to be sufficiently alleged, the court will direct the jury to find the party Not Guilty. We think this act does give us this liberty, otherwise I know not to what purpose it was made; the very meaning seems to be, that the exceptions of the counsel for the prisoner might be of prejudice to the king; and therefore it says after the king's evidence given, and the fact discovered, no such exceptions shall be made: therefore we must make it before the evidence given, otherwise this Act of parliament, that was designed in favour of the prisoner, will prove a very great hardship upon him, especially in case of an imperfect indictment, as we apprehend this is, and he will be in a worse condition than ever he was; he must take his exceptions now or not at all. The act says, he is not to take it after evidence given; and by construction the king's counsel would have it, that he should not give it before: and consequently he has no time at all to give it.

L. C. J. Have not you had time to do it before now, sir Bartholomew Shower? Certainly you had. You had time this day seven-night, when you were arraigned; you have had your opportunity if you would have taken it; the jury are now charged, the indictment is opened, they have been told what they are to enquire of, and now you would break in and take exceptions to the indictment.

Sir B. Shower. My lord, this is a new act of parliament, it says we shall take our exceptions before the evidence given; which we take it, is any time before the evidence given; and if your lordship will not allow us to do it now, it may be, we may lose the benefit of it absolutely.

L. C. J. It is one question whether we shall allow it or no; and another question whether you can claim it or no: certainly it is an irregular motion, and the like of it was never offer-

ed in any case before, be it criminal or civil: for if it be a criminal case that is not felony or treason, when the issue comes to trial upon an indictment, did you ever know any exception taken to the indictment after the jury were charged? Certainly it is contrary to all practice; and it is not fair, the court is not well dealt with; you have had an opportunity before, and will you now put the court and the jury to so great deal of trouble, to stay till the jury be called over? The prisoner called to his challenges, he has challenged thirty-four, the jury is sworn, the indictment is read to them, the charge given them, the counsel have opened the indictment; and now when the business is only to try the issue with which the jury are charged, you come to turn us quite round, by taking exceptions to the indictment.

Mr. Phipps. My lord, we take it the act gives us this time to do it in.

L. C. J. You know you had another time more proper to do it in.

Mr. Phipps. My lord, if we have not time now; then this clause with humble submission, signifies nothing at all.

L. C. J. The clause was made in this respect, to your disadvantage, because you should have a copy of the indictment, whereby you might have an opportunity to advise with counsel, that they might instruct you how to plead, and to take any manner of exception before plea pleaded, it ought to be before the trial, and now because of this advantage, it provides that you shall take your exceptions before the trial, and not move them in arrest of judgment, that is the meaning of the act.

Mr. Phipps. Then, my lord, there needed no time at all to be mentioned in the act, but have left it as it was at common law.

L. C. J. Yes, yes, there did need a time to be limited; for this clause was made I say in your disadvantage, in depriving the prisoner of the benefit of such kind of exceptions in arrest of judgment, because of the advantage that was given in the former part of the act, where you had time given you to make your exceptions, for which end you are to have a copy of the indictment five days before you are called to plead.

Sir B. Shower. We could not come before, my lord, as we apprehend, because the words of the act are "before evidence given."

L. C. J. But I tell you, this clause was not for your benefit, but for your disadvantage.

Sir B. Shower. My lord, what we press arises from the very words of the act of parliament, if the meaning of the law-makers was as the king's counsel now contend to have it; they would never have used those words "before evidence given in open court," but have said they should have had no advantage of the exception, unless it were before plea pleaded; it does not say it shall be after the verdict, or before the verdict, but before the evidence given now if they had meant what these gentlemen say, they would have appointed it to be before the verdict, which would have included the

trial; because then it had been like the penning of other acts of parliament, the statutes of Jeofailes and the like, which say, that after a verdict, such and such exceptions shall not arrest a judgment: but if they can shew me any statute that is penned like this, they give me an answer: all those statutes are, that no judgment shall be arrested or delayed upon such or such exceptions after a verdict: but here it says they shall not arrest judgment, unless the exception be taken before evidence given in open court. My lord, we submit it to you, we think the law-makers did intend somewhat by that particular way of expression, different from all other acts of parliament; and truly if it be not as we offer to your lordship, we think it can have no meaning at all.

Att. Gen. Truly, my lord, we think it is very plain what the parliament meant, by this clause in this act; the design was, to restrain the prisoner from moving in arrest of judgment, for mis-spelling, or false Latin, or little matters of form, if he did not move it in a proper time, having such a liberty allowed him, as to have a copy of the indictment so many days before he was compelled to plead: they insist upon it, that the words are, before evidence given; it is so: but what can be the meaning of that? It must be at such time as the law allows; it is not making a new method of trial; you shall take exception before the evidence, that is, before the trial, for it can never be intended, that they meant to alter the course, and let the counsel break in between the time of the jury's being sworn, and the evidence given; that by no law could ever have been done before.

Sir B. Shower. Pray, Mr. Attorney, when would you have us do it?

Att. Gen. Regularly before plea pleaded, at least-wise before the jury be sworn.

L. C. J. Undoubtedly this is not regular, it is contrary to all the course of practice, it is not fair dealing with the court. But then there is another consideration in the case, that I would have you think upon: if so be this had been at a trial by *Nisi Prius*, then the judge of *Nisi Prius* is only to try the issue; but now here the very record is before us, and we are judges of the record, as well as we are to assist the jury in trying the issue. Now take it in any other case of the like nature; suppose a trial at the bar in any civil cause, though this be contrary to practice, and the court not fairly dealt with, yet when we have the record before us, and find an error in the record, cannot we quash the indictment and discharge the jury? That is the question, Mr. Attorney, though I must confess, I do not know that it has been practicable.

Att. Gen. No, my lord, in a case of treason, where the jury are once charged, they are to give a verdict, they must either acquit or convict.

Sir B. Shower. It was done in Whitebread's case.*

Att. Gen. But I know what has been usually thought in that case, and I believe they cannot shew me another.

L. C. J. Nay, that this is a very irregular motion, is very plain.

Sol. Gen. Certainly, my lord, you must take it as the law was before this act, for this clause does nothing for the prisoner, but is against him.

L. C. J. I know it is not for the advantage of the prisoner, therefore I put it as a case in an action, or an indictment, as the law was before, whether this being a trial in the same court where the indictment was found, and we find an insufficiency in the record before us, whether we cannot quash the indictment?

Sol. Gen. Your lordship mentions civil actions; with submission, nothing of that kind could be done after once the cause came to trial, but in criminal causes according to the course of practice, which will always be the law till particularly altered; I believe nobody can pretend that after issue joined, and a jury charged, any one can move to quash the indictment. I think I have heard it often said in this court, that in capital cases, as high-treason, you may put in a plea in abatement of, but not a motion to quash an indictment; I am sure it was disallowed where I moved to quash an indictment of murder, let them but show any precedent of this nature.

Sir B. Shower. We will show you, though this is the first case upon this act of parliament, therefore to show any practice upon it would be very hard to require of us.

L. C. J. But can you show it before this clause in this act of parliament? which, as I told you, is not for your advantage; it does not give that liberty that you desire.

Sir B. Shower. All the clauses in this act of parliament showed their intention was this, that the sense of the law-makers was, that we should have this liberty at any time before evidence given, for if there be such words as showed they thought it might be quashed at any time, though they were mistaken in the practice, yet we shall have the liberty that they intended us; and the wording of this act shows, that the parliament thought it might be done after the trial begun, before evidence given, because they restrain us from taking those exceptions after the evidence given; and it is no prejudice to the king at all really, it is rather for the advantage of the prosecution, because there is none of the evidence disclosed, and therefore if the indictment should be found faulty, still the evidence remains undiscovered upon another indictment; and I have often heard it said at this bar in cases of indictments for felony or treason, as murder, or the like; if any one did come as *amicus curiæ*, and acquainted the court, that they were going to proceed upon an erroneous record, or give an erroneous judgment, or do any other erroneous act, he ought to be received with kindness, because he would prevent a wrong doing.

* See vol. 7, p. 311 of, this Collection.

L. C. J. That is in the proper time, not to interrupt the trial when the jury is once sworn.

Sir B. Shower. We are ready to offer our exceptions, and we hope it is no prejudice at all to the king before the evidence of the fact is given.

Mr. Phipps. My lord, I perceive that this clause, as they would have it, is intended to prevent us from moving that in arrest of judgment, which we could have moved before, and ties us up to do it before evidence given; now I would fain know, if we could not before this act move in arrest of judgment for mis-spelling, or false Latin, or improper Latin.

Att. Gen. You might, no doubt of it.

Mr. Phipps. They say we might; why then, if we could have a time to move it after the verdict, and that time is abridged by the act of parliament, which directs that it shall be before evidence given in open court, sure we may take any time before the evidence given, and shall not be restrained further than the letter of the law has restrained us; for this act was intended for the benefit of the subject, and ought to be construed as much in their favour as the letter of it will permit.

Att. Gen. No doubt of it, it is to be done before evidence given: but the question is, at what time it must be before the evidence given, whether it must not be at such time as by the course of practice and usage of the law it should have been done before; if you will satisfy my lord and the court that ever such an exception was taken, or an indictment quashed between the swearing of the jury and the giving the evidence, ye say something; but I believe not one instance of that nature can be given, and therefore it is very irregular for them to do it.

L. C. J. They do not pretend to it, for aught I hear, for I would put them upon it, to show me whether they could do it before.

Sir B. Shower. I do not question, my lord, but it might be, with submission.

Mr. Conyers. Did you ever know it before that any one undertook to inform the court as *amicus curiæ*, but it was to prevent a wrong judgment? And for that you have your proper time either before plea pleaded by motion to quash the indictment, or after verdict to arrest a judgment; this act of parliament has restrained you in particular instances that are mentioned from doing it after verdict in arrest of judgment; but having given you a copy of the indictment before you pleaded, you have had a proper time to make these exceptions; and if you have lapsed your time you come too late to do it now, for sure nobody ever made a motion to quash an indictment after issue joined, and the jury sworn.

Sol. Gen. My lord, I would only mention one case, and that was of sir Richard Mansell, upon an indictment of murder, for killing the apothecary in Holborn; I did myself move to quash the indictment, because it was not expressed in what year of the king the fact was done: but the court was of opinion we could not move to quash an indictment for that,

or any such notorious crime, till after the fact determined.

L. C. J. No, we were always of that opinion, never to allow motions to quash indictments for perjury, murder, or any great offence, but it must be moved in arrest of judgment afterwards.

Mr. Cowper. My lord, these gentlemen seem to beg the question upon this act of parliament, as if it had appointed this to be the time of making exceptions to the indictment; the act of parliament does not say you shall make your exception immediately before the evidence given in open court, as if it had pointed out and directed to them that particular time, that then they should take their exception and no other time: The act has only set a bound, that they shall not do it afterwards; but as to the particular time, it is left as it was before to the regular course and method of proceedings, which is before plea pleaded.

Mr. Phipps. My lord, they do not answer my objection; it is, it seems, a restriction of a liberty that we had before of moving in arrest of judgment; if so, we ought not to be restrained further than we are by the words of the act of parliament, which say, before evidence given, that is, at any time before evidence given, as well after as before plea pleaded.

Sir B. Shower. I would ask these gentlemen, whether the law-makers intended that we should have no advantage of excepting against false spelling and improper Latin?

Mr. Conyers. Yes, they did, but that you should do in your proper time.

Sir B. Shower. Then the time for doing it must be that which the words of the law say, before the evidence given in open court, and that is now.

Mr. Conyers. No, you might have come at the day of arraignment, and have taken the advantage of it then before you had pleaded.

L. C. J. Ye have had my opinion what I think of it, my lords and brothers, I suppose, will tell you theirs.

L. C. J. Treby. My Lord Chief Justice has delivered his opinion in this matter, and he thinks fit that we should deliver ours. I think this motion of the prisoner's counsel to quash this indictment after the jury sworn, is irregular and quite out of season; the intent of this clause in this act of parliament, certainly was not in favour of the prisoner; it abridgeth him of a liberty he had before, but gives him nothing: for the law-makers did think they had given the prisoner an extraordinary favour in the foregoing part of the act, in giving him a copy of the indictment five days before he should plead, and a copy of the pannel two days before he should be tried, and allowing him counsel: and all these advantages were to enable him to quash the indictment, or the process returned, for the clause extends to both; the words are, "That no indictment nor process or return thereupon, shall be quashed on the motion of the prisoner or his counsel for mis-writing, mis-spelling, false or improper

latin, unless exception concerning the same be taken and made in the respective court where such trial shall be by the prisoner or his counsel assigned before any evidence given in open court upon such indictment, nor shall any such mis-writing, &c. after conviction be any cause to stay judgment:" Therefore they made this extraordinary provision to restrain the prisoner, in part, by this clause; as much as to say you have an advantage of the copy of the indictment, and you may make use of that to quash it by motion, if you think fit, as you may also the process, but it shall be 'before evidence given.' It is true, those are the words, but the using that term, viz. 'quashing' such indictment or process, shows it must be done in such a way and time as is proper for quashing; and the very words are, that it shall be upon motion. Now we are to expound those words. And I say, a motion to quash an indictment, must be understood a motion in the proper season, which I think is before plea pleaded; but at least before the jury is sworn. There were three times when the prisoner might have had the advantage of a fault in the indictment before this act. 1. By motion to quash it before plea pleaded. 2. Then afterwards in arrest of judgment: and 3. After that by writ of error. Now this clause of this act takes away the privilege of moving in arrest of judgment for mis-writing, &c. but saves the advantage upon a writ of error, and upon a motion to quash the indictment. We are to consider what is a proper time for a motion to quash an indictment; the motion is to be made to the court and to them alone. It is not to be made to the court and the jury. When the jury is sworn all application is to be made to the court as having a jury present which they are to assist in the trial and determination of the fact only. What use then is there of the jury, when you make this motion, which consists only in points of law? They must stand by and be out of office all the while this motion is making: and it is not reasonable, nor certainly ever was intended, that after a jury is sworn to try a matter of fact, they should stand idle while you move a thing which you should have moved before they came to the bar: suppose you should now move some exception to the Venire, and the return thereupon, should we, when we and you also have admitted the jury to be sworn, quash the process whereby they are returned? And yet we may as well do that as this. For, the act provides in the very same words concerning quashing process and indictments. But when the jury is sworn, and ready to receive their evidence, sure, then it is out of all season to make such a motion; therefore I do not think the parliament intended by this clause (which was a kind of exception to the favour the prisoner received by having the copy of the indictment) to institute a new method of proceedings for motions to quash indictments, even when a jury is at the bar and sworn to try the issue, and there is nothing proper to be proceeded upon, but only to hear

the evidence produced for the proof of that issue, till the jury is discharged. But still this I would say, this is a new case, and upon a new statute. I am truly of opinion, that the motion is altogether unseasonable and irregular, and it should have been made before, and you had a full opportunity to make it this day seven-night before plea pleaded, and you might likewise to day before the jury was sworn; therefore when the jury are now at the bar actually entered into, and employed upon the service, the court ought not to be interrupted by such a motion. Yet nevertheless I would propound this, that, seeing it is a new case and upon a new statute, the court would forgive the irregularity, (for I think it does need forgiveness) and if the king's counsel will consent to it (to prevent any error or any pretence of hardship upon a new law) that we should hear their exceptions.

L. C. Baron. (Sir Edward Ward). This act of parliament, as it has given a benefit to the prisoner that he had not before, in allowing him a copy of his indictment, in order to his making exceptions; so it has restrained him as to the time of making those exceptions: that he should have time, there is no doubt: the time limited for it, as this act says, must be before evidence given, because they thought it unreasonable that there should be any quashing of the indictment after such time as the king had given any evidence whatsoever in the case; for that would be a discovery of the king's evidence, and great inconveniences would ensue thereupon; but the question is at what time this is to be done; whether it may be at any time before evidence given or no; it did intend surely that the motion to quash the indictment and the exceptions to it might have their proper effect, and that must be before the trial; for it was not the intent of the act to alter the method of proceedings, and it is to no purpose after the jury is sworn, for then their proper office is to determine the fact; now if before this act of parliament it never was allowed to take any such exception as this after the jury sworn, it will be consistent with the words of the act of parliament, which are, 'That it shall be done before evidence given': if then it be in the regular time for motions, which is before plea pleaded or jury sworn, that is, before evidence given; for it is not said, as Mr. Cowper observed, that it should be immediately before the evidence given, I think sure such an exposition as was formerly made ought to be made in this case, the time not being precisely fixed by this act; if there were a certain time determined when men should take their exceptions, as we know it has been in practice before issue joined, then after the jury is sworn it is an improper time then, I think, to make such exceptions: I do not suppose this act, as to the method of proceedings—, than it was before, but this exception ought to be taken before plea pleaded: truly it is a new act of parliament, and this is so far within the words of the act that it is before evidence given, as the counsel for the prisoner

say. If this can be governed and ruled by proceedings and practice in former times in cases not of felony or treason, but only in criminal cases: If nobody should suffer by any interpretation, I should think it ought to bear a conformable construction to what the practice was before. I take it you have lost the regular time for making your exception, and you invert the whole method of proceedings upon trials: for to what purpose is it to take exceptions to quash the indictment when the jury are once charged with it? If it be an indictment that ought to be quashed, the jury ought not to be charged, you have had two times, and they are both of them elapsed, for this matter, that is, at the arraignment, and before the jury sworn; yet I would propose it to the king's counsel as my lord chief justice of the common pleas has done, it being a new case, that it should be better considered of and agreed upon, that in these cases we may go on upon a certain rule that it may be established for all time to come.

Just. Nevile. I would begin with the proposal, because, I believe, I may not be so clear in my opinion, otherwise I must deliver my thoughts according to my judgment, but I would have the king's counsel consider of the proposal.

Att. Gen. My lord, for us to consent to that in such a case as this, where the court thinks it not regular, would be pretty hard to desire of us; if any thing of advantage should happen on the other side, I verily think the counsel for the prisoner will not be so ready to consent to wave any such advantage, nor am I for asking them to do it; this clause goes only to some faults in the indictment; mis-spelling, mis-writing, false and improper Latin, that is all that they are restrained from moving in arrest of judgment; any thing else, any uncertainty or other matter, that is not comprehended under these particulars, they may take advantage of to move in stay of judgment after a verdict; this clause does only abridge them from moving in arrest of judgment for mis-writing, mis-spelling, false or improper Latin; therefore if your lordship should think it reasonable we should consent to let them in to make any exception now, it must be confined to those particular objections of false and improper Latin, there can be no colour to make the liberty larger, because for any thing else they are not restrained from moving it in arrest of judgment, for there can be no hardship in that case, as I think, they have no reason to complain that there has been in any other part of the case; but for those particulars that there may be no complaint of hardship, if your lordship thinks it reasonable we should consent, it may be we may be prevailed upon to do it, though whatever hardship does happen it is their own fault, and the prisoner may thank his own counsel for that hardship: if we assist them now to let them in, it ought to be taken as a great kindness; and truly, my lord, I am unwilling to do any thing that your lordship and the court should think hard upon the prisoner. Certainly it is the

fault of their own counsel, now the law has allowed the prisoner counsel, not to take the proper time, and pursue the usual methods; and it is a strain beyond what is usual, that we must help their faults by our consent; however, if the court think it reasonable, I shall not be against it, but then I am sure the court will take care they shall be confined to those particulars that are mentioned in the act.

L. C. J. No doubt of it: Therefore sir Bartholomew Shower, are your exceptions for mis-spelling, mis-writing, or false or improper Latin? for if they be such things as you may move in arrest of judgment and have that advantage, then there is no colour that we should break through all the rules of proceedings to admit such an irregular motion as this.

Sir B. Shower. My lord, in the case of the life of a man I will not take upon me to say what is mis-spelling, mis-writing, or false or improper Latin, or what is substantial; but all that I say is, I have five exceptions, every one of them imports a doubt, as I take it, worthy the consideration of the court, and some of them effectual enough to quash the indictment; but for me, when a man's life is at stake, and it partly depends upon me as his counsel, to say what is proper or improper Latin, or to admit it to be matter of substance, and then to-morrow to have it come and told me, you should have moved this to-day, then I am sure they would have reason to say, it was the fault of the prisoner's counsel; for he would have chosen very ill counsel, in me, I confess, if I should consent to put any such disadvantage upon him. I beg the favour that I may have the liberty to propose my objections, which I think are worth considering of; it is for the advantage of the king for us to take our exceptions all together, because, else, if any of them prove material, the trouble of the trial will be but mispence of time.

L. C. J. No, we cannot hear all your objections, but those that are mentioned particularly in the act of parliament! for such as are not mentioned in the clause, you have a proper time to move them in arrest of judgment.

Sir B. Shower. Then we will put those that are within the act.

Att. Gen. If we do any thing by way of consent in this matter, we must insist upon it, that they be confined to the particulars in the Act; we desire they may open their objections to the court, and if the court shall think they are properly under those heads, then they will consider of them, if the court be of another mind, then they must be reserved till the proper time.

L. C. J. Do you consent then, Mr. Attorney, that they shall now take those exceptions that are mentioned in the act of parliament?

Att. Gen. If the court think it reasonable upon those terms, I do.

Just. Powys. Let them open them if your lordship please, and let us keep the power in our own hands to do as our discretions shall direct.

L. C. J. Truly I do not know whether we can do any thing in this matter, I question much whether it be discretionary in us to break through all the common method of proceeding, and admit of such irregularities.

L. C. J. Treby. I have a great inclination to hear them, that we may get rid of these pretended exceptions, which I am apt to think will, when opened, disappoint the expectations that may be raised by this mentioning them in general; for, I have that opinion of the ability and circumspection of the counsel, that I believe if they had had exceptions sufficient to quash the indictment, we should have heard of them at a time more proper than this now between the swearing the jury and giving evidence to them. But, possibly, the counsel may think fit to make an essay, and try what can be got out of this unusual expression in this new act.

L. C. J. No, no, I know this is a piece of art, and the court is not well dealt with in it.

L. C. J. Treby. Indeed I am very willing to hear them for that reason.

L. C. J. I look upon it only as mere trick, and a piece of art to take the opinion of the court.

Sir B. Shower. My lord, it was my mistake then; for I take it, if the act of parliament had intended otherwise, they would have expressed it otherwise.

L. C. J. Does the act of parliament give you another liberty, and a greater than you had before? does it not design to abridge you of a liberty that you had before? Certainly it never intended that the court should admit of any irregular proceedings.

Just. Powell. You should have timed your motion better; for certainly now the jury is charged they must give a verdict either of acquittal or conviction; and if you move to quash the indictment, and your exceptions are material, the jury cannot proceed; you see what a pass your motion has brought it to, 'tis certainly a mighty irregular motion.

L. C. J. Treby. What judgment would you have us give? I would ask you that: if any exception were moved before the jury were sworn, and it proved material, the proper judgment were, that the indictment be quashed; but now they are sworn, what judgment must we give? Must we not expect the verdict of the jury first upon the fact? And must we then give judgment upon your exception?

Sir B. Shower. I know not whether your lordship may not give judgment first to quash the indictment, and then discharge the Jury.

L. C. J. Treby. And what if we do not find cause to quash it, then you will say, we must go on with the evidence, as we were going before this interfering? Are we to be doing two things at once? I am pretty certain you can show me no precedent for any like proceedings in any case: it is confounding the offices of the judge and jury.

Mr. Phipps. If your lordships tried the validity of our exceptions, and find occasion to

quash the indictment, there will be no need of a Jury.

L. C. J. Upon the statute of *Jeofailes* in a civil cause, suppose at a trial at bar, it appears upon the face of the declaration, that there is such a mistake as will be cured by the verdict; but if the party had demurred, and shown it for cause, it would have been fatal. Do you think, when he has waved the benefit of demurrer and pleaded to issue, that you shall move this and help yourself by such a motion, because it will be helped after a verdict?

Sir B. Shower. If this act had been worded as that Statute of *Jeofailes* is, it may be we might not.

L. C. J. Why, it is not said, in the Statute of *Jeofailes*, that it shall be good after issue joined, before the jury is charged or sworn, but that it shall not be good after the verdict.

Sir B. Shower. It is before the evidence given.

L. C. J. Could he do so in any case before this act, and does the act enlarge your liberty, or abridge it?

L. C. J. Treby. Sir Bartholomew Shower, you insist upon part of the words of the act of parliament; it says, No indictment or process shall be quashed upon the motion of the prisoner or his counsel, unless it be made before any evidence, &c. Now, I suppose, the parliament use that expression, 'upon the motion,' in the same sense as it is used in law, viz. for such a one as should be in the time when motions for quashing the indictments are properly to be made; now, when is that? It is plain, it was always before the jury come to the bar, nay before the plea of the party. If that be the proper time to make such a motion, then that expression in this act of a 'motion to quash the indictment' will very well help to construe the other part of the clause that you insist upon: For if the motion be made before plea pleaded, it is certainly before the 'evidence given' in your sense. And I conceive, that under that expression [evidence given] which signifies the main part, the parliament intended to comprehend the whole proceeding to trial, beginning, if not from the pleading Not Guilty, at least, from the swearing the jury. 'Before evidence given in court,' may reasonably be expounded, 'Before the prisoner hath fully entered into that contestation of the fact, which is to be determined only' by evidence in court. I attended the court of King's Bench a long time, and I believe that I have heard it said a hundred times, upon motions to quash indictments of great or odious offences: No, try it, says the Court, we will not quash it, plead to it, let the fact be tried, you may then move it in arrest of judgment. Those expressions shewed that the proper time for a motion to quash an indictment was before plea, though they, in their discretion, would not grant a motion to quash, in cases of such great offences. But sure they did not think that when a jury came to the bar, it was a tolerable time to move to quash an indictment; there was no expecta-

tion of hearing of such a motion then. And certainly this clause which is made wholly against the prisoner, should not be construed to help him to such a new extraordinary and absurd liberty.

Sir B. Shower. My lord, with submission, that practice goes upon another reason, the court would not quash it at all upon a motion; this act of parliament supposes that you will quash upon a motion at any time before evidence given: We never heard of a motion to quash an indictment for felony or treason, but still the court would always say, demur, or plead, or move in arrest of judgment; but by this law it seems the sense of the parliament was, that it might be quasht upon a motion.

Sol. Gen. Sir B. Shower is come to what I said, that in truth there is no such thing as quashing an indictment for treason or felony, as I mentioned in sir Rich. Mansel's case, and I think the rule that was given in that case will serve now in this case; I am for consenting, if they be kept within the limits of the act of parliament; but I must desire the opinion of the court before we do consent.

L. C. J. Holt. Aye, aye, Go on, brother Nevile.

Just. Nevile. I must confess I cannot but doubt, as this act is, there were two times that they had liberty of taking these exceptions to indictments; but indeed, in murder and treason they were seldom admitted, till they came to move in arrest of judgment; but still there was always a privilege, and a time given to the prisoner, be the crime what it would, to take that advantage which the law gave him, to prevent judgment against him. Now I agree, it is irregular and unseasonable to offer it now, and quite different from all former practice; you might have done it before now, the act says expressly it must be done before evidence; but you might have taken advantage before the jury was sworn, nay before you had pleaded, but you have lapsed your time. Yet truly, notwithstanding you have lapsed your time, I cannot satisfy myself to take away the liberty that the law has given the prisoner sometime or other, to except against the indictment. It is plain that before this act, after verdict he might have moved in arrest of judgment, now he cannot do so; whether the fault be in the counsel I cannot tell, but the great prejudice is to the person that is to be tried, who will now be wholly precluded from making any advantage of the exceptions he has to the indictment, because by the act he cannot move in arrest of judgment. This seems a strong implication that the parliament intended he must have some time or other, but before evidence given, to offer his exceptions. I say this only to those particular things that are mentioned in the act, mis-writing, mis-spelling, false or improper Latin; as to these four particular things which the party is barred from moving in arrest of judgment, I cannot satisfy myself but that he should have one time or another to take this advantage before the evidence given, and there-

fore I think he should have it now: It is true, it is altogether irregular, the jury being sworn, and it ought to have been done before; but I hope if it be admitted now, it will be with such observation, that nobody will ever offer at it for time to come. As this case is before us, and the act of parliament, which perhaps may have led the counsel into that mistake, that it might be any time before evidence given, though they know the proper time, and the regular method in other cases; yet I doubt it is hard to put such a construction upon this act on the sudden, quite to debar the prisoner of the benefit of his exceptions to the indictment.

Just. Powell. I have already declared my opinion, that the prisoner has had his proper time for making his exceptions, but he has lapsed that time; but I am not against that motion in a case of life, upon an indictment for so great a crime as treason is; and where the consequence is so great, if it may consist with the rules of law, and it be the sense of the court, and the king's counsel consent to let them be heard, I submit to it, nay I would second or third that motion that they may be heard.

Just. Eyres. Truly I am of the same opinion, I think we ought not to alter the ancient course of law by words of implication, nor go any further than the act of parliament does express. The act appoints that a copy of the indictment should be delivered to the prisoner so many days before, to enable him to make his exceptions, and therefore deprives him of the benefit of those exceptions after conviction in arrest of judgment. I see no words in the act of parliament that do alter the course of proceedings as to this matter, from what it was in all civil and criminal causes before; persons must take their advantage of excepting in their proper time, but when it comes to issue, the next thing to be done is the trial; and truly I must needs say the counsel are to blame, that knew this so very well, that if they have any advantage of excepting, they did not take that advantage sooner, it is their fault; but seeing it is so, I am of opinion not to foreclose the prisoner, as the case stands. I would be tender of life, but at the same time I declare my opinion upon this act of parliament as the rest of my brothers have done, to prevent the objection for the time to come; yet seeing there is this misfortune, and there would be a hardship upon the prisoner by the default and neglect of his counsel in the case of a man's life, I would be so tender as to indulge them to make their objections now.

Mr. Baron Powys. I am of the same opinion the prisoner has lapsed his time, for I take it this clause of this act of parliament has not altered the common course of proceedings; nay, I take it, it signifies very little in this case; for certainly it was intended to disable the prisoner, and not enable him at all; and therefore, as the case is, I think it very irregular and impracticable to introduce so great a novelty, as to admit the motion for quashing the indict-

ment, when the jury is sworn, and when the fact is the only single point to be determined, and every thing else ought in legal course to come before or after, but for us to confound time, one time for pleading, another time for trial, and another for arrest of judgment, all at once, and to have a jury attending merely to hear counsel at the bar moot points of law, which might be determined either before or after the trial, is so very irregular, that it really introduces nothing but confusion, which courts of justice ought to avoid above all things, and ought to keep to the proper seasons that the law allows. Therefore, truly, I think in strictness of law we ought not to allow it; but it being in a case of life, and it being a new case upon a new act of parliament, if the king's counsel thinks fit to consent, I shall be for it; if not, I think in strictness of law we cannot allow it.

Att. Gen. My lord, I am very unwilling to deny the prisoner any advantage that he might have had by this act of parliament, though his counsel have slipt the proper time; if sir Bartholomew Shower will say his exceptions are to any of the four particular heads mentioned in this clause of the act of parliament, for we must confine them to that, then we do consent that he should make them now.

L. C. J. Truly, Mr. Attorney, if you do consent that they take their exceptions now, we may consider of it whether it can be; but I know not how we could admit them to that liberty otherwise, for if there be any thing material, they may move it in arrest of judgment.

Att. Gen. And I believe they won't say their objections are so slight, as to be only matter of form; they say they are substantial, and then your lordship will hear them in a proper time.

Sir B. Shower. I do not know whether I am mistaken in the law, I am sure you are mistaken in the indictment.

L. C. J. Well, do you consent to let them make their objections, as to those four heads in the act of parliament?

Att. Gen. Yes, my lord; if it be any matter of substance, that is out of the case at present, for the provision of the act of parliament is only for mere matter of form, and I should be very unwilling in any point that is material, to make a precedent in such a case as this.

L. C. J. I confess if you had consented farther, I do not know how we should have admitted of it.

L. C. J. Treby. I tell you how I thought it might be done; you might have committed an irregularity, for which in a case of life, and upon a new law, I believe and hope we should have been forgiven.

L. C. J. Well, for my part I will not commit any irregularity upon any account whatsoever; I cannot see how by law they can take any exceptions to the indictment; Mr. Attorney cannot consent, and if he did, I think it could not be, unless he did also consent to discharge the jury; but I see they will not offer any ob-

jections according to your consent, Mr. Attorney, and therefore pray go on to open the evidence.

Att. Gen. May it please your lordship, and you gentlemen of the jury, the prisoner at the bar, Ambrose Rookwood, stands indicted for high-treason, in compassing and imagining the death of his majesty. Gentlemen, the overt-acts that are laid in the indictment to prove this treason, are; that he, together with divers others, had frequent meetings and consultations in order to assassinating his majesty's royal person, and did provide horses and arms for that purpose.

Gentlemen, the evidence that you will hear, to prove these facts that are thus laid, will be of this nature; you will hear by the witness, that there has been for some years a design carried on to murder the king's person; that this was discoursed of, and several debates and consultations were had about it the last year, some time before the king went to Flanders; there was several meetings, where were sir William Parkyns, captain Porter, and Charnock that was executed, and several others, and there they did consider in what way to take off the king at that time; and you will hear they did expect a commission to authorize it from the late king James; but then the commission did not come, they had not any such at that time; but they did think fit to put it in execution without any such order and authority, and therefore they endeavoured to have got a vessel to have carried them off after they had executed this bloody conspiracy; but it happened his majesty went to Flanders sooner than they thought, and they could not provide themselves of a security for a retreat, and so at that time the design was laid aside.

But, gentlemen, you will hear this conspiracy was renewed, and set on foot this winter; and in order to the accomplishment of it you will hear, that about Christmas last there were several persons sent from France by the late king James, on purpose to put this horrible design in execution. Sir George Barclay was to be at the head of it; he was a lieutenant in one of the late king James's troops of guards in France, he was sent over with a commission, and Mr. Rookwood, the prisoner at the bar, was a brigadier in the guards there; these came over, and several other troopers of the late king James's guards, by two or three at a time, that they might not be observed; particularly you will hear, that when sir George Barclay was come over, several troopers were sent by king James himself to come to him at St. Germain: and there he told them he had a piece of service for them to do in England, and that they should observe sir George Barclay's orders and directions. More particularly there was one Harris and Hare, two troopers in the guards, were sent for by the late king James into the late queen's bed-chamber at St. Germain, where colonel Parker was present; they were told by the late king, he was sensible they had served him faithfully, and he

would advance them, and he had now a piece of service for them to do, which would enable him to do it. He told them they must go over into England, and be sure to obey sir George Barclay's directions; and they were ordered to endeavour to find out sir George Barclay when they came into England; and were told by him, that they would meet sir George Barclay twice a week in Covent-garden-square, in the evening, and the token by which they should know him was, he would wear a white handkerchief out of his pocket; this they were told by the late king, when he sent them upon this errand. Colonel Parker was by at the same time, and being there, he was ordered to go to Mr. Carol, secretary to the late queen, who had order to furnish them with money to bear the charges of their journey into England; and if they were detained by contrary winds, they had letters of recommendation to Monsieur Latour the French king's president at Calais, to furnish them with money to bear their charges over into England; and accordingly they went; but being detained at Calais for want of wind, they were furnished by the French president; and by the beginning of February they came over.

But I omitted one thing, gentlemen: Before they came over, the late king when they were with him took a list out of his pocket of names, and told these two, Harris and Hare, what names they should go by in England; Harris was to go by the name of Jenkins, and Hare by the name of Guiny; and accordingly they came over in a boat, and landed in Kent; and when they came to town, they endeavoured to find out sir George Barclay: The first time I think they did not find him; but the second time they did find him; and he saluted them, and told them he was glad to see them come over, and he would furnish them with money; and he sent major Holmes to them; and according he did come, and give them subsistence-money.

Now, gentlemen, you will hear that sir George Barclay being come over with these troopers, and many others, to the number of sixteen, that at several times were sent upon this conspiracy; I say, after they were come, sir George Barclay had frequent meetings and consultations with several other persons that were to be engaged in the same design; and they met at several places, sometimes at captain Porter's, sometimes at the Nag's-head in Covent-garden, at another time at the Sun tavern in the Strand; and you will find by the evidence, that the prisoner at the bar, Mr. Rookwood, was present at most of those meetings; and there they did consult of the best ways and methods for putting this conspiracy in execution; sometimes they thought of doing it by an ambush laid on the other side of the water, by persons on foot, in a little wood there near Richmond, where the king was to pass by, whilst others on horseback were to take notice of their firing, and then to attack the

guards. This was proposed: but there was another proposal to do it on this side the water; and therefore to settle the matter one of the conspirators, King, was sent to view the ground on the other side of the water; and he did glory that he had found a very proper place, and thought it a very convenient method; but yet they were not all satisfied; and at the Nag's-head-tavern in Covent-garden they did debate the matter again, and it was resolved to have the ground viewed again; and Porter, and Knightley, and King that was executed, went to view the ground on both sides the water, to see which was the most convenient place; this was about the 12th of February they did take an account of the most convenient places on either side; and when they had done it, they came back in the evening to give an account what they had done, to several others of the conspirators who met for that purpose; and I think the prisoner at the bar, Mr. Rookwood, was present there at this meeting; and you will hear, the place agreed upon was the lane that leads from Turnham-green to Brentford; that they thought the most convenient place, because there were several inns in and about Turnham-green and Brentford, where they might place their men by two or three in an inn, that they might not be liable to observation: This was the place that was approved of.

Then next, the manner of doing it was to be considered and adjusted, and that was thus: that the whole number should be divided into three parties; one party to be commanded by sir George Barclay to attack the coach and kill the king and all that were in it, while at the same time the two other parties, to be commanded by captain Porter, and Mr. Rookwood the prisoner at the bar, were to set upon the guards; and the time agreed upon to put it in execution was the 15th of February on Saturday, that being the usual day the king went to Richmond a-hunting; and you will find, that on Saturday morning they met in several parties, not all together, but under the several heads of the parties, in order to be ready, if the king had gone out that morning, to have assassinated him.

Gentlemen, I say, you will hear of several meetings that day; there was one meeting at Mr. Charnock's, where were present Mr. Porter, sir William Parkyns, and several others; and another meeting you will hear of, where the prisoner at the bar was present, at the lodgings of one Counter, another of king James's friends, that came over for this purpose; and there was sir George Barclay, and there was the prisoner at the bar; and those that were to be under sir George's command met that Saturday morning, in order to make ready, in case the king had gone abroad, to have attacked him: you will find by the evidence, that the prisoner was there; and Harris, that was one of the troopers sent over from France, was sent for, and came in and found them in a great hurry; for Harris was not ac-

acquainted at St. Germain's with the immediate design of assassinating the king; but finding them in a great hurry, he asked them what was the matter? And they told him they were to make ready immediately upon the design. He wondered at it, and asked what it was; and then they told him they were to go to attack the Prince of Orange to assassinate him; and Rookwood the prisoner at the bar told him, if he would go to Counter, he should have particular orders and instructions from him what to do. Accordingly Harris went to Counter; he told him where his horse, and Hare's horse and Hungate's horse were; and their horses happened to be placed in Somerset-house, by Mr. Lewis, in a stable there, recommended by him, to the care of my lord Feversham's servants, who were to take care of them, and of two or three more that were placed there; in all, six of these conspirators horses by the recommendation of Mr. Lewis were lodged in that stable in Somerset-house, and looked after by my lord Feversham's men; and thither Harris, Hare, and Hungate were directed by Counter to go for their horses.

But it happened by very good providence, that his majesty did not go abroad that day; and Durance, one of the orderly men that lodged at Kensington to give intelligence, came from thence and acquainted them that the king did not go out that morning, so there was nothing more done; but Harris was told that he should have his horse at that time, and take it away; and in the mean time, till they were to go upon their design, they were to ride out upon their horses, as they had opportunity, to make them fit for service; or else it would be thought the rider's fault, if, at the time of the attack, they did not come up in good time and order to join with the rest, and it would be thought want of courage in the rider; and accordingly major Holmes, another of those conspirators, went with Harris and Hare to Somerset-house to take away their horses, and they carried them to a stable in Soho; but for several nights they had been kept at Somerset-house.

You will find, gentlemen, that Mr. Rookwood, the prisoner at the bar, was concerned in all these consultations and meetings, in making preparations for the assassination; they intended, as I said, to do it on the 15th of February; but that not taking effect at that day, between that and the Saturday following, Mr. Harris was frequently in the company of Mr. Rookwood, and Mr. Lowick, and others, where they did discourse of this assassination, and they did think it a very barbarous thing; but however, they resolved they would do it, for they had orders to obey sir George Barclay: and this was expressly declared by Lowick and the prisoner, that they had directions to obey sir George, and what he would have them to do they would do: they must and would obey orders; that was their resolution, even upon discoursing of the heinousness of so bloody and barbarous a design.

You will likewise hear, Gentlemen, by the

evidence, that the next Saturday, being the two-and twentieth of February, they resolved to put it in execution again; and accordingly there was a meeting on the Friday before at the Sun tavern, where were present sir George Barclay, Mr. Porter, and others; and there they did resolve upon it, though they had at first some apprehension the thing was discovered; but they were soon satisfied there was no such thing, because, they said among themselves, that if it had been so, they should have been taken up, and not have been permitted to meet there: therefore they resolved the next day to put it in execution; and accordingly they met at several places, and got ready in the morning, in case the king had gone abroad. The prisoner met that morning at Porter's lodging, with several other troopers, to make ready for the enterprize: and there the prisoner at the bar did, at that time, give a list of the names that he was to command; for he was to have one party of those that were to attack the guards, of whom Harris was one and Hare was another, and Richardson was another, and Blackburne was another, and his own name was chief; and he ordered Harris to go and see to get them ready, for they must go out that morning: accordingly Harris did go and got them ready, and came back and gave an account of it. His majesty did not go abroad that day as it happened very fortunately, by reason of the happy discovery; so that news being brought back again, though they had made all things ready, those preparations were put off, and they did nothing that day; and quickly after the discovery was fully made, and made public by the apprehension of the conspirators.

Gentlemen, you will have this matter fully proved to you by several witnesses, that I think there can be no room to doubt the truth of it that there was such a conspiracy, and that the prisoner was as highly concerned in it as those who suffered the just punishment of the law. We will call our witnesses to prove this; and I believe they will be able to give you an account of the whole affair better and more fully than I can do, or can pretend to open it.

Sol. Gen. Call Mr. Harris and Mr. Porter.

Sir B. Shower. We oppose the swearing Mr. Porter: I must beg the favour of the court to hear us in it; if my instructions be true, we insist upon it, that he is not capable of being a witness; he stands convicted of felony: here we have the record, and we desire it may be read.

Capt. Porter. I know nothing of the matter, that there is any such thing standing out against me.

Sir B. Shower. Then sure we are mistaken in the man. Pray let us hear it read.

Cl. of Ar. (Reads the Record.) This is an indictment of murder against George Porter, for the killing of sir James Hacket, knight.

Att. Gen. Do you know any thing of this, Mr. Porter?

Porter. I came off with manslaughter, and pleaded the king's pardon in court.

Att. Gen. Pray read what was done upon it.

Cl. of the Crown. Here's the jury's verdict : ' Quod prædictus Georgius Porter est culpabilis de felonica interfectione prædicti Jacobi Hacket, et non culp.' as to the murder. Here is a ' Curia advisare vult,' and I suppose there was a pardon afterwards.

Just. Powell. Was he not burnt in the hand.

Porter. No ; I pleaded the king's pardon.

L. C. J. And there are several acts of pardon since.

Mr. Cowper. See the time when the indictment was.

Cl. of Ar. It is the 8th of December, in the 36th year of king Charles the 2nd.

Sir B. Shower. We agree that he did plead the king's pardon ; and then the case is no more than this, a man is convicted of manslaughter, and the king pardons him, he still remains unqualified to be a witness ; we say, this has been the case that has been much debated in Westminster-Hall, and upon debate it has been resolved.

Just. Powell. It has been so, but always against you.

Sir B. Shower. It was in the case of my lord Castlemaine* at this bar ; one of my lords the Judges went to the court of Common-Pleas to ask their opinion, and these cases were put † In case a man be outlawed of felony and pardoned ; in case a man be convicted of felony and had the benefit of his clergy ; and in case a man was convicted and not attainted, but pardoned upon the second case ; they were of opinion, that the receiving the punishment of burning in the hand had purged the very guilt, and did set him upright by the statute of the 15th of queen Elizabeth, they thought it did operate to that purpose ; but in the case of a pardon of a man attainted or convicted, it was agreed he was not qualified to be a witness ; and Dangerfield, against whom the objection was made, being burnt in the hand, was received to be a witness ; and it was only made use of against him to take off his credit. The record of that case is in this court, and I looked upon the print of the trial this day. We say, that there is a case in 1 Brownlow 47. a man attainted of felony cannot be of an inquest, though pardoned ; and we think, he that cannot be a juryman, sure cannot be a witness ; there is the same exception to his being a witness as there is in the case of a juryman ; for the one ought to appear as free, and stand as clear and unsuspected, in respect of his probity and verity, as the other, as the one is sworn to try and determine upon oath, so the other is sworn, and his oath is to sway and determine the jury, and in consequence it is all one ; and upon these reasons we hope he is not a good witness.

L. C. J. Where is that case in Brownlow ?

Sir B. Shower. It is 1 Brownlow 47. and

then there is 11 H. 4, 41. 2 Bulst. 154. there my lord Cook says, if a man be convicted of felony, and pardoned, he cannot be a juryman ; for though the punishment is pardoned, the guilt remains, so that he is not ' probus et legalis Homo ;' and every particular person has an interest in it, that they have free and clear persons to be jurymen and witnesses.

Mr. Phipps. My lord, that is the distinction we go upon, which was taken in Dangerfield's case, upon the trial of my lord Castlemaine, where the whole court were of opinion, that a pardon from the king only, would not make him a good witness ; but if he were burnt in the hand, that by the statute of *decimo octavo Elizabethæ*, amounted to a statute pardon, and set him right to all intents and purposes : and there they did take notice of that book that sir Bartholomew Shower cited of 11 of Hen. 4, that a man attainted could not be a juryman, though pardoned by the king : it was objected he might be a witness ; but Mr. Justice Jones said, it was the same reason if he be not fit for a juryman, he is not fit for a witness ; they ought to be both ' probi et legales Homines,' thus the case stood there. And that other book of Bulstrode is the same ; it was in the case of a prohibition for a *Modus Decimandi*, where the suggestion is to be proved by two witnesses, it was objected he had not proved it by two witnesses, because they were both attainted of felony, and though they were pardoned, yet that did not make them good witnesses in the opinion of the court.

L. C. J. This is quite another case, it does not come up to your point ; here is no attainder, and here is pardon upon pardon, by act of parliament.

Mr. Phipps. As to that, we think the parliament pardon is out of the case ; for if the pardon from the king be a good pardon, there is no guilt for the act of pardon to work upon.

Sir B. Shower. My lord, this we think to be a good distinction as to that matter, a man that is actually pardoned the punishment by the king's pardon, and afterwards an act of pardon comes and pardons all offences, that we say does nothing, for he is not a subject of pardon, for he was discharged of his punishment before.

Att. Gen. Sure these gentlemen are not in earnest when they make this objection.

Sir B. Shower. When the king has once pardoned him, he is not an offender within the meaning of the act of parliament, and therefore the act works nothing as to him, and so he stands as much disabled from being a witness, as he was before.

Just. Powell. In the case of Cutington in Hobbard, there it is said the pardon takes away ' tam Reatum quam Pœnam, &c.' An action being brought for calling a man thief, who had been indicted for felony, and convicted, and pardoned, the court adjudged, that he ought not to be called so ; for he was no thief, for the pardon had washed him entirely clean, and he was discharged both of the guilt and punishment, and all the consequences of it.

* See his Case in this Collection, vol. 7, p. 1867.

† See vol. 7, p. 1088.

L. C. J. Those cases that have been put are no authorities at all in this matter ; for where there is a conviction of manslaughter, and the party is pardoned, we think that pardon of the king works in a way of discharge as much as the burning in the hand. I take it, it is the same thing: they admit, that will discharge him to all intents and purposes, and so we think does this as effectually ; for having his clergy, and being burnt in the hand, works by way of statute pardon: for the case of a jury-man, I take it not to be the same with this case ; but even in that case, I do not think that the party convicted, after the king hath pardoned him, is disabled from being of a jury ; but supposing that to be so, yet there are many cases wherein a man may be a witness, that cannot be a jury-man. It is true, the credit of such a witness is left to the jury, but it is no objection against his being a legal witness ; and it is a very strange argument to me, that because he was pardoned by the king, if that should be deficient, that therefore the act of pardon should have no effect. Truly, that is to say, that the king's pardon works so, as to have nothing left for the parliament pardon to work upon, and certainly it sets him so right, that to all intents and purposes, he is as good a witness as ever he was ; and if any thing remained to be done, the act of parliament has done it, and supplied the defect ; but I think the king's pardon is sufficient.

Att. Gen. My lord, I suppose, they do not insist upon it, as thinking there is any great weight in it, but only for objection sake ; but we hope that notwithstanding this objection Mr. Porter shall be sworn.

Sol. Gen. My lord, they take this exception at an improper time, for they speak to his credibility.

L. C. J. No ; they except to his being a witness.

Sol. Gen. If so, your lordship remembers a case that was before your lordship not long since, but in Easter term last, when one was tried at this bar for treason, and Aaron Smith was produced as a witness, and the prisoner took exception against him as no good witness, because he had stood in the pillory ; and your lordship and the court did say, that the act of pardon did restore him to all intents and purposes *ad liberam legem*.

Mr. Conyers. In the case of the earl of Castlemaine, both the courts of King's-bench and Common-Pleas held Dangerfield a legal witness, though burned in the hand for felony, and so was the opinion of Rolls : in Stiles reports 388, one that hath been burned in the hand for felony, may notwithstanding be a witness.

Sir B. Shower. My lord, in answer to that case that was put, that after the king's pardon for one convicted of felony, another man has not the liberty to call him thief, that was an objection in my lord Castlemaine's case, that may stand as good, and our notion that we contend for, be good too ; he cannot be impeached, or have guilt imputed to him, when

once the king has forgiven him, and yet that may not restore him to his entire credit, as was my lord chief justice Scroggs' distinction in the case of Dangerfield ; and as to the case of Aaron Smith, that was very different : the reason in that case was, because the crime for which Mr. Smith was indicted, did not import any such scandalous offence for which his credit could be impeached.

L. C. J. No, no, we did not meddle with that, we went upon the pardon.

Sir B. Shower. But in that case, they did not insist upon it that he had a pardon antecedent to the Act of Pardon, so that he was *subjectum capax*, for the act to work upon, he was an offender that needed a pardon ; whereas Mr. Porter being pardoned before, could not be an offender needing a pardon, and consequently not within the first words of the Act of Indemnity, because he was pardoned by the king before ; but he was not by that pardon, say we, restored to his credit to make him a good witness, and the act of parliament did not affect him, he being not *subjectum materiae*, as not being an offender.

Mr. Phipps. As to Mr. Solicitor's case of Aaron Smith, we agree the act of parliament did restore him, because he never was pardoned before by the king, so there remained an offence for the parliament pardon to work upon.

L. C. J. Do you agree that, then you may agree the other ; for the act of parliament pardons none but those that the king can pardon generally.

Mr. Phipps. It is true, my lord ; but we say that an act of parliament pardon removes those disabilities which the king's pardon does not ; for every one is in law a party to an act of parliament, and therefore no person shall be permitted to alledge in disability of another, any crime which he himself hath pardoned, for that is to aver against his own act ; but it is otherwise in the case of the king's pardon.

L. C. J. Why the very parliament pardon comes from the king ; the king has a full power of pardoning, and where he does pardon under the great seal, it has the full effect of the parliament pardon. A pardon, before attainder, prevents all corruption of blood, so that though a man forfeits his goods by conviction, yet after a pardon he is capable of having new goods, and shall hold them without any forfeiture whatsoever ; for the pardon restores him to his former capacity, and prevents any further forfeiture. Indeed, if he had been attainted, whereby his blood was corrupted, no pardon, whether it were by the king or by the parliament, could purge his blood without reversal of the attainder, by writ of error, or act of parliament, or express words in the act to restore blood ; but either pardon makes him a new creature, gives him new capacity, and makes him to all intents and purposes, from the time of the pardon, to be ' *probus et legalis homo*, ' and a good witness. Indeed this crime might be objected against his credit ; but it is not to be urged against

the sufficiency of his evidence, that is, his being a witness.*

Att. Gen. My lord, we desire he may be sworn. (Which was done.)

Sol. Gen. Now, Mr. Porter, do you give my lord and the jury an account what you know of this intended assassination, how it came to your knowledge, and what share the prisoner at the bar had in it.

Porter. My lord, the first account that I had of this assassination was from Mr. Charnock, who brought to me sir George Barclay and major Holmes to my lodging in Norfolk-street, where I was sick of the gout. Sir George Barclay did not then particularly acquaint me with the business, but said, he would leave it to Mr. Charnock to tell me what it was.

L. C. J. Who told you so?

Porter. Sir George Barclay; and after that we had several meetings, at which the prisoner at the bar was present, particularly at the Globe-tavern in Hatton-Garden, where it was consulted of the best ways and means to assassinate the king as he came from Richmond: some were of opinion that it was best to be done on the other side of the water; others were of opinion that it should be done on this side, by a party of men on horseback: upon this difference of opinion, there were persons appointed to go and view both places; I was appointed for one to go with captain Knightley, and Mr. King went along with me, and we did view the ground on both sides, and when we came back, we gave an account to sir George Barclay, and those that sent us; and upon our report, sir George Barclay's mind was changed, who was for the other side of the water before. And he agreed to do it in the lane that leads from Turnham-Green to Brentford. Afterwards there was a meeting at the Globe-Tavern in Hatton-Garden, and there it was agreed that the king should be attacked on Saturday the 15th of February, by sir George Barclay and his party; and Mr. Rookwood, the prisoner at the bar, was to command a party of men that came over from France, who were to assault the guards on one side, and I and Mr. Charnock were to set upon the guards on the other side. Sir George Barclay, with four men out of each party, was to attack the king in his coach, and to kill him and all that were there in it.

L. C. J. Who were at that meeting?

Porter. There were sir G. Barclay, capt. Charnock, sir Wm. Parkyns, myself, major Holmes, capt. Rookwood, and capt. King.

* As to the operation of the King's pardon in giving credit, see Mr. Hargrave's very learned Discourse on the effect of the King's Pardon of Perjury, as referred to at vol. 7, pp. 1052. 1090. See, too, Peake's Law of Evidence, ch. 3, s. 2, art. Witnesses restored to Credit by Pardon; and in this Collection the Cases of Reading, vol. 7, p. 296, of Collier, vol. 7, p. 1043; of lord Castlemaine, vol. 7, p. 1067, and of Crosby, vol. 12, p. 1291.

L. C. J. Where was this?

Porter. At the Globe-Tavern in Hatton-Garden, upon Saturday morning the 15th, we having two orderly men that lay at Kensington to give intelligence, had notice brought us first that the king would go out; Durance, who was one of them, used to go every morning to court to get us what intelligence he could, and sir George Barclay told me upon the Friday, that he should give me an account as soon as ever he could, the next morning; and the next morning at my lodging in Little Ryder-street in St. James's, he came to me, and told me, the advance guards were gone out, and the king's kitchen was gone, and all was preparing for the king's going abroad, and there went a great many noblemen and gentlemen a-horseback with him, and therefore he thought there would be no opportunity of effecting the thing: Said I, that's no objection at all, nor any reason for putting it off, because when the sport is over, all the company goes away, and the king comes only in his coach with the guards; he said, he would give sir George Barclay an account of it, and he came back with sir George Barclay and Mr. Rookwood to my lodging, and upon repeating that objection, and my giving the same answer, it was agreed, if the king had gone out that day to have put the design in execution.

Att. Gen. Was the prisoner at the bar there at that time when that was agreed upon?

Porter. Yes, he was.

L. C. J. Where do you say was that meeting?

Porter. At my lodging in Little Rider-street.

L. C. J. Had you that discourse with sir George Barclay in the presence of the prisoner?

Porter. Yes; sir George said, he doubted we could not do it, because there would go so many with the king, but I objected against that, that after the sport was over, all the company went away, and the king came back in his coach: then it was agreed to go on; there was sir George Barclay, Durance, and the prisoner at the bar, and myself in the room.

L. C. J. This you say was Saturday the 15th, in the morning?

Porter. Yes, my lord; but I cannot say I saw the prisoner at the bar at any meeting after that.

Att. Gen. Pray, tell my lord and the jury, what method you were to take in putting this design in execution.

Porter. There were to be so many horsemen armed and prepared for that purpose. Sir George Barclay told me, we should be about 40 or 45 horsemen, and they were to be divided into two parties, and sir George Barclay was to have four men out of each party, and his business was to attack the king, and all that were with him in the coach. Captain Rookwood was to command those that were come out of France to serve under sir George Barclay, and captain Charnock and I were to command the other party, and both parties were to

set upon the guards at the same time that sir George Barclay attacked the king's coach.

Att. Gen. If the prisoner will ask him any questions, let him.

Sir B. Shower. Pray, captain Porter, when was that first meeting at the Globe-Tavern?

Porter. It was one day in the week before the 15th.

Sir B. Shower. Was Mr. Rookwood, the prisoner at the bar, there that day?

Porter. Yes, he was.

Sir B. Shower. How long before the 15th?

Porter. One day that week, but I cannot tell what day.

Sir B. Shower. He says it was agreed so, and so I desire to know what words Mr. Rookwood uttered at that time?

Porter. It was discoursed by every one round, which was the best way and method. I heard Mr. Rookwood say, indeed, he believed it a very desperate thing, and he was not very willing to engage in it; but when sir George Barclay told him he should command his party, he replied in French—

Sol. Gen. What is the meaning of that?

Porter. There is an end of it.

Att. Gen. You say the prisoner was at your lodging Saturday the 15th, in the morning, What discourse had you there?

Porter. He was there upon Saturday in the morning, the 15th of February, and Durance brought an account that the king's first guards were gone, and the king's kitchen was gone before, and it was expected that the king would go about eleven a clock; but it was said, that there were a great many preparing to go with him, and therefore it would not be convenient to do it that day: Said I, that is no objection at all, for the nobility and gentry go out of the field as soon as the sport is over, and the king used to go with a few people to Mr. ——— house at Richmond, and therefore it might be as well done at that time as any time: Durance made that objection at first himself; and when I made him that answer, he went to sir George Barclay, and he came back with sir George Barclay, and the prisoner was there by at the same time, and sir George Barclay made the same objection; it was at my lodging in Little Ryder-street, and when I told them my reason against the objection, as I had done before, they all agreed to do it that day.

Mr. Phipps. At that second meeting, did Mr. Rookwood make any proposal there?

Porter. I only say, he came with sir George Barclay, and what I heard; I tell you sir George Barclay made that objection, and I gave it that answer.

Mr. Phipps. But what did he say?

Porter. I cannot say that I heard Mr. Rookwood say any thing in particular; but they all agreed to do the thing that day.

Sir B. Shower. You remember nothing that he said?

Porter. Sir George Barclay said, we will go and prepare; and he went away with him.

Sir B. Shower. Pray, when did sir George Barclay come into England?

Porter. Truly, Sir, I don't know that; the first time that I saw him after he came, Mr. Charnock brought him to my lodging in Norfolk-street; but before that, Mr. Charnock told me he was come into England.

L. C. J. Hark you, Mr. Porter, when you came back from viewing the ground before the first Saturday, and you said you made your report, and then it was agreed that it should be done at such a place; do you say the prisoner was there?

Att. Gen. No, my lord, he does not say so. Do you say Mr. Rookwood was there at that time?—*Porter.* No, my lord, I do not say so.

Sir B. Shower. I am sure he did not say so before; and besides, your lordship will observe there is no such overt-act as that laid in the indictment against the prisoner, that Mr. Porter made his report upon the view; that only concerns Mr. Knightley.

L. C. J. No, that is not an overt-act, I agree it; but I only ask the question, whether the prisoner was there?

L. C. J. Treby. If it were an overt-act laid in the indictment, it would not affect the prisoner, because the viewing of the ground, and making the report, is captain Porter's act, and it must be the consulting and debating afterwards that must affect the prisoner, if he be concerned.

Mr. Conyers. The meetings and consultations that are laid in the indictment are the overt-acts.

Sol. Gen. Well, if they have done with captain Porter, we desire Mr. George Harris may be sworn.

Sir B. Shower. My lord, we beg leave to oppose Mr. Harris's being sworn; here was a proclamation that did take notice of this barbarous conspiracy to assassinate the king, and the proclamation did signify, That the king had received information of several persons concerned in that conspiracy; and for the encouragement of taking those so accused, he did promise a thousand pounds reward for the taking of any of the conspirators; and in the conclusion of the proclamation there is a clause, 'That if any of the conspirators should discover or apprehend any of the other persons that were therein named, so as that they should be brought to condign punishment, such conspirator so discovering should receive a thousand pounds reward for any of the other persons apprehended, and his own pardon.' My lord, we have a witness here ready to prove that this was Mr. Harris's case; he was himself in the proclamation, he did actually discover Mr. Rookwood, the prisoner at the bar, and was instrumental in the taking of him; and consequently upon this clause of the proclamation, if he be brought to justice, then is Mr. Harris intitled to this reward and his pardon; and consequently he has such an interest and advantage to himself as will prevent his being a witness. It is true,

indeed, where it is at the king's suit, in a capital case, it is pretty hard to say that a man has an interest; but we think, as this case is circumstantiated upon this proclamation, that the same objection lies against him as would do, if this were a civil cause; if we shew how he is to have an advantage by the event of this cause, then he is not to be admitted a witness.

L. C. J. Did he apprehend any body upon the proclamation?

Sir B. Shower. Yes; he apprehended Mr. Rookwood himself, or was the cause of it, and thereby is intitled to the reward and his pardon.

Mr. Phipps. That upon which we ground our objection is the different penning of the proclamation; for if any one that is not a conspirator do but discover and apprehend any of the persons named in the proclamation, he is intitled to the thousand pounds; but the conspirators themselves must go further; for a bare discovery and apprehending any of their accomplices will not entitle them to the reward mentioned in the proclamation, but they must discover and apprehend their accomplices so as they be brought to justice, before they can be entitled to the reward: And to be brought to justice for any crime, is in common understanding to be brought to such punishment as the law inflicts for the offence. Now, Mr. Harris's case is this: He discovered Mr. Rookwood, and went with the guards to the Compter and seized him: And if Mr. Rookwood ben't convicted, Mr. Harris is not to have any thing for his pains; but if he be convicted, Mr. Harris is intitled to the thousand pounds and his pardon. And therefore, surely, Mr. Harris cannot be admitted an evidence against Mr. Rookwood, since he is to receive so great a benefit by his conviction. Upon an indictment for an usurious contract, the person whose deed it is cannot be a witness, because it is to avoid his own act: So in an indictment for perjury, on the stat. 5 Eliz. the party injured by the perjury cannot be a witness, because he is to have half the forfeitures.

Att. Gen. I suppose they will make out their objection before they expect an answer from us.

Sir B. Shower. I hope your lordship will not put us to prove a copy of the proclamation from the inrolment, but that we may have the same favour as in the case of the statute book, that the print of it may be allowed for evidence.

Att. Gen. My lord, we will not stand with them for that, we know they are mistaken throughout, we consent the proclamation should be read.

Cl. of Arr. reads:

'By the King a Proclamation.

'WILLIAM R.

'Whereas his majesty has received information upon oath, that the persons herein after named have, with divers other wicked and traitorous persons, entered into a horrid

'and detestable conspiracy to assassinate and murder his majesty's sacred person, for which cause several warrants for high treason have been issued out against them, but they have withdrawn themselves from their usual places of abode, and are fled from justice: His majesty has therefore thought fit, by the advice of his privy council, to issue his royal proclamation, and his majesty doth hereby command and require all his loving subjects to discover, take, and apprehend James duke of Berwick, sir George Barclay, major Lowick, George Porter, capt. Stow, capt. Walbank, capt. James Courtney, lieutenant Sherborne, Brice Blair, ——— Dinant, ——— Chambers, ——— Boise, George Higgins, and his two brothers, sons to sir Thomas Higgins, ——— Davis Cardell, ——— Goodman, ——— Cramburne, ——— Keyes, Pendergrass alias Pendergrass, ——— Bryerly, ——— Trevor, sir George Maxwell, ——— Durance, a Flemming, Christopher Knightly, lieutenant King, ——— Holmes, sir William Parkyns, ——— Rookwood, wherever they may be found, and to carry them before the next justice of peace or chief magistrate, who is hereby required to commit them to the next gaol, there to remain until they be thence delivered by due course of law. And his majesty doth hereby require the said justice, or other magistrate, immediately to give notice thereof to him or his privy council. And for the prevention of the going of the said persons, or of any other, into Ireland, or other parts beyond the seas, his majesty does require and command all his officers of the customs, and other his officers and subjects of and in the respective courts and maritime towns and places within his kingdom of England, dominion of Wales, and town of Berwick upon Tweed, that they and every of them, in their respective stations and places, be careful and diligent in the examination of all persons who shall pass or endeavour to pass beyond the seas, and that they do not permit any person whatsoever to go into Ireland, or other places beyond the seas, without a pass under his majesty's royal sign manual until further order. And if they shall discover the said persons above-named, or any of them, then to cause them to be apprehended and secured, and to give notice as aforesaid. And his majesty does hereby publish and declare to all persons who shall conceal the persons above-named, or any of them, or be aiding and assisting in the concealing of them, or furthering their escape, That they shall be proceeded against, for such their offence, with the utmost severity, according to law. And for the encouragement of all persons to be diligent and careful in endeavouring to discover and apprehend the said persons, we do hereby further declare, that whosoever shall discover and apprehend the persons above-named, or any of them, and shall bring them before some justice of peace, or chief magistrate, as aforesaid, shall have

‘ and receive as a reward the sum of one thousand pound; which said sum of one thousand pound, the lords commissioners of his majesty’s treasury are hereby required and directed to pay accordingly. And if any of the persons above-named shall discover and apprehend any of their accomplices, so as they may be brought to justice, his majesty does hereby declare, that every person making such discovery shall have his majesty’s gracious pardon for his offence, and shall receive the reward of one thousand pound, to be payed in such manner as aforesaid.

‘ Given at our court at Kensington, the 23d day of February, 1695-6, in the eighth year of our reign. GOD SAVE THE KING.’

Mr. Phipps. My lord, the different penning of the clauses is not only in that proclamation, but it is the language of every proclamation that has gone out for the apprehending any of the conspirators.

Att. Gen. My lord, all that we say in answer to this objection, is, That Mr. Harris is not named in that proclamation.

L. C. J. What say you to that, sir Bartholomew Shower? He is not named in the proclamation: and so if he hath discovered and apprehended the prisoner, he has earned his money, whether he be convicted or not, because Rookwood’s name is in the proclamation, tho’ his is not.

Mr. Phipps. Then, my lord, with humble submission, here is another proclamation wherein he is named; we desire that may be read.

Sol. Gen. And when it is read, it will be as little to your purpose as the other.

Att. Gen. Let them read what they please, we need say nothing at all to it.

L. C. J. Certainly, upon this proclamation there is no objection; for he is intitled to his 1,000*l.* already, though Rookwood be never convicted.

Mr. Phipps. But is he not by this proclamation, which mentions his accomplices, intitled to his pardon? If so, he swears to secure himself.

L. C. J. By the apprehending and discovering, he is intitled to his pardon.

Mr. Phipps. But not without he be brought to justice; that is to say, till he be convicted; therefore he cannot be an evidence to convict him.

L. C. J. That is, as to any that are there named, if any of them discover and apprehend one another, it must be so as that they be brought to justice: but if any person that is not named there does apprehend any that is, he is intitled to the 1,000*l.* barely by the apprehension.

Mr. Phipps. Then there is another proclamation where they are both named, as Mr. Rookwood tells me.

Sir B. Shower. My lord, we will set this matter right; we will show the other proclamation, in which, if I am rightly informed, for I have not read it, Mr. Harris is named.

Att. Gen. If you have not read it, I would

advise you not to trouble the court with it; for you will find the latter part is restrained to three or four particular persons, of which he is none.

Rookwood. I am named in the proclamation.

Att. Gen. Aye, but read the latter part of it, and you will find you are not named in the clause that they referred to: you need not read the former part of the proclamation, we agree the prisoner is named there, but only look towards the bottom, which is the clause that they refer to.

Cl. of Ar. (reads). ‘ And we do hereby further declare,’ &c.

Att. Gen. They have not considered the proclamation, and therefore make an objection of they do not know what.

Sir B. Shower. We are in your lordship’s judgment,

L. C. J. For what? See if you can make or state a case for our judgment.

Sir B. Shower. Mr. Rookwood is mentioned in the first proclamation, and Harris is not: but there are the word accomplices: he is likewise mentioned in the last proclamation, but not in the last clause of it. I confess, if he had, it had been plain it would have taken off his testimony; but now we must submit it to you, whether he is not an interested person, and consequently no good witness.

L. C. J. Truly I do not see any colour for the objection. Is he not as well intitled to his 1,000*l.* though Mr. Rookwood had never been try’d, by the bare apprehending of Mr. Rookwood, as if he was convicted?

Sir B. Shower. No, my lord; because the words are, so as he may be brought to justice.

L. C. J. That is not so, as to any person that apprehends one mentioned in the proclamation, if the person that apprehends be not mentioned in it, and named himself; if any one that is not mentioned apprehend one that is mentioned, he is intitled, by the apprehension, to the 1,000*l.* If any one that is mentioned apprehend another, then he is to bring him to justice; now Mr. Harris is not named in this proclamation, and so as to the 1,000*l.* he stands in the same condition as any other person that discovered or apprehended one of the persons there named.

Sir B. Shower. But it seems he was one of the conspirators, because he is himself described in another proclamation.*

Att. Gen. If it were so, it would not be material, nor any manner of objection; but as they have made their objection upon these proclamations, we think there is nothing for us to give an answer to.

Mr. Cowper. Nay, my lord, if it were so, will sir Bartholomew Shower say his client is not brought to justice unless he be convicted? I am sure the words ‘ convicted ’ or ‘ attainted,’ are not in the proclamation.

* As to the admitting the testimony of a Particeps Criminis, see *Howard v. Shipley*, 4 East, 180; and see 4 East, 684. 686.

L. C. J. There is nothing in it: you must swear Mr. Harris. [Which was done accordingly.]

Sol. Gen. Will you give an account to my lord and the jury, what you know of this conspiracy against the king's life, from the first time you were acquainted with it, and what hand the prisoner at the bar had in it.

Att. Gen. Pray give an account of the whole thing, your coming over, and who sent you, and upon what errand, and the whole that you know of this conspiracy.

Capt. Harris. Upon the 14th of January last, the French Stile, N. S. I was at St. Germain's, where I was sent for by king James, and was ordered to wait his dinner till it was over, and accordingly I did wait till his dinner was over; and then I came in, and col. Parker was with him, and one Mr. Hare, who is also mentioned in the proclamation, was there also: the king told me he was sensible I had served him well, and now he had an opportunity of doing something for me; he told me he would send me into England, where I should be subsisted, and I was to follow the orders of sir George Barclay; and accordingly he ordered me ten lewidores to be paid by Mr. Carroll, who is secretary to the late queen; and colonel Parker went along with me, and Mr. Hare, to Carroll, and told him he came from the king, and we had the lewidores, and we went to Calais, in order to our coming over hither: But we were told if we were wind-bound, that the money we received would not bear our charges; there was orders given for our further subsistence at Calais, to the president there. Accordingly we came to Calais, and the wind did not serve us for eight or nine days; and while I stayed there, the money that I spent at Calais was paid by the president of Calais, Monsieur Latour. Afterwards I landed in England, near Romney marsh, as I was told, and I came to the house of one Hunt, and he provided me and my comrade with a couple of horses; and coming from thence, I came in the first place to one Tucker's an apothecary in Sandway, and next from thence we came to Rochester, to Charles Croft's, and from thence in a coach to Gravesend, and from thence by water to London: That night we lay in Grace-Church-street at an inn, it being night, the night-tide, and something late. The next day I came to a lodging at an acquaintance's of my comrade's, Mr. Hare, at the Unicorn in Brownlow-street, one Mr. Wateman's. The next night I went to look for sir George Barclay, whom the king told me I should certainly find by such a sign of a white handkerchief hanging out of his pocket, on Mondays and Thursdays, in Covent Garden, where his walk was to be in the evening, because he was not to appear in the day-time openly. It happened that upon Monday night after I came to town, I went there, and did not find sir George Barclay according to the king's direction, which I admired at; but there was one Mr. Berkenhead, who told my comrade, a day or two after, That sir George

Barclay would needs speak with me, and accordingly I met with him; and he asked me how the king, queen, prince, and princess did, and I told him they were very well; I told him I was appointed to attend him, and obey his orders. He told me he had no money at present, but in two or three days he would send some; and so he did, by major Holmes. I had five shillings a day for subsistence, and I had no horse; and when I had a horse, it was six shillings a day; after which rate I had subsistence for a month at five shillings a day, guineas going then at thirty shillings. Major Holmes paid me the money by sir George Barclay's order, as he told me, and he afterwards gave me a guinea, and that was the first Saturday when the assassination was designed; for that we told him we wanted money, and it was not reasonable we should take our horses out of the stable before we paid for them: And I met sir George Barclay several times at Covent Garden, and he told me it was a suspicious place, and desired me not to come any more there; but when he had any particular orders to give me, he would give me notice of it where I should meet him; and accordingly I did meet him several times.

Att. Gen. Now, Sir, will you tell what you know as to the prisoner at the bar?

Harris. As to Mr. Rookwood, the Saturday that the assassination was designed to be, the first time that I knew of it, I met Mr. Rookwood, at one Mr. Burck's lodging, where he was up, and I saw him in a great hurry and some consternation, and in came M. Bernarde; I asked him the meaning of it, and what they were going about; and Mr. Rookwood told me, if I would go down to captain Counter I should know; accordingly I went, and to the best of my remembrance, he gave me a little note to captain Counter, but that I am not positive in. I went to captain Counter, and as soon as ever I came, he told us, we must be immediately ready to go to Turnham Green.

Att. Gen. Where was that?

Harris. At the Woolpack, that was the sign—as near as I remember. Mr. Hare and I were ordered together to come there, and there was Mr. Hungate, who had been there some time, and when I came in, sir George Barclay did declare laughing, 'These are my 'janissaries:' And he talked something of bringing the garter, and of attacking the coach; but he went out of the room, and afterwards he came in and declared, 'We are all men of 'honour, and that the business we were going 'about, was to attack the prince of Orange;' but Durant came in after that, and said, 'The 'prince of Orange did not go out that day.' When he talked of attacking the prince of Orange, I was very much startled, not knowing any thing of it before; and I came the next morning to Mr. Rookwood, and asked him if we were to be the murderers of the prince of Orange: Says Mr. Rookwood to me, 'I am 'afraid we are drawn into some such business; 'but if I had known it before I came over, I

should have begged the king's pardon at St. Germain's, and not have come over hither: and said I, 'This is very fine, we have served to a very good purpose, to be sent over upon such an errand and account.' After this Mr. Rookwood, and Mr. Lowick, and I, had a meeting at Red Lyon fields, where we did discourse about the matter. I did often declare against it, that it was so barbarous a thing, that no man of honour almost would be guilty of it; but major Lowick answered, That we were to obey orders; for sure sir George Barclay would not undertake a thing of that nature without orders.

Att. Gen. Pray what said Mr. Rookwood?

Harris. He owned it was a barbarous thing; but he was sent over to obey sir George Barclay's orders, which he had several times declared he was resolved to do; upon that we parted: So afterwards I came to Mr. Rookwood's lodging; it was the Saturday morning I came to him, and so went to sir George Barclay's; while he was there, Mr. Rookwood gave me a note, naming so many names, particularly Mr. Hungate, Mr. Hanford, Mr. Hare, and his own name at top, not the name that he is arraigned by here; but a sham name that he had, as the rest of us all had sham names, which at that time we went by.

L. C. J. What was your name?

Harris. My name is Jenkins.

L. C. J. Who gave you that name?

Harris. King James at St. Germain's, and he gave Mr. Hare the name of Guiney, and Mr. Rookwood's name was Roberts. King James told us in his bed chamber, we were to go by those names.

Att. Gen. Pray, Sir, what did Rookwood say to you, when he gave you that list?

Harris. He told me, he was to go to Turnham-green, and I was to go along with him, and says he to me smiling, 'You shall be my aid de camp; and get the rest of the gentlemen ready;' and accordingly I went to look for several of the persons—particularly for Mr. Blackburne: when I came back again, I found him lying on his bed, and that sir George Barclay had told him the prince of Orange did not go out that day; and from thence we went to dinner, where major Lowick dined with us, and Mr. Bernarde and major Lowick seeing me in a heat, asked me, Why I was in such a sweat? I told him I were getting those men ready for Mr. Rookwood, who had made me his aid de camp: says major Lowick to me, You may very well do it, for you have six shillings a-day allowed you, and I have nothing; I bring two men at my own charge. Said I, Major Lowick, I wonder you do not apply yourself to sir George Barclay, and then, I believe, you may be subsisted too. He answered me, He did not think it worth the while to trouble him, since he had never spoke to him of it before: and Rookwood, and Bernarde, and Lowick, and myself, several times met in Red-Lyon-fields, and talked of attacking the prince of Orange.

Att. Gen. Who did?

Harris. Rookwood, Bernarde, Lowick and myself.

Att. Gen. Pray, Sir, let me ask you one one question. Where was your horse at first?

Harris. At first it was at my lord Feversham's stables, as they told me, in Somerset-House.

Att. Gen. Where were the other persons horses?

Harris. There was Mr. Hungate's and Mr. Hare's horses in the same place, at the same time, as they told me.

Att. Gen. How came you by your horse there?

Harris. Major Holmes did deliver my horse and committed it to my care, and I carried it thence to another place.

Att. Gen. Did you observe there was any more horses there?

Harris. I believe there was five or six, as near as I can guess.

Att. Gen. Do you know where Rookwood was to have his horse?

Harris. He had a horse; but whence he had it I do not know.

Att. Gen. Had you any arms delivered you?

Harris. Yes, I had by capt. Counter.

Mr. Conyers. Were you at no other place together that Saturday night, the 22d of February, because you say you dined together?

Harris. Yes, we were at the Bear tavern.

Mr. Conyers. What discourse passed between you there?

Harris. They were talking about the assassination; but what any particular person said, I cannot tell.

Mr. Conyers. Pray who were there?

Harris. There was Mr. Knightly, captain Rookwood, and Mr. King; and Knightly went out, and came in again, and declared, we must have a great deal of care of ourselves or we should be taken up: and he whispered at first, and afterwards I asked him what it was; and he told me, and said, 'We must have a care of ourselves.' Says Mr. King, staring this way with his eyes, 'Surely God Almighty is on our side;' and so we parted.

L. C. J. When was this?

Harris. This was the night of Saturday the 22d, when it was discovered; for some of them were taken up the next day.

Att. Gen. Was Rookwood there at that time at the Bear tavern?

Harris. I cannot positively say whether he was or not.

Att. Gen. What discourse had you there?

Harris. We talked of assassinating the king; but what it was in particular, I cannot tell.

L. C. J. Was Rookwood there?

Harris. Yes, I believe he was; but I cannot positively say.

L. C. J. You say it was the last Saturday that the king was to go abroad, that you apprehended you were discovered?

Harris. Yes, we apprehended we were discovered before that; for Mr. Lowick told me that three or four days before, in that week, that his name, and one Harrison's, were given into the council, and another, and another, two or three of them, as he told me; I think three or four; and upon that account major Lowick went from his lodging, and did not lie at his lodging the night before; and I came to major Lowick, and he told me the same thing at the King's-arms tavern.

Att. Gen. Can you remember what discourse you had that Saturday night?

Mr. Cowper. You say that on Saturday the 22d, Mr. Rookwood gave you the list.

Harris. I do not say it was the 22d, for I cannot swear to the day of the month; but it was the second Saturday that we were to have gone about this business.

Mr. Cowper. You say he gave you a list of names: pray when he gave you that list, what discourse happened in the room just before, or after the giving of the list?

Harris. Sir, I think I told the court that before.

Mr. Cowper. Sir, I desire you would repeat it.

Harris. My lord, I humbly desire to know whether I am to answer that gentleman that question?

L. C. J. Yes, you are to answer, being upon your oath, and to tell the whole truth.

Mr. Cowper. I asked him the question so fairly, what discourse introduced the giving of the list, and what followed upon it, that I perceive this gentleman does not know which side I am of.

Harris. Mr. Rookwood said we were to go to Turnham-green; and he told me, that I was to be one of his party, that we were to attack the Prince of Orange.

L. C. J. You say you were to be one of his party; pray was it there that he told you, you should be his aid de camp?

Harris. Yes, he did tell me I was to be his aid de camp.

Mr. Phipps. Whose hand writing was that list?

Harris. I cannot tell, I had it from that gentleman.

Mr. Phipps. But whose writing was it?

Harris. Indeed I know not his hand-writing, and therefore cannot tell whose it was: he is for his life, but I believe he cannot deny any thing that I have said, I suppose not: I should be very sorry to accuse Mr. Rookwood of any thing that was not true.

Mr. Phipps. Pray whose names were in that list?

Harris. I have mentioned Mr. Hare, Mr. Hanford, Mr. Blackburne, myself, and you, Mr. Rookwood, had your own name at top.

Rookwood. What is that Blackburne?

Harris. He is a Lancashire man.

Rookwood. It is a very strange thing I should give you a list with a man's name that I do not know; I declare it, I know no such person.

Harris. Mr. Rookwood, I believe you are very sensible I do not accuse you of any thing that is not true.

Mr. Phipps. When did you see that list last?

Harris. He gave it into my hands, and had it from me again, or I threw it away afterwards.

Rookwood. But you that were to be an evidence ought to have kept it to justify your evidence.

Harris. Truly I did not intend to have been an evidence at that time.

Att. Gen. If they will ask him any questions, let them.

Sir B. Shower. No, indeed, I will ask him no questions.

Att. Gen. Then, my lord, we have another piece of evidence which we would offer to your lordship, which is not direct evidence against the prisoner, but only to prove a circumstance or two of what has already been sworn: we do acknowledge, my lord, it does not affect Mr. Rookwood, but only to strengthen and confirm what they have sworn.

Sir B. Shower. With submission, we hope it will not be evidence fit to be given as to the prisoner at all; for because a man may swear true in the particular circumstance of a thing, that therefore he swears true what he swears against the prisoner, I think is no consequence in the world.

L. C. J. It is a thing distinct and foreign to the matter, as to Mr. Rookwood.

Att. Gen. My lord, we do not say it directly affects Mr. Rookwood; but when your lordship has heard it, we shall submit it to you, how far it confirms even the evidence given against him.

Mr. Conyers. My lord, we say the prisoner was to have his horse from Somerset-house; and that there were horses placed there for that purpose we are going to prove.

Att. Gen. My lord, it is one entire conspiracy, in which every one had his part; one was to have his horses and his party in one place, and another in another: Now that there were at such time such horses at Somerset-house, and those horses were delivered out from Somerset-house, is certainly a confirmation of the truth of what the witnesses have said.

L. C. J. It is so. If that be it you offer, it is very material.

Mr. Conyers. We shall prove, That upon the disappointment on the first Saturday, the 15th of February, they were to be ready against the 22d; and you will hear how the horses were disposed of in the mean time. Call Chamberlain, Maskel, and Allen.

Att. Gen. Call any of them, I believe it is enough.

(Mr. Chamberlain appeared and was sworn.)

Att. Gen. Pray will you give my lord and the jury an account what you know of any horses that were brought to Somerset-house about February last, and how long they stayed there?

Chamberlain. There was six horses.

Att. Gen. Who brought them in?

Chamberlain. They were sent in by some persons in Mr. Lewis's name.

Att. Gen. Had you any direction to take care of them?

Chamberlain. Mr. Lewis sent in a note to take care of them for a night or two.

Att. Gen. Who carried them away?

Chamberlain. I cannot tell: some people came to see them that I never saw before, and they took care of them; I know not who they were, and I never saw them since.

Att. Gen. What time was it that they came for them?

Chamberlain. It was about the middle of the day.

Att. Gen. What month was it in?

Chamberlain. I think it was much about the latter end of February, to the best of my remembrance.

Att. Gen. How long was it before the plot was discovered?

Chamberlain. It was about a week, or a small matter, before the plot was discovered, to the best of my knowledge.

Att. Gen. How long staid the horses there at Somerset-house?

Chamberlain. Three of them staid a night or two; but the other three of them about a matter of a week or ten days.

Att. Gen. Who owned those horses?

Chamberlain. They were sent in in Mr. Lewis's name; but who owned them I cannot tell indeed.

Mr. Conyers. Then swear John Allen. [Who was sworn.] Pray tell my lords and the jury what you know concerning any horses about the time of the breaking out of the plot.

Att. Gen. We mean in Somerset-house stable.

Allen. There was seven horses came in.

Mr. Conyers. Who brought them?

Allen. There was six in the first place; one came in afterwards in the evening.

Mr. Conyers. By whose order were they brought there?

Allen. By Mr. Lewis's order.

Att. Gen. How long did they stay there?

Allen. Some of them staid there several days; three of them went away the next day, as I think.

Mr. Conyers. Do you remember about what time those horses were brought thither?

Allen. They were brought there, I believe, about seven or eight days before the plot broke out.

Att. Gen. My lord, we only call these witnesses to confirm the testimony of the others, that there were such horses there at that time, and for the present we rest it here.

L. C. J. Then, gentlemen, what say you to it for the prisoner?

Sir B. Shower. If your lordship please, we are of counsel for the prisoner; and that which we are to insist upon, is this, which we submit to your lordships' judgment: In the first place,

whether here be two witnesses against the prisoner to prove this treason, according to the statute of Edw. 6, which requires two witnesses in High-treason, and lawful ones; but that in the first place we say, there are not two witnesses at all, at least not to any overt-act that is laid in this indictment. As to what captain Porter says of what passed between him and Durance, the dialogue between them where Rookwood was present, we are in your lordship's direction; and we doubt not but the jury will take it into their consideration, how far that affects the prisoner; that he shall not be concerned in any transaction between Mr. Porter and any other persons; none of their declarations, none of their treasonable practices, can be imputed to or affect him in any way whatsoever. Now all that captain Porter says of Mr. Rookwood is, that he was once at the Globe tavern, and there was a discourse about this matter; and then he tells your lordship of a dialogue between him and Durance, and an account of what passed between them; but he does not say any thing of Mr. Rookwood being any ways concerned in the matter, but only that he dropped this expression, it was a desperate adventure, a dangerous enterprise, and he seemed against it; but in the end he concluded with something in French, which what they are, and what they mean, we must submit to your lordship and the jury; he interprets it, when sir George Bareley said he must have a share in it, then Rookwood replied, There is an end of it. But there is not one word of agreement sworn to, that Mr. Rookwood spoke to shew his consent. There is but one time more that Mr. Porter swears to, about the prisoner at the bar, and that is, at his lodgings in Little-Rider-street; for as to the other consults, Mr. Rookwood was not present there; It seems there was a discourse about the affair, but that Rookwood said nothing, but went away; there was not so much as the least intimation of an agreement to any such design, or approbation of what was agitated in the company; and we insist upon it as to this in point of law, that it amounts to no more than misprision of treason at most. My lord, I will not now contend about notions, nor will I argue whether consulting and agreeing be evidence of an overt-act; I submit to your lordship's directions, notwithstanding the variety and difference of opinions that have been.

L. C. J. Sir Bartholomew Shower, I know not what variety of opinions you mean; there have been some discourses in pamphlets, I agree; but it was always taken and held for law, that consulting and agreeing was an overt-act.

Sir B. Shower. Here is no evidence of any agreement.

L. C. J. Pray let us hear what you say to that.

Sir B. Shower. It is not the being present where traitors do consult and conspire the death of the king, unless they actually agree; nor is it evidence sufficient to guide or prevail

upon a jury's conscience to affirm upon their oaths, that such a one is guilty of high treason, because such a one was there, and said nothing at all; for the not discovering afterwards, nor accusing, is no evidence at all against Mr. Rookwood. As to Mr. Harris, he gives you an account of a great deal that does not affect Mr. Rookwood, neither all that passed at St. Germain's, nor in their journey into England; for all that may be true, and yet the prisoner no way concerned in it. As to what he affirms of the prisoner, we shall submit it to your consideration: what it amounts to, and all that his deposition comes up to, is, that Mr. Rookwood complained that he was to obey implicitly sir George Barclay's orders; and Harris gives an account but of one particular time that Mr. Rookwood undertook, or did agree to be concerned in this matter; it was but once, and that was, when he gave him the note of those that were to go to Turnham-Green, and that he was to be his aid-de-camp: and as to that, we shall give you an account by witnesses whom we shall call, that these two witnesses ought not to be believed as to what they have sworn, though they do not come up to make two witnesses according to law upon this indictment. What they have said as to this man, is not credible, though they may speak true as to others; and no doubt there was a barbarous conspiracy; it appears there was such, beyond all exception and contradiction; and the persons that have been condemned as conspirators have acknowledged it: but, my lord, that which is now before your lordship and the jury is, to enquire whether the prisoner is concerned in this affair at all, and how far; and we hope the jury will be of opinion he is not concerned. The heinousness of the crime, and the aggravations of it, being to be abhorred by all mankind, we think ought not to sway with the jury, nor influence their judgments to believe a witness ever the sooner in accusing any other person; it ought rather to have a contrary allay; for the greater the crime is, and the farther off from having any tolerable opinion in the world, they ought to expect the greater proof; and no one is to be presumed guilty of such an act, without very sufficient evidence of it; and the greater the crime, the proof ought to be the more positive and undeniable. It is not their being plainly positive that is sufficient, but whether it is such that is good in law; and about that we are sure your lordship will give true directions in point of law: and whether the witnesses be credible or no, must be submitted and left to the jury, after we have called some witnesses, who will give you an account of their reputation.

Mr. Phipps. My lord, we humbly insist there are not two witnesses, such as the law requires, to prove the charge upon this indictment against the prisoner: the two overt-acts that touch Mr. Rookwood are, first, consulting and agreeing how to kill the king; the other is, the finding arms and horses for that purpose.

But as to this latter, the finding arms and horses, there is not one evidence that comes up to it: and as to the former, the consultations, whether there be sufficient evidence that comes up to that, is very much a question with us: but we say, with submission, there are not two witnesses in that case; for Mr. Porter says only what he was told by sir George Barclay, that sir George proposed this matter; but withal he tells you, that when sir George Barclay proposed it, and Mr. Rookwood was informed what the design was, he was so far from conspiring, consulting, or agreeing to do it, that he said it was a barbarous act, and he recoiled at it. Then at last says sir George Barclay, 'You must command a party.'

L. C. J. Well, and what said Rookwood then?

Mr. Phipps. Porter says, he then said, there is an end of it. Now, my lord, what evidence is this of a consultation and agreement? And this is all that Porter says. As to what Mr. Harris says, we are to consider whether the list given to him be an overt-act; and there the point in question is, whether that list can be given in evidence against Mr. Rookwood, upon this late act of parliament, as an overt-act, it not being laid in the indictment? There is indeed an overt-act of a list laid in the indictment, as given to Cranburne, but none as given to Mr. Rookwood.

L. C. J. Pray take the evidence right: first, what will you make an overt-act? What do you think when there is a debate among divers persons about killing the king?

Sir B. Shower. With submission, that will be no overt-act, if there be a debate of such a matter, though he be present.

L. C. J. Aye; but when there is a consult, and upon debate a resolution is formed, and though he does at first dislike it; yet when he is told he must command a party, he says he is content, or there is an end of it—What do you make of that?

Sir B. Shower. He said he did not like it; it was a barbarous, desperate design.

L. C. J. It is true; but when sir George Barclay said he should command a party, he acquiesced, and said there was an end of it. There was a discourse about cutting off the king, and that was agreed upon in the company at that time; and though at first he did not like it, yet he might afterwards agree to it.

Sir B. Shower. My lord, that is it which we deny; we say there is no proof of his agreement to it.

L. C. J. Captain Porter says, he did declare that he said he looked upon it as a desperate design, and was averse from being engaged in it, but afterwards did agree to it: whether is not that such an overt-act as is laid in the indictment?

Sir B. Shower. My lord, we must beg leave for the prisoner in a case of this nature, that it may be recollected what the evidence did say. Mr. Porter did not take upon him to affirm that Mr. Rookwood consented to it, but only said,

'There was an end of it.' Now we must leave that to the jury, what they can make of such a doubtful expression.

L. C. J. Call Mr. Porter in again.

Mr. Conyers. My lord, the first meeting Mr. Porter speaks of, where the prisoner, Mr. Rookwood, was, is at the Globe tavern, where this discourse was; the next meeting that he speaks of was on the Friday night before the first Saturday when the business was to be done; and afterwards he met at Porter's lodgings, on Saturday morning, in Rider-street.

(Then Capt. Porter came in again.)

L. C. J. Hark ye, Mr. Porter, the first time that this matter was proposed, when Mr. Rookwood was present, you say was at the Globe tavern?—*Porter.* Yes, my lord, it was.

L. C. J. And you say he disliked it, and did not care to be concerned in it?

Porter. Yes, my lord, he did so.

L. C. J. Well, what said sir Geo. Barclay?

Porter. Sir George Barclay said, he ought to obey his orders, for he had such a commission for such a thing, and he drew out a scheme how it was to be done; and when sir George Barclay told Mr. Rookwood he should command his party, he replied in French, 'There's an end of it.'

L. C. J. This was at the Globe tavern, was it not?—*Porter.* Yes, my lord, it was.

Att. Gen. Pray then, capt. Porter, let me ask you another question: Was he afterwards with you at any other meeting, and when and where?

Porter. He was with me upon Saturday the 15th, at my lodging in Little Rider-street, where was sir George Barclay and others.

Att. Gen. What discourse happened then, I pray?

Porter. They did there discourse the whole matter, and sir George Barclay was not for going at that time, because there was so many people that went with the king, that there would not be a good opportunity to effect the design: but I told him they would go off after the hunting was over, and so it was agreed upon to go on with the undertaking.

Att. Gen. Pray, at that time did Mr. Rookwood pretend to dislike the affair, or refuse to be any way at all concerned in it?

Porter. No, my lord, I cannot remember that he spoke one word.

L. C. J. Was Mr. Rookwood there?

Porter. Yes, there was Mr. Rookwood, sir George Barclay, and Mr. Durance.

Att. Gen. And had you discourse at that time about this business?

Porter. Yes, my lord; there was that objection made of so many people going with the king, and I made that answer that I tell you.

L. C. J. Why, then, suppose at the Globe tavern such an expression had not dropt from the prisoner, but a man is present at two consultations that are held about the death of the king, but says nothing either at the first or second, what would you make of that case?

Sir B. Shower. My lord, I confess this is a case of a very barbarous nature, of which I hope my client will acquit himself: but I think we have the authority of parliament on our side, that this does not amount to a proof of treason. It seems they lay a stress upon this, that Mr. Rookwood came to captain Porter's lodgings on the Saturday morning the 15th: but then take the case as it is; for aught that does appear upon the proof, he knows not upon what account the meeting is, beforehand. I think that is the case of my lord Russel, upon which the reversal of his attainder went, that the evidence came short, and that it was but misprision; for the evidence was, that he was present at the supposed declaration's reading, but said nothing at all to it.

L. C. J. But I speak of two meetings; there was but one.

Sir B. Shower. My lord, I do not know whether there were two meetings or one then: but this is the ground we go upon, there ought to be two witnesses: and if there be two meetings upon such a design, the second may be as accidental, and it does not appear to be a designed meeting; and there was no appointment of Mr. Rookwood to be there, nor any negotiation by way of message or otherwise, to that purpose. Is this, my lord, an overt-act? Suppose a man be present at a consult about treasonable practices, and he uses words that are indifferent, it is true, in the case of a wager it amounts to an assent, but it hardly will come to that when people meet by accident, or for they do not know what.

L. C. J. How is this by accident?

Sir B. Shower. It does not appear that it was by design or appointment.

L. C. J. They were acquaintance.

Sir B. Shower. He had no acquaintance with him but in sir George Barclay's company.

L. C. J. But, besides, there was an express consent at the Globe tavern, when Rookwood said, 'There is an end of it.'

Sir B. Shower. That is as much as to say, I will not do it, I will not go with you—

Sol. Gen. Sir George Barclay was the person whom they were to obey; and Harris tells you he told them what they were to do, and six horses were first placed, and three of them afterwards removed.

Sir B. Shower. That will not affect him what sir George Barclay said, any more than Lewis's appointing of the horses.

L. C. J. Then here is another thing, Why did he give a list to Mr. Harris? The list that was given had Mr. Rookwood's name at top, as he was to command the party, and there was Harris's name and Hare's name as of his party; that is, their feigned names: Mr. Rookwood's feigned name was Roberts, that was at top, and they were to go to Turnham-Green, and Rookwood told Harris he should be his aid-de-camp.

Sir B. Shower. My lord, for that I think we have a point of law, that we apprehend will turn off all that evidence, and sure we may

take that exception now. The words of the act are, That no evidence shall be given of any overt-act that is not expressly laid in the indictment. Now cannot I shew upon this indictment, that there is an overt-act in such a positive direct manner as they now urge about this list? Will not that satisfy your lordship's judgment to set aside all this evidence? To make the indictment good for treason, there ought to be a compassing of the death of the king laid, and an overt-act laid declaring that compassing; but no evidence is to be given of any overt-act that is not laid in the indictment.

L. C. J. You are not to take exceptions to the indictment now, but only to the evidence.

Sir B. Shower. I have this one exception more; there is never a 'Quodque,' nor a 'Juratores ulterius præsentant.'

L. C. J. There does not need; but that is a fault, if any, in the indictment, and is not to be stirred now.

Sir B. Shower. If there be not a presentment by the jury, then there is no overt-act alleged: and if there be no overt-act alleged, or no such overt-act, then we are within the words of the act, That no evidence shall be given of any such overt-act but what is alleged; and it is, if not expressly alleged, as if it were not alleged at all. Now here it is very loose, '&c. 'iidem Christophorus Knightley,' and so it goes on with the rest, did so and so. There is a presentment at first, that they did compass and imagine the death of the king; and then the indictment comes farther, and says, that forty men should do this business, and of those forty these four should be some; and then the 'iidem' bought horses and arms, and so it must go to the last antecedent, and then there is no express alleging of any overt-act; and then it is as if no overt-act at all was alleged.

L. C. J. This exception is not to the evidence, but to the indictment: it begins 'Juratores presentant quod;' Does not that relate to all?

Sir B. Shower. No, my lord; and I can tell you a reason why not: if it be not so well alleged as it should be, it is an indictment as if it were never alleged at all; and so within the words of the act of parliament this is not an overt-act alleged, and therefore they cannot give evidence upon it.

Sol. Gen. Truly, my lord, I cannot imagine what they are doing, they are moving in arrest of judgment before a verdict given: they say the overt-act is not expressly laid; Is that an exception to the evidence, or to the indictment?

Sir B. Shower. If my lord will please to give us the liberty, we would shew there can be no verdict given upon this indictment.

L. C. J. Certainly this is an irregular proceeding; this is not a time of exception to the judgment.

Mr. Phipps. Then, my lord, we are in your judgment, as to the proof that has been given: if a man be present at a meeting of several persons, and there is a treasonable debate about

killing the king, and this man is only present, but neither assents, nor makes the proposal how it shall be done, whether the bare being silent, and saying nothing, is such an overt-act as shall convict a man of treason?

L. C. J. I tell you, consenting to a traitorous design is an overt-act of high-treason, if that consent be made to appear by good proof. Now the question is, What is a good proof and evidence of this consent? A man is two or three times at a treasonable consult for killing the king, and though perhaps at the first he did not, yet at the second he did know that the meeting was for such a design, (suppose for the purpose there was but two meetings) and at the second it is determined to go on with the design; Is not that an overt-act, though it cannot be proved that the prisoner said any thing?

Mr. Phipps. If the first meeting is not a consent or an overt-act, neither will a second or a third be, if there was no more done than at the first, but they are like so many cyphers without a figure.

L. C. J. The first meeting possibly might be accidental, he might not know what it was for, though that will go a great way if he does not dissent or discover; but when he meets again with the same company, knowing what they had in design; does not that prove a consent? That was the case of sir Everard Digby in the Powder Plot.

Mr. Phipps. But where it may be uncertain, my lord, whether it were with a good design, or a bad design, that he met with that company, it ought to be taken most favourably for the prisoner: This man might be present in order to a discovery.

L. C. J. But besides, that is not this case; you are mooting upon points that are not in the case. When Mr. Harris came to Mr. Rookwood, and finding them in some disorder, and being inquisitive what was the occasion, he was sent to Counter; and when he discovered what they were to go about, he afterwards meeting Mr. Rookwood, says to him, Are we sent over to murder the prince of Orange? says Rookwood, if I had known of this design before I came from France, I would have begged the king's, that is king James's pardon, and desired to have been excused. Hereby he expresses his knowledge of the design, and what he was to do; and though he disliked, yet would obey orders.

Mr. Phipps. There is no doubt, my lord, but he knew of it; but whether your lordship will construe his silence as a consent, in treason, is the question.

L. C. J. A man is at frequent consults about killing the king, and does not reveal it, it is a great evidence of his consent.

Mr. Phipps. But it is not proved that he did actually consent to it.

Sol. Gen. My lord, we must submit it to your lordship, whether this is not totally improper and irregular at this time? They are arguing how far the evidence is to be believed,

before the time proper for such an argument comes.

Att. Gen. If they will call their witnesses, let them; or if they say they have none, then they may make their observations upon the evidence; but else we desire we may be kept to the usual method of proceedings.

Mr. Phipps. With submission, we thought it fit to know the opinion of the court first, if there be two witnesses against the prisoner; for if there be not two witnesses, as the law requires, we need not trouble the court with our evidence.

Sir B. Shower. Then, my lord, we must desire that the record may be read of captain Porter's conviction of manslaughter; a man that has been guilty of doing such an act, feloniously, maliciously and voluntarily, as that is, sure is not a competent witness.

Cl. of Ar. It has been read already.

Att. Gen. I thought we had been over that objection before.

Sir B. Shower. We think it is proper for us to move it now again; for though it is no objection to his being a legal witness, yet we hope it will influence his reputation as to his credit; for he that has been guilty of killing a man in such a manner as the indictment lays it, will find but little credit, we hope, with a jury of countrymen. But since it has been read, and your lordship and the jury have taken notice of it, we will call some other witnesses as to Mr. Porter's reputation and behaviour, we think they will prove things as bad as an attainder. I shall not open them to your lordship, but beg leave to call our witnesses, who will acquaint you what they have to say.

Att. Gen. Certainly, my lord, you will not think fit to let them do so. I desire they would not usher in any thing of evidence without acquainting the court what they call them for: For that were the way to let them in to call witnesses to things that are not proper.

L. C. J. Nay, without doubt it is not regular to produce any evidence, without opening it.

Att. Gen. For if it be for any crime that a man may be presented for, and there is no conviction; I think that ought not to be given in evidence to take away a witness's credit: If it be only to his general reputation and behaviour, so far they may go, and we cannot oppose it. Therefore I desire sir Bartholomew Shower will open to the court of what nature his evidence is.

Sir B. Shower. Well, I will tell you then what I call them to.

L. C. J. You must tell us what you call them to.

Sir B. Shower. Why then, my lord, if robbing upon the highway, if clipping, if conversing with clippers, if fornication, if buggery, if any of these irregularities, will take off the credit of a man, I have instructions in my brief, of evidence of crimes of this nature, and to this purpose against Mr. Porter; and we hope that by law, a prisoner standing for his life is at liberty to give an account of the ac-

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tions and behaviour of the witnesses against him. I know the objection that Mr. Attorney makes, a witness does not come prepared to vindicate and give an account of every action of his life, and it is not commonly allowed to give evidence of particular actions; but if those actions be repeated, and a man lives in the practice of them, and this practice is continued for several years, and this be made out by evidence; we hope no jury that have any conscience, will upon their oaths give any credit to the evidence of a person against whom such a testimony is given.

Mr. Phipps. We are speaking only, my lord, to the credit of Mr. Porter; and if we can shew by evidence that he is so ill a man as to be guilty of those crimes that we have opened, according to the instructions in our brief, we hope the jury will not think him fit to be a good evidence against us in this matter.

L. C. J. What say you to this, Mr. Attorney?

Att. Gen. My lord, they themselves know, that this sort of evidence never was admitted in any case, nor can be, for it must tend to the overthrow of all justice and legal proceedings; for instead of trying the prisoner at the bar, they would try Mr. Porter. It has been always denied where it comes to a particular crime that a man may be prosecuted for; and this it seems is not one crime or two, but so many and so long continued, as they say, and so often practised, that here are the whole actions of a man's life to be ript up, which they can never shew any precedent when it was permitted, because a man has no opportunity to defend himself. Any man in the world may by this means be wounded in his reputation, and crimes laid to his charge that he never thought of, and he can have no opportunity of giving an answer to it, because he never imagined there would be any such objection: It is killing a man in his good name by a side-wound, against which he has no protection or defence. My lord, this must tend to the preventing all manner of justice; it is against all common sense or reason, and it never was offered at by any lawyer before, as I believe, at leastwise never so openly; and therefore I wonder that these gentlemen should do it, who acknowledge, at least one of them did, that as often as it has been now offered it has been over-ruled; and I know not for what end it is offered, but to make a noise in the court: They know that it is irregular as much as any thing that could be offered.

Sol. Gen. Indeed, my lord, if the prisoner at the bar had offered this matter, it had been excusable; but that gentlemen of the long robe, and who are so well acquainted with the practice of the courts of law, should pretend to do such a thing, is unaccountable. There was somewhat like this that was offered at Manchester, but that was by the prisoner, to prove that one Lunt who was a witness had two wives, and they brought a copy of an indictment upon which there was no process;

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after that they endeavoured to prove him guilty of several robberies; but all that sort of evidence was refused. I only give them this instance to shew, that where the prisoner has attempted it, it has been always rejected; and I am sure they cannot shew me that ever it was allowed, even to the prisoner himself, to give any thing of this kind in evidence; and this I must say, they can never shew me any one particular instance, when counsel ever endeavoured to do it, before this time.

Sir B. Shower. My lord, I mentioned the particular crimes, the faults which I had in my instructions to object against the credit of the testimony of capt. Porter, in answer to Mr. Attorney's desire, that I would open the particulars of the evidence, that I would call my witnesses to the truth of it; I was loth to repeat the words, I think the things themselves so abominable; but we conceive, with submission, we may be admitted in this case to offer what we have offered. Suppose a man be a common, lewd, disorderly fellow, one that frequently swears to falshood for his life: We know it is a common rule in point of evidence, that against a witness you shall only give an account of his character at large, of his general conversation; but that general conversation arises from particular actions, and if the witnesses give you an account of such disorderly actions repeated, we hope that will go to his discredit, which is that we now are labouring for, and submit it to your lordship's opinion whether we may not do it.

L. C. J. Look ye, you may bring witnesses to give an account of the general tenour of his conversation, but you do not think sure that we will try now at this time, whether he be guilty of robbery or buggery.*

Sir B. Shower. My lord, we will give you an account that he used to have a private lodging, and come in with his horse tired, and several other such things, as that he used to go out in disguises, and the like.

Mr. Phipps. My lord, I cannot imagine why a man that has been guilty of any such crimes, and is not taken, should be of greater credit than a man that has been taken and punished.

L. C. J. What is that you say, Mr. Phipps?

Mr. Phipps. My lord, I say it is the crime that renders a man infamous, and I do not know why a man that has had the good fortune not to be taken and punished for great crimes by him committed, should be in a better condition as to the credit of his testimony, than one that is taken and undergoes the punishment of the law.

Sol. Gen. Mr. Charnock urged that as far as it would go, but we are obliged, it seems, to hear things that have been over-ruled over and over; but I desire to know of them, whether they can shew he has been guilty of a greater crime than he has confest himself

guilty of in court, I mean of the intended assassination.

Mr. Phipps. No, we agree we cannot; but pray let us prove him guilty of as many crimes as we can.

Sol. Gen. But, my lord, I hope you will keep them to the general question of the common ordinary tenour of his conversation.

Sir B. Shower. Call Mr. Oldfield, Mr. Nicholas, Mr. Milford, Black Will.

[Mr. Milford appeared.

Cryer. Lay your hand on the book. The evidence that you shall give on behalf of the prisoner at the bar shall be the truth, the whole truth, and nothing but the truth. So help you God.

Sir B. Shower. Pray will you give my lord and the jury an account whether you know captain Porter, and how long you have known him?

Milford. I have known him about four years.

Sir B. Shower. What reputation is he of?

Milford. I never knew any hurt by him in my life.

Sir B. Shower. Pray what is your name?

Milford. Frederick Milford.

Sir B. Shower. But the name in my brief is John Milford, that is my man.

L. C. J. But you see this man knows him.

Sir B. Shower. Call Mr. Oldfield.

[Which was done, and he appeared accordingly.]

Mr. Phipps. Do you know captain Porter?

Oldfield. Yes, I do.

Mr. Phipps. How long have you known him?

Oldfield. I believe about twenty years.

Mr. Phipps. Pray will you give my lord and the jury an account of his life and conversation.

Oldfield. I can say nothing, he was always civil in my company, but he was lewd in his discourse.

Sir B. Shower. What do you mean by being lewd in his discourse?

Oldfield. Why, he would be talking very extravagantly.

Mr. Phipps. What do you mean in talking? Was it of what he had done himself, Sir?

Oldfield. No otherwise than that he had whored, and those kind of things.

Sir B. Shower. What other things beside whoring?

Oldfield. I know no other part of it.

Sir B. Shower. Where is Edward Bouchey? (He did not appear.)

Mr. Phipps. Call William O'Bryan. (He did not appear.)

Sir B. Shower. Where is Mr. Page, and Mr. Hardiman?

(None of them appeared.)

Cryer. There is not a man of them here, Sir.

Sir B. Shower. Mr. Webber, Do you know where they are, for the court stays for them.

* See Peake's Law of Evidence, chap. 3, Witnesses, sect. 2, art. General Character.

Mr. Webber. Indeed I do not, they were summoned to be here.

Sir B. Shower. Where is Black Will?

Cryer. Black Will. (He appeared, and was a Moor.)

L. C. J. Ask him if he be a Christian.

Cryer. I have asked him, and he says he is a Christian.

(Then he was sworn.)

L. C. J. Well, what do you ask him?

Rookwood. Will, Pray give an account of your master, and of his life and conversation.

Mr. Phipps. You are sworn to tell the truth, sweet-heart.

Will. I served him almost eight years, and he has been a very good master to me, my lord.

Sir B. Shower. What do you know him to be guilty of?—Will. Nothing at all.

Sir B. Shower. I believe they have put in these men to confirm his reputation.

L. C. J. Indeed, I think the king's counsel should have called these witnesses, if there had been occasion.

Sir B. Shower. We submit it to your direction, how far this evidence will affect him; there is nothing said, as we apprehend, that will amount to treason; if the prisoner has a mind to say any thing himself, we hope your lordship will please to hear him.

L. C. J. Aye, if he will, let him.

Rookwood. My lord, Mr. Porter does not say, that I consented to command a party.

L. C. J. Is that all you have to say? Then, Gentlemen, will you sum up?

Mr. Conyers. My lord, we are agreed; we submit to the court on both sides.

L. C. J. Then, gentlemen of the jury, the prisoner at the bar, Mr. Rookwood, is indicted for high-treason, in compassing, imagining, and intending the death and destruction of the king, by a most barbarous and wicked assassination; you have had an account of this design from two witnesses that have been produced; the one is captain Porter, the other is Mr. Harris, who swear they were both concerned as actors in it.

Captain Porter tells you, about the latter end of January, or the beginning of February last sir George Barclay came over into England from France; and there was a former design to murder the king; and after several meetings and conferences among the conspirators, they came to a resolution that he should be assassinated; but which way to effect it, admitted of a dispute among them; for the king as you have heard, going frequently, about once a week, a hunting on the other side the water near Richmond, the design was first to assassinate him at Richmond Park, or thereabouts, as he returned from hunting, and preparation was made accordingly; but that not being so fully agreed upon, the conveniency of the place held still some debate; for some were of opinion, that it was better to make the attempt on this side the water, than on the other;

therefore, as Mr. Porter tells you, to determine that difficulty, there were several men sent, whereof he was one; Knightley another, and King a third, to view the ground on both sides the water, and to make their report: the ground being viewed, and the report made to some of their accomplices, who to receive it met at the Nag's-Head in Covent-Garden, which was about the tenth or twelfth of February last; it was then agreed that the king and his guards should be attacked on this side the water, about Turnham-Green.

Mr. Porter has told you, that at several meetings for the carrying on this design, the prisoner Mr. Rookwood was present, more particularly at the Globe Tavern in Hatton-garden, where were also sir George Barclay, Mr. Charnock, sir William Parkyns, himself, and others, and there they did enter into a consult how they might assassinate the king; and it being proposed, Mr. Rookwood did not like it, as Mr. Porter says, but said it was a desperate attempt; and thereupon sir George Barclay pulled out a scheme that he had, and shewed it at that time to Mr. Rookwood, and said, you are sent over from France, and are to obey my orders, and you are to command a party; and then Mr. Rookwood made an answer in French, 'There's an end of it,' which, as he says, imports a consent.

Then at another time, which was the Saturday morning the 15th of February, they met at captain Porter's lodging, and there was a discourse about going on to put the design in execution; and one Durant, one of the men that was to watch the king and the guards going out at Kensington, came in, and the question was, whether they should go that day upon the design? They had discourse about it, and Mr. Rookwood the prisoner was there present, and there did not appear any dissent in him to the prosecution of the design, but it seems it was readily agreed among them, to pursue it according to the former determination.

Then the next witness that is produced is Mr. Harris, who gives you a large account of the beginning of his knowledge, and of his being concerned in this matter; he tells you he was in France, and at the court of St. Germain, where the late king then was, and that he spoke with him, and where was also colonel Parker; and king James took notice of him and of his faithful service, and told him, he always designed him a kindness, and then had opportunity of doing it, and said he would send him over into England, where he should be subsisted, and directed him to obey the orders of sir George Barclay; and there being one Hare by, who was to come over with him, king James gave them both names of disguise which they were to go by in England, and, as it seems, others that came over did also assume; for Mr. Rookwood went by the name of Roberts, Harris was to go by the name of Jenkins, and Hare by the name of Guiney; they were directed to apply themselves to sir George

Barcley, and had directions how they should find him, which were to go into Covent-garden, in the evening, upon a Monday or a Thursday and if they saw a person that had a white handkerchief hanging out of his pocket, they were to take notice of him to be sir George Barcley, and they had ten lewis d'ores a-piece for their journeys to carry them off; and you have heard from whom they had them; and they were told, that if at Calais they were kept longer than they expected, whereby their money was spent, care was taken that they should be supplied from the governor of Calais, the president there; and it seems Mr. Harris and Mr. Hare went together to Calais, and lay a considerable time for want of a wind, whereby their money fell short of defraying their expenses; but they were afterwards supplied by the governor of Calais, according as was promised at St. Germain's.

Gentlemen, he tells you, that after they came into England, the first time they went to seek sir George Barcley, was upon the Monday night, but they did not find him at that time; but afterwards they met with him, and Mr. Harris had subsistence-money from him, according to king James's promise, which was at the rate of 5s. a-day, when he had no horse, and afterwards when he had a horse, at 6s. a-day; this is the account he gives you how he came over, and of his journey and meeting with sir George Barcley.

And now he comes to speak particularly concerning the prisoner at the bar, Mr. Rookwood: He tells you, that on Saturday morning the 15th of February, the first day when this assassination was designed to be committed, he went to the lodging of one Burk, where Mr. Rookwood was, with others, and he found them all in a great disorder; and thereupon he asked them, what was the matter, and what they were going to do? And Rookwood bid him go to one Counter, and he should know of him what was the matter: accordingly he went to his lodging, and Counter told him and those who were with him, that they must get ready to go to Turnham-Green; and at the same time and place he met with sir George Barcley, and after some discourse of attacking the coach, sir George Barcley at the first said, they were his janizaries; and afterwards going out, he came in again and said, they were men of honour, and that they were to go abroad to attack the prince of Orange,

The next day, or a little time after, Mr. Harris met with Mr. Rookwood, and enters into discourse with him to this effect: What! are we sent over to murder the prince of Orange? It is a strange sort of employment: (for it seems they were not informed in France what they were to do here, but they were to put themselves under the conduct of sir George Barcley, and obey his orders.) Mr. Rookwood said, he was afraid the thing was so, and that they were drawn in; but said, If he had known of the design before-hand, he would not have come over, but have begged the king's pardon.

Which shews not only his knowledge of the design, but his being engaged in the prosecution of it.

And then, Gentlemen, you are told further, That upon the going out upon Saturday the 22d, which was the second time it was to have been put in execution, there was a list of men that Mr. Rookwood gave to Mr. Harris of several names that he has mentioned to you; he says, Mr. Rookwood's name was at the top, as one that was to command the party, and the name he went by was Roberts; and there was Harris's counterfeit name, which was Jenkins; and Hare's counterfeit name, which was Guiney; and they were to make ready to go to Turnham-Green. He told him, there was a list, and that he and Harris was to be of his party, that he was to attack the prince of Orange, and that Mr. Harris should be his aid de camp.

Gentlemen, I forgot to tell you, That between the first Saturday and the second, Mr. Harris, Mr. Rookwood, and Mr. Lowick, walking in Red-Lyon-Fields, and there in discourse among themselves, Mr. Harris and Mr. Rookwood did express themselves to be much concerned that they were to be employed upon such a design as this was, which they owned to be very barbarous; but Mr. Rookwood and Lowick said, They were under command, and must obey orders, though Mr. Rookwood did not like the design they were engaged in.

Gentlemen, they have told you of horses that were placed at Somerset-house in a stable there, under the care of Mr. Lewis, my lord Feversham's gentleman of the horse, about six or seven horses, and those six horses that were there at that time were afterwards taken away; but that is only a circumstance.

So that, Gentlemen, this is now the sum and substance of this evidence that has been given you, as far as it relates to the prisoner: his counsel in his defence have insisted upon several things; in the first place, though it was last mentioned in time, yet it ought to have the first consideration; the counsel for the prisoner have endeavoured to take off the credit of Mr. Porter, and have opened indeed very great crimes that he should be guilty of, which must render him a person not to be believed, but they have not proved any thing; no witness that they have called against Mr. Porter says the least against him to invalidate his testimony, or to induce you to disbelieve what he has said.

Then they say in point of law, There is no overt-act proved of any design against the king's life that affects Mr. Rookwood; now that matter you are to consider of, whether or no it does appear by the testimony of two witnesses, that Mr. Rookwood was concerned in this design of assassinating the king: captain Porter is positive that he was at the consult at the Globe-tavern, where it was proposed, debated, and resolved upon; but Mr. Rookwood says, he did dislike it; so says captain Porter, he did not approve of it at the first upon his being acquainted with it; but being sent over to obey the orders of sir George Barcley, and sir

George Barclay producing a scheme ready drawn, wherein he was to command the party, telling him, that he must obey orders. You hear what he said, and the answer he returned in French, There is an end of it; whether that does not amount to a consent and agreement to be engaged in this design, is left to your consideration; for if it do, it is plainly an overt-act.

Then, Gentlemen, you hear further, that Harris was told by Mr. Rookwood, that he should be of his party, and be his aid du camp, and go to Turnham-Green to attack the prince of Orange, and he had a list of men given him by Rookwood, and was directed to get the rest ready.

Rookwood. That was not in the indictment.

L. C. J. But you were at that meeting, which is laid in the indictment.

Rookwood. My lord, that list is not in the indictment; the list in the indictment refers to Mr. Cranburne.

L. C. J. No, but that is an evidence of your being in the design; I hope that list of men will be some evidence of the consent and agreement that Mr. Rookwood was to command a party.

Sir B. Shower. With submission, my lord, the words of the act seem otherwise, and that no overt-act should be given in evidence, that is not expressly alledged.

L. C. J. But cannot there be one act, that may be proof of another act which is alledged?

Sir B. Shower. Then there is no advantage of this law; for, my lord, the end of the act was, That they should know the particular crimes that they were to answer to.

L. C. J. That could never be the end of the law, that all particular facts that are but evidence of the facts alledged should be set forth in the indictment; it was sufficient before the act, to alledge any overt act; and any other overt-act, though not alledged, and had no relation to the overt-act that was alledged, yet if it were to the same sort of treason, might be given in evidence.

Sir B. Shower. The law says, Ye shall not give evidence of any overt-act that is not expressly mentioned.

L. C. J. It is not urged as an overt-act, but as evidence of an overt-act that is alledged; for instance, the overt-act alledged is, that they did meet and consult, shall not they give in evidence what was said and done at those meetings, though not alledged? Sir George Barclay produced a scheme at the Globe-tavern, shall not the producing of that scheme be given in evidence? If it may, why not the giving the list to Harris?

Mr. Phipps. My lord, it is plain it was Mr. Attorney's opinion, it could not be given in evidence, unless it was alledged in the indictment; because he has particularly alledged the list in Cranburne's case, in this very indictment.

Sol. Gen. I know not what those gentlemen mean by this sort of practice; certainly there never were so many irregularities com-

mitted in any trial as in this, and now particularly to break in upon the court in the midst of the charge.

L. C. J. Nay, nay, if there be any mistake, let us hear them, that it may be rectified.

L. C. J. Treby. I think we should receive them, to try if they can make it out. But the objection I do not very well understand yet; for, as I take the matter to stand, it is alledged in the indictment, that they had prepared men and arms, and horses, for the execution of this design. Now is it not reasonable, or can there be any thing more proper, than to give in evidence, and prove that the prisoner had, and delivered to some of the complices, a list of those men that were to do it? Why, it proves the very thing alledged; but let us see whether it be so.

Sir B. Shower. My lord, there is no such thing alledged.

L. C. J. That is strange! pray see if it be in the indictment.

Clerk of Arr. (Reads.) 'Conveniebant, proposuerunt, tractaverunt, consultaverunt, consenserunt, et agreaverunt, ad ipsum Dominum Regem nunc ex Insidiis et Dolo percutiendum, Anglice 'to assassinate,' interficiendum, et murdrandum; et ad execrabilem, horrendam, et detestabilem Assassinationem, Anglice 'Assassination,' et interfectionem illam citius exequendum et perpetrandum, postea scilicet eisdem Die et Anno, ac diversis aliis Diebus et Vicibus, apud Parochiam prædictam in Comitatu prædicto, proditorie tractaverunt, proposuerunt, et consultaverunt de Viis, Modis et Mediis, ac Tempore et Loco, ubi, quando, qualiter et quomodo dictum Dominum Regem sic ex Insidiis facilius interficerent; et consenserunt, agreaverunt et assenserunt, quod quadraginta Homines equestres aut eo circiter, quorum iidem Christophorus Knightley, Robertus Lowick, Ambrosius Rookwood et Carolus Cranburne forent quatuor, et quilibet horum proditorie super se suscepit esse unum, cum Bombardis, Sclopis et Sclopetis, Pulvere bombardico et Globulis plumbeis oneratis, et cum Gladiis, Ensibus et aliis Armis armati insidiati forent, et essent in Subsessu, Anglice 'in ambush,' adundem Dominum Regem in Rheda sua, Anglice 'his coach,' existentem, quando foris iret invadendum; quodque quidam et competens Numerus de Hominibus illis sic armatis in Satellites, Anglice 'the guards,' ipsius Domini Regis eum tunc attendentes et secum existentes aggressi forent, et eos expugnarent et devincerent, dum alii eorundem Hominum sic armatorum ipsum Dominum Regem percuterent, interficerent, occiderent et murdrarent.'

Mr. Conyers. And, my lord, there is evidence of some of these forty men, whose names were given in a list by Rookwood to Harris?

Mr. Phipps. But now, in Cranburne's part, the list is expressly alledged as an overt-act.

L. C. J. Never talk of Cranburne, we have not him before us now; but what do you say to this of the list given by Rookwood to Harris?

Sir B. Shower. My Lord, we say this is not evidence of an overt-act, according to this act of parliament; which says, no evidence shall be given of any overt-act, that is not expressly alledged in the indictment; now the indictment says, they did agree that forty horsemen armed, of which the four named were to be four, and every one undertook to be one, who should lie in wait to set upon the king in his coach, and a competent number should set upon the guards; and then it says, in order to fulfil this, they did prepare horses and arms, and one of them by the consent of all the rest did carry forward and backward a list, that is, Cranburne; and that particular list is a particular overt-act alledged in the indictment; which makes it plain, they thought it necessary to be particularly alledged by this act of parliament, or they could not give any evidence of it; now the list that evidence is given of, is supposed to be delivered by the prisoner to Harris. Now first we say, it is not evidence that forty should do it, for they may do it without a list; and next, it is not evidence of the list that they have mentioned, for that is alledged to be carried about by Cranburne; and as the prisoner himself has observed, this list given to Harris is not in the indictment, and therefore no evidence can be given of it.

Mr. Conyers. It is an evidence of that overt-act which is expressly alledged in the indictment, that they met together to consult how to effect this treason.

Mr. Cowper. My lord, we are in a very strange case here, if we be not very proper in this part of our evidence; the overt-act laid is, That the prisoner met together with others to consult how to assassinate the king, and there the prisoner among the rest did agree it should be done so and so. It is admitted the prisoner was there; but, say they, if you only prove that he sate by while there was a general discourse of such a matter, but do not prove that he said or did any thing expressing his assent, that will not amount to a proof of the overt-act laid; and yet, if we go about to prove further, any act done that manifests his assent, then they say you go too far, and prove an overt-act that is not mentioned in the indictment. Thus they grant, the agreement is a sufficient overt-act, but object, that being present barely is not a sufficient proof of his agreement; then when we go to make proof of any thing that is a sufficient proof of his agreement, they tell us it is not proper upon this act of parliament, because not laid in the indictment, though his agreement be laid in the indictment: And so they would amuse us, rather than make any solid objection to our evidence. This doctrine is certainly very odd, my lord, and we doubt not will have little weight with the court or the jury.

Att. Gen. According to this doctrine, all the evidence must be put in the indictment.

L. C. J. They ask you, what this giving this list does prove.

Att. Gen. His agreeing at that meeting to the conspiracy, and the execution of it, by giving that list of the names of them that were to be of his party, and his own name as commander of that party, this he gives to one that was to be of the party, and particularly was to be his aid du camp, in order to get them ready for the execution; is not this an evidence of the agreement, which is the overt-act? No man in the world can be convicted of treason, if this doctrine be true.

Sol. Gen. My lord, they have not expressed something in the indictment that has been read, which will make it plain that this is the most proper evidence of the overt-act laid in the indictment. The indictment says, they agreed there should be forty men or thereabouts armed, of which a certain number should make an assault upon the king's coach, while another part should set upon the guards: Now the proof we make is, that Mr. Rookwood the prisoner was to command a party that was to set upon the guards; and in order to it, he gives a list of his men to Harris, who was to be his aid du camp, and bids him get those men ready; and this was upon the day that this matter was to be acted: So that it proves very plainly that overt-act that we suggest in the indictment, that a certain number of those men were to assault the king's person, and another the guards. And therefore they needed not to have interrupted your lordship; for this list that Harris speaks of is a very good proof of the overt-act that is laid in the indictment.

L. C. J. Then, gentlemen, as to this matter which they have objected, that this list given on the day of the intended assassination, ought not to be allowed as evidence to prove the treason, because it is not specially laid in the indictment, but is by the late act of parliament excluded from being proved to convict the prisoner: Now though the act doth exclude the giving in evidence of any overt-act that is not laid in the indictment, yet it doth not exclude such evidence as is proper and fit to prove that overt-act that is laid in the indictment. Therefore the question is, Whether this giving of the list does not prove some overt-act that is alledged in the indictment? There is in the indictment an agreement laid to kill the king; and if that be proved, that is an overt-act of this treason. Now when the consent and agreement of Mr. Rookwood to that design is proved, surely the proof of his giving a list of men, is a further proof that he did agree to it, and then it is very proper to be given in evidence; for if by the new statute no one act can be given in evidence to prove another, then must not only the overt-act, but also the evidence of that act be expressed in the indictment.

Gentlemen, You have heard the witnesses what they say concerning this matter. In the first place, if you do believe that there was such consults and meetings, where this intended assassination of the king was debated and resolv-

ed upon, and that Mr. Rookwood was present and did agree to it, that is an overt-act: And again, if you are satisfied that there was an agreement to prepare and provide a number of men to set upon the king and his guards, in the manner you have heard, and he was concerned in making this provision, and was to have a post, and command a party in that attack, that is a further proof of that consent and agreement that is laid in the indictment.

Gentlemen, I must leave it to you, upon the evidence that you have heard. If you are satisfied, upon the testimony of these two witnesses that have been produced, that Mr. Rookwood is guilty of this treason of which he is indicted, in compassing and imagining the death of the king, then you will find him guilty: If you are not satisfied that he is guilty, you will acquit him.

Cl. of Ar. Cryer, swear an officer to keep the jury. (Which was done.)

L. C. J. Now, if you have any thing to move on behalf of your other clients, pray do it.

Sir B. Shower. Yes, we have an exception, but never a one of false spelling.

L. C. J. If so be it be any such matter as you can move in arrest of judgment, it had best be reserved till after the verdict.

Sir B. Shower. Our exceptions will serve, if occasion be, for Mr. Rookwood in arrest of judgment, and they will serve for the others also to prevent the trouble of the trial, if we have your lordship's opinion that they are good exceptions.

(Then the Jury withdrew to consider of their verdict, and after a quarter of an hour's staying out returned, and gave in their verdict.)

Cl. of Ar. Gentlemen of the jury, answer to your names. Samuel Powell.

Mr. Powell. Here. (And so of the rest.)

Cryer. Vous avez.

Cl. of Ar. Gentlemen, are you all agreed of your verdict?

Jury. Yes.

Cl. of Ar. Who shall say for you?

Jury. Our foreman.

Cl. of Ar. Ambrose Rookwood, hold up thy hand, (which he did). Look upon the prisoner: How say you? Is he guilty of the high treason whereof he stands indicted, or Not Guilty?

Foreman. Guilty.

Cl. of Ar. What goods or chattels, lands or tenements, had he at the time of the treason committed?

Foreman. None, to our knowledge.

Cl. of Ar. Then hearken to your verdict as the court has recorded it. You say that Ambrose Rookwood is guilty of the high treason whereof he stands indicted, but that he had no goods or chattels, lands or tenements, at the time of the high treason committed, or at any time since to your knowledge, and so you say all?—*Jury.* Yes.

Mr. Powell. We desire we may be discharged.

L. C. J. We cannot do that, till we see whether there be enough upon the other panel: We will give you as much ease as we can: We shall not, I suppose, try the other till the afternoon, therefore you may take your ease for the present; but you must be about the court when the other trials come on.

(While the Jury was withdrawn, the court offered to the counsel for the prisoners, that they might move what exceptions they had before the Jury was sworn as to any of the other; which accordingly they did; but that relating to the case of Mr. Charles Cranburne, in whose presence, being then at the bar, the objections were made, that part is left to his Trial.)

387. The Trial of CHARLES CRANBURNE, for High Treason: At the Sessions of Oyer and Terminer for the County of Middlesex, sitting in the Court of King's-Bench at Westminster: 8 WILLIAM III. A. D. 1696.*

April 21. 1696.

AFTER the trial of Ambrose Rookwood was over, while the jury were withdrawn to consider of their verdict, the court proceeded thus:

L. C. J. (Sir John Holt.) Mr. Attorney, whom will you have tried next?

Att. Gen. (Sir Tho. Trevor.) Cranburne, if your lordship pleases.

Cl. of Ar. Then, keeper of Newgate, set Charles Cranburne to the bar.

L. C. J. You, gentlemen, that are of counsel for the prisoner, if you have any thing to move for your client, you may move it; but first let the prisoner be here.

(Then Charles Cranburne was brought to the bar in irons.)

L. C. J. Look you, keeper, you should take off the prisoners irons* when they are at the bar, for they should stand at their ease when they are tried.

* See Salk. 633. Holt, 686. East's Pleas of the Crown, c. 2, s. 46, 49, 53.

* See in this Collection, vol. 5, p. 979.

Keeper. My lord, we have no instruments here to do it just now.

Cl. of Ar. You may send to the Gate-house, and borrow instruments.

Just. Powell. It should be done, indeed; they ought to plead at ease.

L. C. J. Well, go on, sir Bartholomew Shower.

Att. Gen. My lord, before sir Bartholomew Shower enter upon his exceptions, unless those exceptions of his are some of the particulars mentioned in this act, he must not do it now, after plea pleaded, before the trial; but he must do it in arrest of judgment.

L. C. J. Treby. It is true, regularly; but let him use his own judgment.

L. C. J. It is very true; the course has not been to allow them to move to quash an indictment for treason, or felony; but it may be done.

Att. Gen. Sure, it must be only for such things as they cannot take advantage of in arrest in judgment after the verdict.

L. C. J. It has not been the course, but it may be done.

Att. Gen. Not where there is an issue joined, and a jury returned to try that issue; I believe that never was done, nor attempted.

L. C. J. Treby. If there were any prejudice to the king by it, it were not fit for us to alter the course; but let us hear what his exceptions are.

Sir B. Shower. I have several exceptions; five at least; one of them is within the very words of the act, that is, improper Latin; I am sure some of it is so.

L. C. J. Well, let's hear what that is.

Sir B. Shower. It says, 'anno regni dicti domini regis nunc septimo,' and Lewis is the last king mentioned before; and so here is no year of the king of England mentioned. It is a certain rule, that relatives must refer to the last antecedent; and that rule holds always, unless there be words that accompany the relative, which undeniably shew to what it refers.

L. C. J. Aye; but do we call the French king 'dominus rex?'

L. C. J. Treby. He would have been so, if he had succeeded in his invasion, and this assassination.

Sir B. Shower. In every indictment, if there be occasion to mention a former king, it is always *nuper rex*, and such a one, naming the name of the king, where the present king's name does intervene, to prevent confusion; and so in civil actions it is the same; and so it should have been here.

L. C. J. Ay, but I tell you, it is 'dominus rex nunc,' which is our king.

Mr. Phipps. It is not said 'Angliæ.'

L. C. J. But wherever it is 'dominus rex,' we understand it of the king of England, and nobody else. Read the indictment.

Cl. of Ar. 'Necnon eundem Dominum Regem ad Mortem et finalem Destructionem ponere et adducere, ac subditos suos fideles, et Liberos Homines Hujus Regni Angliæ in

'servitutum intolerabilem et miserrimam Ludovico Regi Gallico subjugare, et mancipare, Decimo Die Februarii, Anno Regni dicti Domini nunc Regis septimo, et diversis aliis Diebus, &c.'

L. C. J. Can any man imagine this to be the French king?

Sir B. Shower. My lord, your lordship is not to imagine one way or other.

Mr. Cowper. In the strictest sense and grammar in the world, it must mean king William, and no other. We do not need any imagination, when in the strictest construction it is plain who it refers to.

Sir B. Shower. I am sure no grammar can make it good; nothing but a supposition can help it.

Mr. Cowper. When it is said 'Dictus Dominus Rex,' if sir Bartholomew Shower can find out another 'Dominus Rex' in the indictment, then he may make something of his objection; but the 'Dominus' is only applied to our own king throughout.

L. C. J. Treby. Besides, as to the rule that sir Bartholomew Shower mentions, it is that 'ad proximum Antecedens fiat relatio nisi impediatur Sententia.' That is the restriction of the rule, it must relate to the next antecedent, unless the sense would be prejudiced; but here if this construction should be, it would make this clause to be no better than nonsense, viz. That the subjects and freemen of this realm were to be brought into intolerable slavery to Lewis the French king, such a day in the seventh year of the reign of our lord the French king.

Sir B. Shower. We say it is little better than nonsense; I am sure it is loose, and uncertain, and not grammar, but carries a new form with it.

L. C. J. No, it is as well as it can be.

Sir B. Shower. Then, my lord, there is another exception; it is said, 'Diversis Diebus et Vicibus tam antea quam postea;' and then afterwards it says, 'postea scilicet eodem Decimo Die Februarii;' that is repugnant; it is as much as to say, That upon the 10th of February, and two days afterwards (to wit) the said 10th day of February; that is, after two days after the 10th of February, viz. upon the same tenth day.

Att. Gen. That 'Postea' is another sentence, and relates to other matters.

Sir B. Shower. It cannot in propriety of speech be said to be afterwards the same day.

Sol. Gen. (sir John Hawles.) If sir Bartholomew Shower remembers the evidence that we have given this day, he will find it was in fact so; they met on the Saturday morning, and afterwards met again the night of the same day.

L. C. J. There is nothing in that objection, sure; it is a common form, when they tell of different matters.

Sir B. Shower. Well then, if you will hear the rest which are not of the same nature, we shall come to what we think a fatal exception;

we say this indictment of High-Treason being against a subject born, ought to have had the words in it, 'Contra supremum naturalem Ligeum Dominum suum;' according to Calvin's Case in the 7th Report, fol. septimo.

L. C. J. It is 'Contra Ligeantiae suae Debitum,' is it not?

Sir B. Shower. That won't help it, my lord, for all that is applicable to an alien born: and so is the case in my lord Dyer, 144. where it is said, that if an indictment of treason be against an alien, you must not put in the word *naturalem*; if you do, it will be faulty, because he owes but a local allegiance to the king of England, and not a natural one. Now we say, there are none of these prisoners but are subjects born, and the constant form in queen Elizabeth's time, and queen Mary's, was to put in the words 'Naturalem Dominum,' and they cannot shew me any of those precedents without it. There was occasion in Tucker's case to look into this matter, and search all the precedents. I have looked in my lord Coke's entries, and all the precedents; I have seen my lord of Essex's indictment, and all the others in queen Elizabeth's time, and those of the traitors in the Power-Plot, and those of the Regicides, and Tucker's own indictment itself; all along it is 'Naturalem Dominum suum;' and the reason for it is, he that is alien born, you never put in 'Naturalem Dominum suum,' because he owes a double allegiance; one natural, to his own king under whose dominion he was born, and the other local, to the king in whose dominions he resides, for he is bound to observe the laws of the place where he lives: and if he violate them, he does break the allegiance that he owes to the government where he lives, upon account of the protection he enjoys under it. But if he be born a subject of the king of England, he has but one natural liege-lord; and he being an Englishman born, the king stands in that relation to him, as he does to all his native subjects, but not to foreigners; and therefore it was thought requisite to be, and has always been inserted into indictments of treason against subjects born. And, my lord, we think the very resolution of the court, afterwards affirmed in the House of Lords that reversed Tucker's attainder, went upon this opinion, that the law required 'naturalem Ligeum Dominum' to be put in. There the exception was, that 'Contra Debitum Ligeantiae suae' was omitted: to which it was objected, that there was 'Dominum Supremum Naturalem,' which was equivalent; no, it was answered, both were requisite, because every act charged in the indictment ought to be laid against the duty of his allegiance. Now in indictments of treason, there are certain words that are essential, because of their relation between the king and his people. There are certain forms of words, which if the constant practice has been to make use of them, the omission is an error. Those usual forms ought to be observed, and the want of them will be a fatal exception; so we think

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it would be in this case, as much as if the word 'Proditorie' had been left out; or as if in a case of felony and burglary, the words 'Felonice' and 'Burglariter' had been left out.

Mr. Phipps. My lord, we take the practice and precedents to be the rule of law in the case; and I have looked over a great many precedents, besides those that sir Bartholomew Shower has cited; and I never saw any one precedent of an indictment of treason against a subject born, without the word *Naturalem*; and all the cases cited by sir Bartholomew Shower are full in the point. Counter's case in my lord Hobbart, 271, where it is said, that if there be an indictment against a subject born, it must be 'Contra naturalem Dominum;' if against an alien, 'naturalem' must be left out. To say 'Contra Ligeantiae suae Debitum' will not do, it is not enough, for that may be said against an alien, because he owes a local allegiance, though not a natural one. And I take it, upon this difference, this indictment is not good.

Att. Gen. My lord, I do not know how far you will think it proper to enter into this matter before the trial.

L. C. J. Mr. Attorney, I think you had as good speak to it now as at another time; though I must confess it is not so proper in point of practice.

Att. Gen. Well, my lord, then we will speak to it now. The objection is, that the words 'naturalem Dominum' is not in the indictment; which they say is contrary to the usual form: as to the precedents, there are a great many where it has been, and I am sure a great many where it has not been; and I am sure for this six, seven, or eight years last past, it has always been omitted: and, with submission to your lordship, it is not at all necessary, if there be words in the indictment which shew, that what he did was against the duty of his allegiance to his lawful and undoubted lord (which are the words in this indictment). It is true, if he be not a subject born, 'naturalem' cannot be in, because that is contradictory to the obedience which he owes, for it is not a natural obedience that he owes, but a local; but if a man be a subject born, and commits treason against the allegiance that he owes, that is against his natural allegiance; for whatsoever he does against his allegiance, he does against his natural allegiance, and so there is no need to put in the word 'naturalem;' because he owes no other allegiance but that; it is sufficient if that be put in which shews its being against his allegiance. If they could shew that a subject born has two allegiances, one that is natural, and the other that is not natural; then if you would prosecute him, you must shew, whether it was against his natural, or against his other allegiance. But when he has none but a natural allegiance, certainly against his allegiance, without putting in natural, will be well enough. It is true, where there is no natural allegiance, it must be wrong if you put it in, because you put in that allegiance which

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he does not owe; but where he is a subject born, to put in natural liege-lord, there is no ground at all for it; there are words enow that shew it was against his allegiance to his lawful and undoubted lord.

L. C. J. Look you, sir Bartholomew Shower, how does it appear, that these men are subjects born? The matter you go upon does not appear upon the indictment, and you are not to go off from that.

Sir B. Shower. Every man is presumed to be so, unless the contrary appears.

L. C. J. You quote Calvin's Case, and the other cases that are there put; those are all cases of aliens; there is Dr. Lopez's Case: he being an alien comes into England, and commits high-treason: why, say they, how shall we indict this man? We cannot say it is 'contra Naturalem Dominum suum;' for he owes no natural allegiance to the queen of England; how shall we do to frame a good indictment against this man? They considered of this; and they said it will be a good indictment, to charge him with high-treason, or any one else, leaving out the word 'Naturalem.' For if it appear he has committed an offence against the laws of the kingdom, and against the duty of his allegiance, which is high-treason, that is enough. Now as to Tucker's Case, it was reversed for want of the conclusion, 'contra Debitum Ligeantiae suae.' Those words are material; for let the offence be never so much against the person of the king, as to assassinate him, or levy war against him, yet still if it be not against the duty of his allegiance, as it cannot be if he owes him none, it is not high-treason. And therefore if it be against his allegiance, whether that allegiance be natural or local, it is all one, it is enough to make it high-treason.

Sol. Gen. In that case in Dyer, they shew where it was a fault to put the word in, but they can shew no case where it has been adjudged to be a fault to leave the word out.

L. C. J. No doubt it would be a fault to have that in, 'Contra Naturalem Dominum suum,' where there is only a local allegiance due.

Mr. Phipps. How does it appear whether it is the one or the other that is due?

L. C. J. It is no matter whether the one or the other do appear, it is high-treason be it the one or the other, if it be against the duty of his allegiance.

Mr. Phipps. Suppose an indictment against an alien were, 'Contra Naturalem Dominum.'

L. C. J. That would be ill, because then you had laid it more specially, and otherwise than really it is, and restrained it where you ought not to do it.

Mr. Phipps. How then, my lord, shall it appear that he only owed a local obedience?

L. C. J. It may be given in evidence, that he is an alien born.

Sol. Gen. He may plead it in abatement to the indictment.

L. C. J. He ought to be acquitted, for you have indicted him of a crime against his natural

allegiance, when he owes no such. But allegiance generally comprehends all sorts of allegiance, natural and local.

Sir B. Shower. How then, my lord, come all the lawyers of all ages to put in those words in indictments of high-treason against subjects born?

L. C. J. No, I have seen abundance of precedents, that have only 'Contra Ligeantiae suae Debitum' generally, and so the most part are; for allegiance is the genus, and if that be suggested, all the species are contained under that.

Att. Gen. Well, have they any more?

Sir B. Shower. Yes, we have more.

L. C. J. Well, you shall have them all in time.

Sir B. Shower. My lord, here is another objection, and that is this: Here is one fact that they have laid, and that is the second overt-act in this indictment, that they consented and agreed that 40 men, (whereof these four were to be four) but do not lay it to be done traitorously. They say 'Consenserunt, agreaverunt et assenserunt,' but not 'proditorie;' and I never saw an indictment that laid an express overt-act, without repeating the word again. If your lordship pleases, the words in the indictment are thus; as to the first overt-act, it is laid in this manner; 'Et ad execrabilem assassinationem illam exequend.' at such a time and such a place 'proditorie tractaverunt, proposuerunt et Consultaverunt de viis et modis mediis, &c.' and then comes this which we except against; 'et consenserunt, agreaverunt et assenserunt quod quadraginta Homines,' &c. Now this is a plain distinct act, and there is no 'proditorie' to it; and if ever they can shew me any indictment, in which an overt-act was laid, of which they gave any evidence, and it had not the word 'proditorie' in it, I am very much mistaken. I am sure, I never saw any such. And it is not enough to say, that the nature of the thing is such, as that it cannot but be a treasonable act; but they must alledge it to be so, by the express use of that word which the law has appointed to express this crime by. In the case of an indictment for felony, if it be not said felony, it is not good. They are not to describe that by circumlocution, which is a particular crime fixt by law, they must use the *verba artis*, the terms of art, and no other: if your lordship pleases it may be read.

Sol. Gen. Let it be read if you please; but take it in English, and it is no more than this, they did traitorously compass the death of the king, and for that purpose they did traitorously meet, and consult about the ways and means, and did consent and agree that forty men, &c.

Cl. of Ar. Reads: 'Et ad Execrabilem Horrendam et Detestabilem Assassinationem, Anglice Assassination, et interfectionem illam Citius exequendum et anno ac Diversis aliis Diebus et Vicibus apud parochiam praedictam in Comitatu praedicto proditorie tractaverunt, proposuerunt et Consultaverunt de viis modis et mediis ac Tempore et Loco ubi quando

‘qualiter et quomodo Dictum Dominum Regem
‘sic ex insidiis facilius Interficerent.’

Sir B. Shower. There is an end of that, now go on.

Att. Gen. No, sir Bartholomew, you mistake, there is no end of it, that is done at the same time with that which follows.

Sir B. Shower. No, it is not the same overt-act; but let him go on.

Cl. of Ar. ‘Et Consenserunt Agreaverunt
‘et Assenserunt quod quadraginta Homines
‘Equestres.’

Sir B. Shower. Well, you need read no further for our objection. We say there wants the word ‘Proditorie:’ for there are two overt acts, the one is, that they traitorously did consult of the ways and means how to kill the king, and that overt-act we agree to be well laid: but then it says they consented and agreed that there should be forty men, whereof these four should be four, but does not say they traitorously agreed; are not these distinct acts?

Mr. Phipps. Surely, my lord, they are distinct acts; for this part of the indictment upon which sir Bartholomew grounds his objection, is that overt-act of which the list in Mr. Rookwood’s Case was urged by the king’s counsel, and agreed by the court to be an evidence.

Then the jury against Mr. Rookwood came in, and delivered in their verdict, as it is in his trial, then afterwards the court went on thus:

Att. Gen. My lord, the objection is, that ‘Proditorie’ is not inserted into that particular clause of the indictment, which shews their particular agreement that there should be forty men, whereof the four named in the indictment were to be four. Now your lordship observes how the indictment runs, it is for compassing and imagining the death and destruction of the king; and it sets forth for this purpose, that to effect this compassing and imagining, they ‘Proditorie tractaverunt et consultaverunt de viis mediis et Modis’ how they should kill the king. Now that which immediately follows after is, the particular method and means that were agreed upon, that is, that there should be forty men. Now this is the strangest suggestion that ever was, when we have set forth, that traitorously they did so agree of the ways and means, and then set forth the particular means, that here must be ‘proditorie’ again to that. This is such a construction as I cannot but admire how it could come into any one’s head. It is part of the sentence; for the other part, as we have laid it, is not complete before: it may be it might be sufficient without setting forth the particular ways and means; but when it is set forth it is part of the sentence, and refers to the first beginning.

L. C. J. Aye, sure it does.

Att. Gen. I cannot tell what they would have, unless they would have us repeat the word ‘proditorie’ in every line.

Sol. Gen. Or before every verb.

Sir B. Shower. No; but I think it ought to be repeated at every overt-act.

Mr. Conyers. If your lordship pleases, after that they have set forth that this was the particular method and way agreed upon at their consultation, that forty horsemen or thereabouts should go about it, of which the persons indicted were to be four, it goes on, ‘Et Quilibet eorum proditorie super se Suscepit esse unum,’ there it is put in, and it appears to be as particular as possible can be.

Mr. Cowper. Sir Bartholomew Shower says, that when we have alleged that they did traitorously treat, propose, and consult of the means and ways of killing the king, there we have done the sentence, and made that one overt-act. Now how is the sentence done? The next word is a conjunction copulative, ‘et consenserunt,’ &c. And what is the use of a conjunction copulative, but to convey the force of the words in a former sentence to the sentence following, and to prevent the repetition of every word in the subsequent sentence that was in the precedent? But it is plain, they are both one and the same overt-act, and these subsequent words are only an explanation, more particularly of the overt-act set forth in the precedent words.

Sir B. Shower. In answer to that that has been said, if they shew me any precedent, where an indictment has been for high-treason, setting forth several overt-acts, and not the word ‘proditorie’ set to every overt-act, then they answer my objection. If the word ‘Quod’ had come in, that would have made them distinct to be sure; and I think they are as distinct acts now; suppose they had concluded at the end of the word ‘Interficerent,’ that had been a good overt-act; I am sure they will agree to that: and if it be so, then the other is a good overt-act too. For it is a distinct thing from that which was a perfect sentence before; and it either requires a ‘likewise,’ or the word ‘proditorie’ must be repeated. They have not so much as said ‘similiter Consenserunt,’ or ‘simili modo;’ there is an ‘et’ indeed, but that does not so couple the sentences together, as not to make them distinct acts. There are several ‘ets’ through the whole indictment, but that does not, as Mr. Cowper would have it, couple all together to make one overt-act.

Mr. Phipps. My lord, if what Mr. Cowper says be allowed, (viz.) that the ‘et’ makes it one intire sentence, then there is no overt-act at all; for after the treason alleged, the clauses are coupled to one another by an ‘et,’ and consequently, by Mr. Cowper’s way of arguing, the whole indictment is but one entire sentence.

L. C. J. I do not understand your meaning as to that; they tell you ‘proditorie’ is alleged to the consulting, contriving and agreeing, then they tell you what was the subject matter of that contrivance and agreement, to assassinate the king, and in order to that they agreed there should be forty men; is not that good enough, without ‘Proditorie’ to every line?

Sir B. Shower. No, it is not said in ‘Ordine ad,’ there is no such thing; but only they did

consult of the ways and means, and did agree that 40 horsemen should do it, and afterwards did agree to provide horses and instruments of war; Now that being with a 'Quodque,' they say makes a new overt-act; but I cannot understand why 'Quodque' is not as much a 'Copulative' as 'Et,' and the one should not have the same effect as the other.

L. C. J. First, it tells you there was a consult and agreement to assassinate the king, and for the accomplishment of the said assassination; afterwards 'eisdem die et Anno Proditorie' 'Tractaverunt et Consultaverunt de viis et modis,' how they should kill the king.

Sir B. Shower. That is one overt-act, say we, and there you should stop.

L. C. J. 'Et Consenserunt et Agreaverunt' 'quod quadraginta Homines,' &c. it is all at the same time, and must be intended the same consult and contrivance; that they consulted of the ways and means, and then agreed so many men should be provided.

Mr. Phipps. No, my lord, we say that is another overt-act.

L. C. J. Treby. It seems to me to be a specifying and particularising the ways and means, that they had consulted of, and concluded on.

Sir B. Shower. If it had been a specifying, it had been much better to put in either then and there, or that this was the result of the consultation.

L. C. J. Treby. It does seem to me so, that it was the result of the consultation, and it is well enough.

L. C. J. You had better have saved these kind of exceptions till the trial was over.

Sir B. Shower. But, my lord, if there be one overt-act ill laid, I submit it whether they can give any evidence of that overt-act.

L. C. J. Treby. No doubt of that, they cannot; but we think it is as well laid as it could be laid.

L. C. J. Truly I am not well satisfied, that it is necessary after you have laid the 'Proditorie,' as to the particular treason, to lay it again to the overt-act. For the overt-act is but evidence of the treason: the treason itself lies in the compassing, which is an act of the mind.

L. C. J. Treby. You cannot indict a man of treason for assassinating or killing the king, but you must in every such case frame the indictment upon the article for compassing and imagining the death of the king; which must be laid to be done traitorously. Then, when afterwards you say the person accused did wound him, or imprison him, or consult and agree to assassinate him, or did actually assassinate him, these are but so many overt-acts of compassing the death; and you having first said that he did 'Proditorie' compass and imagine the king's death, you have thereby shewn that you charge him with a greater offence than felony (which my lord Coke says is the use of the word 'Proditorie;') and that being thus done, I do not apprehend it to be necessary that you should add 'Proditorie' to all the rest of the

following particulars; for they are only external discoveries of the inward treason; and more properly deemed to be evidence of the treason, than to be the treason itself.

L. C. J. The treason is consummate in the intention; besides the words of the statute make that the treason, not the overt-act, that is but evidence, and so it was held, (not upon this exception, but upon the reason that my lord speaks of) in the Case of the Regicides of king Charles the First, That the indictment should not be for killing the king, but for compassing and imagining his death, and the killing was alleged as an overt-act.

Sir B. Shower. It must be so if it were for levying of war.

L. C. J. Most true; for levying the war is the treason; but in this case we think it is no exception.

Att. Gen. Then let us have the fifth.

Sir B. Shower. Then, my lord, here is another thing. It is a question whether there be any overt-act presented by the jury at all. The indictment says, 'Juratores pro Domino Rege' 'præsentant,' that they as false traitors did compass the death of the king and the slaughter of his subjects, and they did meet, and consult, and agree how to do it, 'Et iidem Christophorus Knightley' and the rest, to fulfil their said traitorous intentions and imaginations did, afterwards, the 10th of February, buy arms and horses. Now our objection is, That it does not appear, that any one of these overt-acts are the presentment of the jury; with submission they ought to have begun it again, either with a 'Quodque,' or something that should have referred it to the first, 'Juratores' 'præsentant,' or else they must have begun quite again, with a 'Juratores Ulterius præsentant,' and not have coupled them as this is with an 'Et.' The most forms begin with an 'ulterius præsentant,' but here we find no overt-act is so introduced. They might present part, and not present the other part, for any thing that does appear. Every thing ought to be laid positively, as the jury's dictum; it may be only the clerk's saying, and not the jury's, for any thing that does appear. Your lordship remembers the case of the king and Trobridge, upon a Writ of Error to reverse a judgment for erecting and continuing a cottage against the form of the statute; now 'Contra' 'formam Statuti' was in the beginning of the indictment, but not in the conclusion; to the erecting but not the continuing. And though there was there 'Juratores ulterius dicunt,' it was not 'super Sacramentum suum,' and they did not say, he did continue it against the statute; and there being no formal presentment, that he maintained the cottage notwithstanding the act, 'Et' did not so couple it to the first part, as to make it a good presentment. So we say in this case, this is a fault, and different from all the common forms; there ought to be a direct presentment of each overt-act, and not coupled by an 'Et.' For 'Et' will not do it; for it is a distinct overt-act every one, and

should have been 'Et quod Consultaverunt, quodque Agreaverunt,' that a certain number should do so and so; and to be sure, it should have been so at the last-overt-act, which is only 'Et iidem Christophorus Knightley,' &c. did buy arms and horses. Now this last 'Et,' being a loose conjunction copulative, in common sense ought to refer to that which they had agreed upon, for that is last mentioned there, and the natural sense leads thither, and not to the beginning of the bill 'Juratores præsentant quod.'

Mr. Phipps. I shall not trouble your lordship further; they ought to have put in a 'quodque,' or an 'Uterius præsentant.'

Att. Gen. Where would you have the 'Quodque,' or the 'Uterius præsentant?'

Mr. Phipps. Either to every overt-act, or at least to that last.

Att. Gen. The indictment sets forth, that they committed such and such a treason: their objection is, that 'quodque' is not put into every overt-act; and our answer is, that the first 'quod' governs all that relates to that treason. It may be, if there were too distinct treasons in the indictment, when you come to set forth the second treason, you should say 'Juratores ulterius præsentant' the second treason; but the overt-acts to prove the same treason, are all parts of that treason, and make but one species of treason, which is the imagining the death of the king. There is the treason; and to bring it to pass, they did so and so: this, my lord, must be part of the finding of the jury as well as the treason itself, of which these are the overt-acts. But then if you will lay the levying of war in the same indictment, then it may be you must say 'Juratores ulterius præsentant quod,' &c. But it had been a strange absurdity to say, 'Juratores ulterius præsentant,' such and such overt-acts: for the overt-act is not a further indictment, but only a setting forth that which is evidence, upon which they found the indictment for treason.

Sol. Gen. What the indictment says, is as direct affirmation as can be all along of the presentment of the jury, that the prisoner and others did compass and imagine the death of the king; and to bring it about, they did consult together, and did agree to make use of such and such means, and were to have a party of 40 men, and they bought arms and horses. Now it does not repeat 'quodque,' or 'ulterius præsentant quod,' to every one of those sentences, that they did so and so, and that they did so and so. Now I would fain know the difference between saying, and they did such a thing, and saying, and that they did such a thing. That is all the difference that they think to overturn this indictment for. The omitting of a 'Juratores ulterius præsentant,' certainly is nothing; for the first presentment runs through the whole indictment, and there does not need an 'Uterius.'

Sir B. Shower. Certainly there should have been a 'Quodque' at least.

L. C. J. No, indeed, I think it is better as

it is, than as you would have it; because the first 'Quod' goes through the whole. That in order thereunto he did so and so; would you have it said 'et quod' in order thereunto he did so and so; but though that may be good sense, I think it is not so good as the other. This indictment is for one sort of treason, and that is, for compassing the death of the king: and it is, I think, more proper to have but one 'Quod,' than to have more; for it makes the whole indictment more entire. As to the 'Juratores ulterius præsentant,' that is never proper, where the species of treason is the same: for, indeed, if there had been two distinct treasons, the one for compassing the death of the king, and the other for levying of war, in that case you must bring it in by 'ulterius præsentant:' because they are two several offences, though comprised in one bill, and they are in law as two indictments. And so it is in the case that you mentioned of cottages: it is one offence to erect a cottage, and another offence to continue a cottage, and they are to have several punishments; and because they there jumbled them both together in one indictment, that indictment was held to be nought: for, by law, the indictment for erecting a cottage, ought to conclude 'contra formam Statuti; and then the jury must begin again, 'et ulterius præsentant quod' the cottage was continued against the form of the statute: because they are several offences. But here the high-treason is but one and the same offence, and the other things are but overt-acts to manifest this treason, the compassing the death of the king; and truly, I think, it is better as it is.

Mr. Phipps. I have seen several precedents of indictments, where the several overt-acts were to the same high-treason, but still they had each an 'ulterius præsentant.'

Att. Gen. I believe it is hard to find many indictments in the same words: I am sure all are not.

L. C. Baron. (sir Edward Ward). Is it not as great an affirmation to say, and they did such a thing, as to say, and that they did such a thing?

L. C. J. I cannot reconcile it to my reason, but it should be as good sense without 'that' as with it.

L. C. J. Treby. In a long deed it begins, 'This indenture witnesseth that' the party granted so and so, and the party covenants thus and thus; and so it goes on commonly, without renewing the word 'that' to the subsequent clauses: but yet the first expression (This indenture witnesseth that) governs the whole deed, though it be many skins of parchment.

L. C. J. If you begin with an indenture, you begin, That it witnesseth so and so; without renewing, unless it be a very distinct thing.

Sir B. Shower. My lord, we think that similitude makes for us. A. B. covenants so and so in a conveyance, and then further, that so and so.

L. C. J. But there you restrain that in the beginning of the covenant to every particular in that covenant.

Att. Gen. Will your lordship please to call the jury now?

L. C. J. Have you a mind to go on with the trial, or to go to dinner?

Att. Gen. I believe your lordship can try but one more to night, and that may be as well after dinner as before.

L. C. J. Well, then, adjourn till five o'clock, and in the mean time, you keeper, knock off the prisoner's fetters.

Keeper. They shall, my lord.

Then the Court adjourned till five o'clock in the afternoon, it being then about three.

Post Meridiem, the 21st of April, 1696. The Court returned, and was resumed about six in the Evening.

Cl. of Ar. Keeper of Newgate, bring Charles Cranburne to the bar, (Which was done). Charles Cranburne, hold up thy hand. (Which he did). Those good men that you shall hear called and personally appear, are to pass between our sovereign lord the king and you, upon trial of your life and death; and therefore if you will challenge them or any of them, your time is to speak unto them as they come to the book to be sworn, and before they be sworn.

Cranburne. My lord, I humbly desire I may have pen, ink, and paper.

Court. Aye, aye. (He had them.)

Cl. of Ar. Where is George Ford?

Cryer. Vous avez.

Cranb. I challenge him.

Cl. of Ar. William Underhil.

Cranb. I challenge him.

Cl. of Ar. William Withers.

Cranb. I challenge him.

Mr. Phipps. If your lordship pleases, those that were of the last jury I hope shall not be called of this jury; this prisoner being tried upon the same indictment the last was.

L. C. J. If they be not, it shall be in ease to them, but it is not in favour of you.

Mr. Phipps. We humbly conceive, having given their verdict upon the same indictment, they are not such indifferent persons as the law intends they should be, and think it is good reason they should not serve upon this jury.

L. C. J. What though it be upon the same indictment? The evidence is not the same; for they are distinct offences.

Mr. Phipps. I do not know whether it be a good cause of challenge, but submit it to your lordship.

L. C. J. Well, you may doubt of it if you please, and try the exception.*

* See the seventh Resolution in the Case of the Regicides, *ante*; and Peter Cook's Case in the same year, *infra*; and Leach's Hawkins's Pleas of the Crown, book 2, chap. 43, sect. 29.

Cl. of Ar. Thomas Trench.

Cranb. I challenge him.

Cl. of Ar. John Wolfe.

Cranb. I challenge him.

Cl. of Ar. James Bodington.

Cranb. I challenge him.

Cl. of Ar. Jonathan Andrews. (He did not appear.) John Raymond.

Cranb. I challenge him.

Cl. of Ar. George Hawes.

Cranb. I challenge him.

Cl. of Ar. Francis Barry.

Cranb. I challenge him.

Cl. of Ar. Arthur Bailey.

Cranb. I challenge him; he was upon the last jury.

L. C. J. That is no reason; will you challenge him peremptorily?

Cranb. I do challenge him.

Cl. of Ar. John Caine.

Cranb. I do not except against him.

Cl. of Ar. Hold Mr. Caine the book, cryer.

Cryer. Look upon the prisoner, Sir. You shall well and truly try, and true deliverance make between our sovereign lord the king and the prisoner at the bar, whom you shall have in charge, and a true verdict give, according to your evidence, so help you God.

Cl. of Ar. Thomas Glover.

Cranb. I challenge him.

Cl. of Ar. Dormer Sheppard. (He did not appear.) George Tredway. (He did not appear.)

Matthew Bateman. (He did not appear.) Timothy Thornbury.

Cranb. I challenge him.

Cl. of Ar. James Partherich.

Cranb. I challenge him.

Cl. of Ar. Thomas Freeman. (He did not appear.) Robert Bredon.

Cranb. I do not except against him. (He was sworn.)

Cl. of Ar. Joseph Blisset

Cranb. I challenge him.

Cl. of Ar. Timothy Launo. (He did not appear.) John Harris. (He did not appear.)

John Billiers.

Cranb. I have nothing to say against him. [He was sworn.]

Cl. of Ar. Richard Bourn.

Cranb. I do not except against him. [He was sworn.]

Cl. of Ar. George Carter. (He did not appear.) Francis Chapman.

Cranb. I challenge him.

Cl. of Ar. Alexander Forth.

Cranb. I challenge him.

Cl. of Ar. Nicholas Roberts.

Cranb. I have nothing to say against him. [He was sworn.]

Cl. of Ar. Thomas Playstead.

Cranb. I challenge him.

Cl. of Ar. William Atlee.

Cranb. I challenge him.

Cl. of Ar. John Marsh. (He did not appear.) Andrew Cook.

Cranb. I do not except against him. [He was sworn.]

Cl. of Ar. John Hall.

Cranb. I challenge him.

Cl. of Ar. William Partridge.

Cranb. I challenge him.

Cl. of Ar. Peter Levignae.

Cranb. I challenge him.

Cl. of Ar. Thomas Moody.

Cranb. I challenge him.

Cl. of Ar. Richard Belinge.

Cranb. I challenge him.

Cl. of Ar. Thomas Evans.

Cranb. I do not except against him. [He was sworn.]

Cl. of Ar. Thomas Ramage.

Cranb. I have nothing to say against him. [He was sworn.]

Cl. of Ar. Edward Townsend.

Cranb. I challenge him.

Cl. of Ar. William Gunson.

Cranb. I challenge him.

Cl. of Ar. Philip Wightman.

Cranb. I say nothing against him. [He was sworn.]

Cl. of Ar. John Wybourne.

Sir B. Shower. I hope you take an account of the challenges, Mr. Hardistey.

L. C. J. Nay, you should take care of the challenges, who are his counsel: if he had no counsel, we would take care of him.*

Cryer. Here is Mr. Wybourne, what say you to him?

Cranb. I have nothing to say. [He was sworn.]

Sir B. Shower. I hope your lordship will also be of counsel for him.

L. C. J. We are to be equal and indifferent between the king and the prisoner: but you that are now his counsel by law, ought to take care that he lose no advantage.

Cl. of Ar. William Strode.

Cranb. I have nothing to say against him. [He was sworn.]

Cl. of Ar. Daniel Byfield. (He did not appear.) Benjamin Noble. (He did not appear.) Thomas White.

Cranb. I do not except against him. [He was sworn.]

Cl. of Ar. Cryer, countez. John Caine.

Cryer. One, &c.

Cl. of Ar. Thomas White.

Cryer. Twelve good men and true, stand together, and hear your evidence.

The names of the twelve sworn were these: John Caine, Robert Bredon, John Billiers, Richard Bourn, Nich. Roberts, Andrew Cook, Thomas Evans, Thomas Ramage, Philip Wightman, John Wybourne, William Strode, and Thomas White.

Cl. of Ar. Cryer, make proclamation.

Cryer. Oyez. If any one can inform my lords the king's justices of Oyer and Terminer, the king's serjeant, or the king's attorney-general, before this inquest be taken, of the high-treason whereof the prisoner at the bar stands

indicted, let them come forth and they shall be heard; for now the prisoner stands at the bar upon his deliverance: and all others that are bound by recognizance to give evidence against the prisoner at the bar, let them come forth, and give their evidence, or else they forfeit their recognizance.

L. C. J. Mr. Attorney, do you think we shall be able to try the other to night?

Att. Gen. That is according as this holds, my lord.

L. C. J. I speak it for the ease of the jury, that they might be dispatched, and not attend another day.

Att. Gen. I doubt we cannot try any more than this to night.

L. C. J. Well, it is no great matter, it will be but a morning's work; it may be too great a stress and a hurry to do any more to night; and therefore we will discharge the jury for to night, those of them that are not sworn; but we will be here to-morrow morning by seven o'clock; and therefore, pray, gentlemen, attend early.

Cl. of Ar. Charles Cranburne, hold up t'ay hand, (which he did). You that are sworn, look upon the prisoner, and hearken to his cause. He stands indicted by the name of Charles Cranburne, late of the parish of St. Paul Covent-garden, in the county of Middlesex, yeoman; for that he, with Christopher Knightley, late of the same parish and county, gentleman, and Robert Lowick, late of the same parish and county, gentleman, and Ambrose Rookwood, late of the same parish and county, gentleman, the fear of God in their hearts not having, nor weighing the duty of their allegiance, but being moved and seduced by the instigation of the devil, against the most serene, most illustrious, most element, and most excellent prince, our sovereign lord, William the Third, by the grace of God, of England, Scotland, France and Ireland, king, defender of the faith, &c. their supreme, true, rightful, lawful, and undoubted lord, the cordial love, and the true and due obedience, fidelity and allegiance which every faithful subject of our said lord the king that now is, towards him our said lord the king should bear, and of right ought to bear, withdrawing, and wholly to extinguish, intending and contriving, and with all their strength, purposing, designing and conspiring the government of this kingdom of England, under him our said lord the king that now is of right, duly, happily, and very well established, altogether to subvert, change and alter; as also our said lord the king to death and final destruction to put and bring, and his faithful subjects, and the freemen of this kingdom of England into intolerable and most miserable slavery to Lewis the French king to subjugate and enthrall, the 10th day of February in the 7th year of the reign of our said lord the king that now is, and divers other days and times, as well before as after, at the parish of St. Paul Covent-garden aforesaid, in the county aforesaid, falsely, maliciously, de-

* See a Note to the Case of Don Pantaleon Sa, vol. 5, p. 466.

vilishly, and traitorously, did compass, imagine and contrive, purpose, design and intend our said lord the king that now is, to slay, kill, and murder, and a miserable slaughter among the faithful subjects of him our said lord the king, throughout this whole kingdom of England to make and cause; and their said most wicked, impious, and devilish treasons, and traitorous compassings, contrivances and purposes aforesaid, to fulfil, perfect, and bring to effect, they the said Christopher Knightley, Robert Lowick, Ambrose Rookwood, and Charles Cranburne, and very many other false traitors to the jurors unknown; afterwards, to wit, the same 10th day of February, in the year abovesaid, at the parish aforesaid, in the county abovesaid, and divers other days and times, as well before as after, there and elsewhere in the same county, falsely, maliciously, advisedly, secretly, traitorously, and with force and arms, did meet, propose, treat, consult, consent, and agree, him our said lord the king that now is, by lying in wait and wile, to assassinate, kill and murder: and that execrable, horrid, and detestable assassination and killing the sooner to execute and perpetrate; afterwards, to wit, the same day and year, and divers other days and times, at the parish aforesaid, in the county aforesaid, traitorously did treat, propose, and consult of the ways, manner, and means, and the time and place where, when, how, and in what manner our said lord the king so by lying in wait the more easily they might kill: and did consent, agree, and assent, that forty horsemen, or thereabout (of whom they the said Christopher Knightley, Robert Lowick, Ambrose Rookwood, and Charles Cranburne, should be four; and every one of them traitorously took upon himself to be one) with guns, muskets, and pistols, charged with gun-powder and leaden bullets, and with swords, rapiers, and other weapons armed, should lie in wait, and be in ambush our said lord the king, in his coach being, when he should go abroad, to set upon; and that a certain and competent number of those men so armed, upon the guards of our said lord the king, then attending him, and being with him, should set upon, and them should fight with and overcome; whilst others of the same men so armed, him our said lord the king should assassinate, slay, kill, and murder. And they the said Christopher Knightley, Robert Lowick, Ambrose Rookwood, and Charles Cranburne, the treasons, and all their treasonable intentions, purposes and contrivances aforesaid to execute, perform, fulfil, and bring to effect, afterwards, (to wit) the aforesaid 10th day of February, in the 7th year abovesaid, at the parish aforesaid, in the county aforesaid, divers horses, and very many arms, guns, pistols, swords and rapiers, and other weapons, ammunition, and warlike things, and military instruments, falsely, maliciously, secretly and traitorously did obtain, buy, gather together, and procure; and to be bought, obtained, gathered together, and procured did cause, with

that intent them in and about the detestable, horrid, and execrable assassination, killing, and murder of our said lord the king that now is, as aforesaid, to be used, employed, and bestowed: and the same premisses the more safely and certainly to execute, do, and perpetrate, the aforesaid Christopher Knightley, with one Edward King (late of high-treason, in contriving and conspiring the death of our said lord the king that now is, duly convicted and attainted), by the consent and assent of divers of the traitors and conspirators aforesaid, the aforesaid 10th day of February, in the 7th year aforesaid, traitorously did go, and came unto the place proposed, where such intended assassination, killing, and murdering of our said lord the king, by lying in wait, should be done, perpetrated and committed, to view, see, and observe the conveniency and fitness of the same place for such lying in wait, assassination, and killing, there to be done, perpetrated and committed; and that place so being seen and observed, afterwards, to wit, the same day and year, his observations thereof to several of the said traitors and conspirators did relate and impart, to wit, at the parish aforesaid, in the county aforesaid; and the said Charles Cranburne the same day and year there, in order to the same execrable, horrid, and detestable assassination and killing of our said lord the king, by the traitors and conspirators aforesaid, the more readily and boldly to execute, perpetrate, and commit, advisedly, knowingly, and traitorously did bear and carry among divers of these traitors and conspirators forward and backward from some to others of them, a list of the names of divers men of them who were designed and appointed our said lord the king, so as aforesaid, by lying in wait, to kill and murder, against the duty of his allegiance, and against the peace of our said sovereign lord the king that now is, his crown and dignity, and against the form of the statute in that case made and provided. Upon this indictment he hath been arraigned, and thereunto hath pleaded Not Guilty, and for his trial hath put himself upon God and his country, which country you are; your charge is to inquire, whether he be guilty of the high-treason whereof he stands indicted, or not guilty: if you find him guilty, you are to enquire what goods or chattels, lands or tenements, he had at the time of the high-treason committed, or at any time since: if you find him not guilty, you are to inquire whether he fled for it; if you find that he fled for it, you are to inquire of his goods and chattels, as if you had found him guilty: if you find him not guilty, nor that he did fly for it, you are to say so, and no more: and hear your evidence.

Mr. Mountague. May it please your lordship, and you gentlemen of the jury; this is an indictment of high-treason that is found against four persons; but the particular treason against the prisoner at the bar, is for compassing and imagining the death of the king, and endeavouring to subvert the government,

and enslave the nation to Lewis the French king: and the indictment sets forth, that the prisoner at the bar did for this purpose meet and consult with several false traitors to the king and government, of the ways, manner, and means how, and the time and place when and where to assassinate the king; and at length they agreed that forty horsemen should go together, and set upon the king in his coach, as he returned from hunting; some to attack the coach, while others set upon the guards. The indictment does further charge him with getting horses and arms, and particularly with carrying a list of the assassins from one to another. These are the particular things charged in the indictment, and to this indictment he has pleaded not guilty; if we prove the fact, gentlemen, we do not doubt your justice.

Att. Gen. May it please your lordship, and you gentlemen of the jury; the prisoner at the bar, Charles Cranburne, is indicted for high-treason, in compassing and imagining the death of the king. Gentlemen, the overt-acts laid in the indictment to prove the prisoner guilty are, that he was at several meetings and consultations about the manner of putting this design in execution; at which meetings it was agreed, that there should be about forty horsemen in number prepared, and armed for that purpose, and they did provide horses and arms for that very thing, and did agree to put it in execution.

Gentlemen, the evidence that you will hear produced against the prisoner at the bar will be of this nature: You will hear from the witnesses, that about Christmas last, or the beginning of January, sir George Barclay did come over from France from the late king James, to whom he was an officer in his guards, with a commission for attacking the prince of Orange, or levying war upon his person. He came over about that time, and several troopers of the late king James's guards, to assist him in that barbarous conspiracy. When sir George Barclay came over, he did acquaint with this design several persons in England, that he thought proper to be accomplices with him in it; particularly captain Porter, Mr. Charnock, sir William Parkyns, and several others whose names you will hear of, and they had several meetings about it the beginning of February, at capt. Porter's lodgings, at the Nag's-Head in Covent-garden, at the Sun tavern in the Strand, at the Globe tavern in Hatton-garden, and several other places where they consulted in what manner they might attempt and accomplish this bloody design.

Gentlemen, you will hear, that at these meetings it was proposed, that they should do it by ambuscade as the king came from Richmond a hunting, whither he used to go upon Saturdays: others were for doing it on this side the water. And so their opinions being divided, it was thought necessary to find out and settle which was the best place; and in order thereunto they employed captain Porter,

Mr. Knightley, and Mr. King (who was executed) to view the ground; and accordingly they went, and pitched upon the lane between Brentford and Turnham-green for this purpose, as the most convenient place: and having so done, they came back, and gave an account to those that had appointed to meet them, to hear the success of their expedition, at the Nag's-Head in Covent-garden; and in that place, you will find by the evidence, that those persons who were the heads of the conspiracy, undertook to find their several proportions of men, for whom they would undertake that would go with them, and be concerned in this design. Sir George Barclay was to furnish about twenty. He had the command of the troopers that came from France, and those other officers that came thence were under him. Captain Porter was to furnish seven, Charnock was to furnish eight, sir William Parkyns was to furnish five horses and three men, and, I think, Lowick was to furnish some more: in the whole number they reckoned there should be about forty.

It will appear, gentlemen, that the prisoner at the bar, Mr. Cranburne, was one of the men that captain Porter undertook to get, and engage in this design; and accordingly captain Porter did acquaint Mr. Cranburne with it; and he did undertake to be one, and to be ready to go with him, and be concerned in this assassination. You will find he was acquainted with it about the 14th of February, the day before the first time that they intended to assault the king: then he did undertake and agree to prepare himself against the next day. The next day, which was the 15th of February, they had several meetings, and they were making preparation in order to go out. It happened, by great providence, his majesty did not go abroad that day, and thereupon they dispersed themselves; but they had meetings afterwards, at which meetings the prisoner was present with captain Porter, Mr. Pendergrass, LaRue, and several others that were concerned in the conspiracy, particularly the 21st of February, the day before the second time they were to have put this in execution. Captain Porter being at the Sun tavern, with several other gentlemen, and they resolving to have it executed the next day, if the king went abroad; captain Porter sent for Cranburne, and Keyes that was executed, and Kendrick and Sherborn, four of those that he had undertaken for, (of whom, I say, Cranburne, the prisoner at the bar, was one) and then he acquainted them that they were resolved to go on with it the next day. And then they agreed to be in a readiness accordingly. The next day the prisoner, with some others, met at Mr. Porter's, where they were preparing to go out and attack the king, and they had several discourses about the ways and means of doing it; and particularly captain Porter at that time said, that he had a very good gun that held about six or eight bullets, and that Mr. Pendergrass was to have, who was to attack the coach, and

shoot into the coach : Mr. Cranburne was there present at that time, and Mr. Cranburne was employed particularly by capt. Porter to carry a list that Porter writ of the names of several men that were to act in it under him, and this he was to carry to Charnock ; Porter writ it and gave it him, and he carried it, with directions to bring it back with the list of the names of Mr. Charnock's men. Cranburne did accordingly at that time carry the list of the names to captain Charnock, and brought it back, with an additional list from capt. Charnock, of his men.

At that time, you will hear further, when Cranburne brought the list, he brought an account that he heard the king did certainly go abroad : for Mr. Charnock had intelligence so from Chambers, who lay at Kensington to get intelligence : at which there was very great rejoicing among all that were present at that time, hoping they should have an opportunity to put this execrable design in execution ; and so they prepared all of them to go out. There were several inns in Turnham-Green and Brentford, and thereabouts, and they were to be placed two or three in an inn, that they might be ready to get together when time should serve. It happened the king did not go abroad that day neither, there being some discovery of this design, and so they did disperse themselves, as apprehending it was discovered.

Gentlemen, it will appear by several witnesses, that the prisoner at the bar was engaged in this horrid treasonable design, and was to have acted a part in it. We will call our witnesses that will make the particulars out to you, and we do not question but you will do what is right. First, call captain Porter.

[Who was sworn.]

Sol. Gen. Pray, if you please, capt. Porter, give the court and the jury an account what you know of this wicked intended assassination, and what share the prisoner at the bar had in it?

Porter. My lord, before this wicked assassination was on foot, the prisoner at the bar, Mr. Cranburne, was employed by me to buy arms ; I used to give him money to go to the brokers to buy arms at second-hand, and he brought a sword-cutler to me, of whom I bought about twenty swords. And when sir George Barclay came into England, and this business was resolved upon, I acquainted him with the design, and promised to mount him. He never was at any of the meetings with captain Charnock, sir George Barclay, or sir Wm. Parkyns ; but he went to look for a horse, and was ready both Saturdays to go along with me. On Saturday the 22d I sent him with a message to sir William Parkyns, for the note for the two horses, which he had promised me to furnish me with, out of his five that he was to furnish ; he came back again, and told me that there was a messenger came and said that the king did go out, and he knew where to have the two horses ; that Mr. Charnock was afraid we should not have the full number of men,

and desired me to send him the names of my men ; I did write a list of the names of my men, and I went afterwards to the Blue-Posts in Spring-garden, whither he was to come to me ; he did so, and he brought back the list of my men, with the list of Mr. Charnock's men written underneath it, and at the same time news was brought that the king did not go abroad that day.

L. C. J. You say, that before the assassination was set on foot, you employed him to buy arms and horses ?

Porter. My lord, I acquainted him with it the Friday before the first Saturday.

L. C. J. You said before the assassination you employed him to buy arms : when was that ?

Porter. I said before the assassination was on foot I employed him to buy arms. I told him I was to be a captain in colonel Parker's regiment, and promised to make him my quarter-master.

L. C. J. How long ago was this ? Was it a week before the assassination was on foot ?

Porter. He has known of my being a captain in col. Parker's regiment this two years.

Att. Gen. I do doubt, my lord, he does not distinguish the times when he bought the arms, and when the assassination was.

L. C. J. Yes, yes, he does now ; I misapprehended him at first, and thought he said he had employed him to buy arms a week before the assassination was on foot ; but he says it was a longer time.

Att. Gen. I desire, my lord, he may be asked what time he bought arms before this assassination : when was the last time he bought arms ?

Porter. It was several months before the assassination.

Att. Gen. Was it within a year before it ?

Porter. Yes ; I believe it was within a year. I gave him several times money for that purpose, in all above ten pounds, and he told me, one with another, he had bought ten case of pistols, and kept them in the house till there were occasion.

Att. Gen. How long ago is it ?

Porter. I believe about a year ; within a year.

Att. Gen. When did you first acquaint him with the assassination ?

Porter. Presently after sir George Barclay acquainted me with it ; I sent to him, to desire him to get the pistols clean and ready.

Att. Gen. Did you tell him of the design ?

Porter. I told him there was a design on foot, and I would tell him more when I saw him next ; and I desired him to get the swords from the sword-cutlers, and the pistols clean and ready. And I met him afterwards, and told him of the design, and that we intended to do it on Saturday the 15th ; and he engaged to be ready and make one. On the Friday before the 22d he went with me to the Cock-pit, and there we met with one Mr. Gunn, and I asked him if he knew where any good hackney

horses might be had? He said he believed he did; and I sent Cranburne with him, and he came back, and told me he had found two or three out in Bloomsbury.

L. C. J. Look ye, captain Porter, you must not speak so fast, it is impossible to understand so much matter as you deliver without distinguishing of times. You said, that some long time before the assassination was on foot you sent him to buy arms; for what purpose were those arms?

Att. Gen. My lord, he has told you—

L. C. J. Pray, let me hear it from him again.

Porter. I say, my lord, he knew of my being a captain in colonel Parker's regiment this two years.

L. C. J. But what were those arms for that he bought?

Porter. To be ready against king James landed, which was designed several times.

L. C. J. Why, now you make the matter clear to me.

Att. Gen. My lord, that is not the thing we go upon, that is but introductory to the business that we are now trying. Therefore we desire to know of him: captain Porter, when did you first acquaint Cranburne of the assassination of the king?

Porter. As soon as sir George Barclay acquainted me with it, and desired me to get what men I could to effect it. I sent for Cranburne to my lodgings in Norfolk-street, and he came to me one morning; and I told him there was a design on foot, and I would tell him more of it afterwards.

Sol. Gen. When was it that sir George Barclay acquainted you with it?

Porter. About the latter end of January.

Att. Gen. And what said he to it when you acquainted him with it?

Porter. He did agree to go with me, and I promised to furnish him with horse and arms; and on Friday before the 15th I sent him with three case of pistols to sir William Parkyns, to furnish the three men he was to mount with his own horses.

L. C. J. Who was to have those three case of pistols?

Porter. Sir William Parkyns was; and he carried them to sir William Parkyns's.

Att. Gen. How long was this, do you say, before the assassination was to have been?

Porter. It was Friday before the 15th.

Att. Gen. That was before the first time that it was to have been done?

Porter. Yes; and Friday before the last, I sent him to look after the horses that Gunn said he believed he could help me to, and he came to me to the Sun-tavern in the Strand, and told me he and Jeffery Gunn had found three horses in Bloomsbury, and I came out of the room where I was with sir George Barclay and others, and there was Kendrick, and Keyes, and Cranburne, and I told them we were resolved to put it in execution the next day.

Att. Gen. Well, pray what discourse had you with him the next day?

Porter. The next day, the 22d, he came to my lodging at Maiden-lane, and I sent him to sir William Parkyns for a note for the two horses, that I was to mount of his: he came back and told me, he knew where to have them, and that captain Charnock was afraid we should not have our complement of men, and desired me to send him an account what men I could bring, which I did by Mr. Cranburne, and being to go to the Blue-Posts, ordered him to bring it me thither, and he did bring it back to me to the Blue-Posts, with captain Charnock's list underneath.

Sol. Gen. Pray, captain Porter, was there any body present when you sent the list, and the prisoner brought it back to you?

Porter. Yes, there was Mr. De la Rue, and captain Pendergrass, and Mr. King, I know of none else.

Att. Gen. Pray do you remember what healths were drunk after you heard the king was not to go abroad?

Porter. I do not remember what healths were drunk that day particularly; but whether it were Thursday or Friday, (I cannot tell particularly the day). We drank a health to the squeezing of the Rotten Orange upon the next Saturday.

Att. Gen. Who was present that day when that health was drunk?

Porter. Mr. Cranburne was there present at that time, and did drink the health.

Mr. Cowper. Pray, Sir, did he meet you by appointment on Saturday the 15th, or was it by accident?

Porter. By appointment, as all the rest did, to get ready, as all the rest did, to go upon the design; and so it was both days.

Sir B. Shower. If they have done with Mr. Porter, we would ask him a question or two for the prisoner: we desire to know when it was that those arms were bought that he talks of? For we must acknowledge that Mr. Cranburne heretofore went upon several messages for captain Porter; when was that buying of arms?

Porter. I tell you, I cannot exactly tell the month.

Cranburne. Do you remember the year?

Porter. I believe it was less than a year before the assassination was on foot.

Cranburne. If you remember, Sir, it was a month before colonel Parker was put in the Tower.

Porter. It was several times; I cannot tell the particular times.

Sir B. Shower. My lord, I desire to know, when he first communicated this design to Mr. Cranburne? and who was by, and where it was?

Porter. I told you I sent for Mr. Cranburne one day in the week before the 15th, and he came to me at my lodging in Norfolk-street, and I acquainted him that sir George Barclay was come, and there was such a design on foot; and I desired him to get those pistols that he had of mine ready, and cleaned, that they might be ready for the execution.

Sir B. Shower. What day was that?

Porter. One day in the week before the 15th.

Cranburne. Did you ever name sir George Barclay to me in your life?

Porter. Yes, I did; I told you he was come from France.

Cranburne. Where was that, at Mr. —?

Porter. In Norfolk-street, where I lay.

Cranburne. Who was by?

Porter. Nobody but myself.

Sir B. Shower. Upon what occasion did you meet there?

Porter. I sent for him to my lodging.

Sir B. Shower. How long had sir George Barclay been in town, before that time?

Porter. I cannot tell the time when he came to town.

Sir B. Shower. How long was it after he came to town before you saw him? Had you seen him a week or a fortnight before? Pray recollect yourself.

Porter. I told you that the first time I heard of him, was the latter end of January; captain Charnock told me he was come, but I was then sick of the gout.

Sir B. Shower. Now then I would desire to know, who was by, upon the Friday before the 22d, at the Sun-tavern in the Strand, when you and Mr. Cranburne were there?

Porter. I did tell you, Sir.

Sir B. Shower. I desire to know, whether there was any body besides Mr. Cranburne, Kendrick, and Keyes?

Porter. Sir, I will tell you all I can remember; I was in one room with sir George Barclay, and there was sir William Parkyns, captain Charnock, and myself; and afterwards I went into another room, where there was Kendrick, and Cranburne, and Keyes; and Jeffery Gunn came in afterwards; I remember nobody else.

Mr. Phipps. Was not Gunn there when you first came in?

Porter. To the best of my remembrance, he came in afterwards.

Sir B. Shower. My lord, this may be a very material part of our defence, and therefore we must enquire a little the more into it. Mr. Porter is pleased to say, that he was in a room with sir George Barclay, and Charnock, and sir William Parkyns; and he came out into another room, where was Mr. Cranburne, Kendrick, and Keyes; and there he says, after he had been there some time, Gunn came in; I desire to know whether Gunn was there when he first came in?

Porter. To the best of my remembrance, he came in afterwards; but I cannot positively tell, for I was in and out several times.

Mr. Phipps. At the time that you communicated this design to Mr. Cranburne, what said he to you?

Porter. When I first communicated the thing to him, I told him there was a thing on foot for the service of king James, and desired him to go along with me.

L. C. J. What kind of service did you tell him it was?

Porter. He asked me, what kind of service it was? I told him sir George Barclay was come over, and I told the whole design of the assassination of the prince of Orange, that it was intended to take him off, as he came from Richmond from hunting.

Mr. Phipps. And pray what did Mr. Cranburne say to you?

Porter. He said he would be ready to go along with me.

Mr. Phipps. You say, you sent by him three case of pistols to sir William Parkyns; at that time did you tell him for what design those pistols were?

Porter. I told him, they were for the three men that sir William Parkyns was to mount upon three of his five horses.

Cranburne. Did you speak to me to carry those pistols to sir William Parkyns?

Porter. I think so, to the best of my remembrance I ordered you myself to carry them.

Sir B. Shower. Captain Porter, I desire you to recollect yourself, and tell us plainly, whether the design was communicated to Mr. Cranburne before the 15th?

Porter. Certainly, Sir.

Sir B. Shower. Are you sure of it?

Porter. Yes, Sir, I am sure of it.

Sir B. Shower. I ask you, because you know what has been said upon this occasion in other trials.

Cranburne. Where did you write the note, that you say you sent to sir William Parkyns? Was that note sealed, or was it not?

Porter. I did not tell you that I wrote a note.

Cranburne. You swore that you wrote a note, and sent it by me to sir William Parkyns for two horses.

Porter. I said no such thing, Sir.

Sol. Gen. Look you, captain Porter, let him ask you any questions; and if they be proper answer them, and let not his affirmations or mistakes provoke you to be angry.

Porter. I said, I sent him to sir William Parkyns, for a note to have the horses from Mr. Lewis.

Mr. Phipps. Did you send him with a letter, or was it a message by word of mouth?

Porter. I did send him by word of mouth, for a note.

L. C. J. Pray, gentlemen, observe the evidence: sir William Parkyns was to give a note for two horses, and captain Porter sent Cranburne for the note.

Mr. Phipps. The question therefore that I ask, is, whether he sent a letter for the note, or whether by word of mouth?

Porter. I sent by word of mouth.

Cranburne. Pray will you tell the court what you said upon the 22d to Mr. Pendergrass and me, after you came down from the Blue-Posts, leaning upon the rail.

Porter. I do not remember a word of it, for

I cannot remember every word that I have spoken.

Sir B. Shower. If you can remember one particular, sure you can remember another. If you cannot remember this, how came you to remember any part of the discourse that happened at the Blue-Posts?

Porter. Because that was material to this business, for I had very soon after a particular occasion to recollect it upon the breaking out of the plot.

Cranburne. Pray what hour was it this Saturday the 15th, that you communicated this design to me?

Porter. I cannot tell what hour, but I say you met at the Blue-Posts Saturday the 15th.

Cranburne. You say, you communicated it to me the 15th.

Att. Gen. He says he communicated it to you, before the 15th.

Cranburne. I desire to know where he was the 14th.

Porter. I say, one day before the 15th; in that week I sent for you to come to my lodgings, and you did come, and there I communicated it to you.

Cranburne. Sir, I was not at your lodgings that week.

Mr. Phipps. What day of the week?

Porter. I cannot be positive whether it was Thursday or Friday, or what day; but one day that week it was.

Mr. Phipps. You ought to be positive when it was.

Porter. I do tell you as near as I can.

Mr. Phipps. With submission, my lord, he ought to be positive one way or other.

L. C. J. Nay, I do not see that he ought to be positive to a day; he may be so if he can.

Cranburne. Pray what day did you say you sent me to sir George Barclay?

Porter. I do not say that I ever sent you to sir George Barclay.

Mr. Phipps. Can you take upon you to say, that he was at your lodgings that week before the 15th?

Porter. To the best of my knowledge it was one day that week.

Mr. Phipps. To the best of your knowledge! Are you sure of it?

L. C. J. Speak as certainly as you can.

Porter. Indeed, I believe so, it was before the 15th. I am sure, I think, it was within three or four days after sir George Barclay had acquainted me with it, I sent to the prisoner to come to me to my lodgings, at Mrs. —, in Norfolk-street, and acquainted him with it.

L. C. J. And when you acquainted him with it, what did you tell him? What part was he to act in it?

Porter. I told him, I would have him go along with me, and that I had set him down for one of my party, and would provide him horse and arms; and he did agree to go along with me.

Sir B. Shower. Mr. Webber, Pray let me see Charnock's trial.

Sh. Buckingham. Why, sir Bartholomew, is the trial any evidence?

Sir B. Shower. Mr. Sheriff, I know what use I can make of it.

Sol. Gen. Will you ask him any more questions?—*Sir B. Shower.* No, Sir.

Sol. Gen. Then swear Mr. De la Rue. [Which was done.] Pray, Sir, give the court and the jury, an account what you know of the intended assassination, and what share the prisoner had in it.

De la Rue. It is too long a story to tell you all that I know of this matter; but, if you please, I will tell you what concerns the prisoner at the bar. I am heartily sorry that I have occasion to appear against him, as I would be truly against any body: but since I am here upon my oath, I must declare the truth, and nothing but the truth; and I hope I shall not declare any thing but what is truth. Upon Saturday the 15th of February, the day that the design was to have been put in execution against his majesty, and all that were in the coach with him, and against his guards; I went to Mr. Charnock's lodgings in Norfolk-street, to inform myself whether they resolved on that day to go out upon the design; and I found by Mr. Charnock that they did resolve it, and I stayed there awhile, till such time as Mr. Chambers came in; I did not know whence he came then, but, as I was informed afterwards, he came from Kensington to Mr. Charnock, and his boots were dirty; and Mr. Charnock told me he had sent a messenger to Mr. Porter; and, says he, 'If you will stay a little time, I shall have an answer.' The messenger came back, and told him, That captain Porter dined at the Blue-Posts in Spring-garden. I did not go to dine with him, but went home, where I saw Mr. King, who told me, that the king did not go out that day. I told him, I heard he did not: I found by Mr. Chambers's coming back, and that we had no notice from Mr. Charnock, that it was concluded the king did not go out as it was supposed he should have gone. When I had dined at my lodging, I went to the Blue-Posts in Spring-garden to Mr. Porter, and there were four, or five, or six people with him; there was one Mr. Sherborn, and Mr. Kendrick, and two people that I never saw before, and another person, but I cannot tell now who he was. When we had been there a little while, in comes this unfortunate man at the bar, Mr. Cranburne; I do not know where he had been; but by his coming in so late, I suppose he had not dined, and he ordered the drawer to get him some costeleets. This is all I can say as to that day. I had seen capt. Porter twice or thrice between that and the 22d, and he desired me to be at home on Friday night between eight and nine, and he would send to me: he did send, and I was from home. But when I came I was informed his servant had been to speak with me; and in the morning, about eight or nine o'clock, Saturday the 22d, he sent his servant to me to tell me his master would speak with me at his lodgings. I went

to his lodgings, and he then lay in Maiden-lane, at one Brown's a surgeon: when I came in, he was in bed; and he told me in French, 'Touts parties sont prests,' All parties are ready. I understood all along that there were three parties to be engaged; one to attack the king's coach, and the two others the guards: sir George Barclay was to head the first, and Porter and Rookwood, the rest. Mr. Porter arose and dressed himself, and in came Mr. Cranburne; and Mr. Porter went out to him in the dining-room, and what he said I cannot tell: but soon after came in Pendergrass, Mr. Keyes, and Mr. King, and then he takes pen, ink, and paper.

Sir B. Shower. Who took that?

De la Rue. Captain Porter took pen, ink, and paper, and writes down a list of his party, and puts me down first. Mr. Pendergrass asked me if I was the captain? And I made him some answer, but what in particular I cannot tell; I think I told him I knew of the thing before the most did. But I can remember particularly that list was given to Mr. Cranburne, to carry to Mr. Charnock; upon what account it was, I cannot tell; but I concluded, that Mr. Charnock was to be acquainted with those persons that Mr. Porter was sure of: and Mr. Porter at that time told me that he was disappointed of some people, and desired me to get him some other men in their rooms; and he sent particularly to one that Mr. King proposed; and I did go, and brought him to the Blue-Posts, where captain Porter told me he was to dine; and the gentleman I went to, told me he would meet me at the Blue-Posts in Spring-garden. When I came back to Mr. Porter's lodgings, Mr. Porter and Mr. Pendergrass, and Mr. Oldfield, and I, went in a coach to the Blue-Posts in Spring-garden; and when we had been there a little while, Mr. Cranburne came back to give an account of the errand Mr. Porter had sent him upon, and he brings this list.

Att. Gen. Who brought it?

De la Rue. Mr. Cranburne.

Cranburne. Whither did I bring it?

De la Rue. To the Blue-Posts in Spring-garden.

L. C. J. You must not ask any questions till they have done with him. But Mr. *De la Rue*, let me ask you what day was this?

De la Rue. This was Saturday the 22d of February; and he told Mr. Porter there was a list of Mr. Charnock's men at the bottom of that list; and I took the list in my hand, and there was Mr. Charnock's list of six or seven, or thereabouts, of his party, and at the bottom of it was R. C. I think, for Robert Charnock. Mr. Porter takes Mr. Cranburne from the company into another room, and I went after them, and he told captain Porter, in my hearing, that the king did not go out that day. There is one thing I forgot which now I recollect, and I am upon my oath to tell the truth, and the whole truth. When I was at Mr. Porter's lodging, he told me the king was to go out; and that

Mr. Chambers, the orderly man, had sent word, That the king resolved to go out between ten and eleven.

L. C. J. Who said so?

De la Rue. Mr. Cranburne told me so at Mr. Porter's lodgings: I say I had forgot it, but it occurs to my memory now, that he told me there before he went to the Blue-Posts, that the king did go out that day between ten and eleven; for Mr. Chambers, the orderly man, had been with Mr. Charnock or sir Wm. Parkyns, to let them know so much. And afterwards, when he came back with the list of captain Porter's men, to captain Porter at the Blue Posts, in the Spring-garden, there was at the foot of that list, a list of Mr. Charnock's men in another hand, I suppose writ by himself, but that I cannot swear whose hand it was; and Mr. Porter took him into another room, and then Mr. Cranburne told him the king did not go out, and I believe it was then between eleven and twelve o'clock; and he also told Mr. Porter, that Mr. Charnock was apprehensive the thing was discovered, and therefore desired him to have a care of himself, for he himself was resolved not to lie at home that night; I think, my lord, Mr. Porter did send back Mr. Cranburne to Mr. Charnock; I cannot be positive whether he did or not, but I believe he did; because I am sure Mr. Cranburne did tell Mr. Porter, sir George Barclay would speak with him; and Mr. Porter made answer, why should he desire me to go to him, when he knows I am under some ill circumstances, and he can better come to me? And I believe Mr. Porter did send Mr. Cranburne once again to Mr. Charnock.

L. C. J. Well, pray do not say any thing of any matter, but what you can be positive in.

De la Rue. But Mr. Porter did not go to Mr. Charnock, nor did Mr. Charnock come to him, therefore they staid there and dined; and after dinner, or a little before dinner, Keyes the trumpeter came up and told us, that my lord of Oxford's regiment of Guards was returned from Richmond, foaming: Keys went down stairs again to learn intelligence, as I thought, and came up and told us he saw the king's coaches newly returned to the Mews, and Mr. Cranburne was by all the time; I think this was before dinner, and then we went to dinner.

L. C. J. I tell you again, do not speak any thing that is material, but what you can be positive in.

De la Rue. I am positive as to the thing, and that it was the 22d of February, but I cannot be positive as to all the circumstances. After dinner there was the usual healths, the Jacobite healths to king James, and the prince of Wales, and the Restoration, and the like; and after that I think it was Mr. Porter took an Orange in his hand, and squeezed it, I am sure one in the company did, and drank something to the Rotten Orange, I cannot very well remember just now what it was; but I would be cautious of saying any thing but what

is truth; but if your lordship will give me leave to recollect myself, I will tell you what it was—Oh! it was 'to the squeezing of the Rotten Orange,' and the health went round, and Mr. Cranburne was in the company, and drank the health. But being disappointed and frustrated of the design by the king's not going abroad that day, and Mr. Porter being cautioned by Mr. Charnock to take care of himself, and being told that Mr. Charnock would not lie at home that night, and the guards returning in that manner, they were all apprehensive that the thing had taken air, and the design of assassinating the king was discovered, and therefore Mr. Porter concluded of going out of town; several healths were drunk round, and I think about two o'clock he went out of town, and then the company broke up. This is what I can say as to the prisoner, and I hope I have said nothing but what is truth.

Sol. Gen. Then, my lord, we desire to know whether they will ask him any questions?

Mr. Phipps. At the time you say this list was given by captain Porter to Mr. Cranburne, did Mr. Porter declare to what purpose the list was sent?

De la Rue. No, Sir, not a word of any such thing. Mr. King was by, and Mr. Pendergrass was by, and I think Mr. Keyes was by, and he writ a list of his party, putting me down first; and Mr. Pendergrass said to me, You are captain, and he gave it to Mr. Cranburne to carry it to Mr. Charnock; what the particular message was, I cannot be positive: indeed I do not very well remember the message, but the list was carried to Mr. Charnock, and to the best of my memory it was to give Mr. Charnock an account what men he was sure of; for Mr. Porter told me of several disappointments he had had, of persons that had promised him, and failed.

Mr. Phipps. Can you remember what Mr. Cranburne said upon that?

De la Rue. No, I do not.

Cranburne. What message was that, you say, I brought from sir George Barclay?

De la Rue. I do not say that you brought any message from sir George Barclay.

Cranburne. You said that I brought a message, that sir George Barclay would see him.

De la Rue. I do not say so; but I say that you told Mr. Porter that Mr. Charnock sent you with a message to let him know that sir Geo. Barclay was desirous to see Mr. Porter, to confer about taking care of themselves.

Cranburne. Did you hear me name sir George Barclay's name?

De la Rue. Yes, I say you told Mr. Porter that Mr. Charnock bid you caution him to take care of himself, and that he would go that way, for sir George Barclay, and he, desired to see him; and Mr. Porter said it was an unreasonable thing for Mr. Charnock to desire it, because they knew he was under circumstances that it was not proper for him to go, and he wondered they would not rather come to him.

L. C. J. What time a-day was this?

De la Rue. It was about twelve o'clock, I think.

L. C. J. Was it after such time as the news was brought that the king did not go abroad that day?

De la Rue. Yes, my lord, it was after that time.

Mr. Phipps. Were you with sir George Barclay when he was here in England? Did you see him here?

De la Rue. I did not see him on this side of the water. I knew him abroad, and a great many other unfortunate persons, that were concerned in this affair; I knew some of them here, and that they were concerned in the design, but I did not converse with many, indeed with but a very few about it; for to shew that I was not a man that designed to trepan or ensnare any man, I did never exchange two words about this matter with any persons that I knew were concerned in it, but sir William Parkyns, (and that but in a small measure) and Mr. Charnock, and Mr. Porter, and Mr. King, and colonel Parker; except what passed upon the 22d, between Mr. Porter and Mr. Charnock, when Mr. Porter sent Mr. Cranburne to Mr. Charnock. Mr. Cranburne was one who Mr. Porter called his quarter-master: I know this gentleman was commonly depending upon Mr. Porter, but I think I never was much in his company; I did not know what design he had upon him, but I was told by Mr. Porter, that he intended to make him his quarter-master, and I understood Mr. Porter was to have a troop of horse in colonel Parker's regiment.

Mr. Phipps. You say you knew a great many of them that were concerned, but you discoursed and conversed but with a few?

De la Rue. I do so, Sir.

Mr. Phipps. How do you know that they were concerned, when you did not discourse with them?

De la Rue. By information from Mr. Charnock and Mr. Porter.

Mr. Phipps. Do you know any thing more of Mr. Cranburne, than the list, and what you have said already?

De la Rue. I give you an account of all that I do know.

L. C. J. Answer that particular question. Do you know nothing more than what you have said?

De la Rue. No, my lord, I do not remember nor know any more as to Mr. Cranburne than what I have declared, and I am sorry I had occasion to declare so much.

Att. Gen. Then call Mr. Pendergrass.

[Who was sworn.]

Sol. Gen. Pray will you give my lord and the jury an account of what you know of the intended assassination, and how far Mr. Cranburne, the prisoner at the bar, was concerned in it.

Pendergrass. My lord, the 13th of February last, I came out of Hampshire, Mr. Porter sent for me to come to town, and I met him that

day at the Blue-Posts in Spring-garden, and there he told me of the assassination that was to be done on Saturday following: the next day we dined at the Rose-tavern, where the prisoner dined with us, and we talked of the business; that was Friday the 14th, and we were to be in readiness the next day to assassinate the king, as he was coming from Richmond; but some company coming in afterwards, we left off the discourse, and talked no more that night. The next day that we were to do the business, we met at the Blue-Posts in Spring-garden, and finding the king did not go abroad that Saturday, we dined there at the Blue-Posts, and talked over again of assassinating the king, and the prisoner was by at the same time; they were all mightily concerned the king did not go that Saturday; but when we had dined there, we had no further discourse about the assassination that day, but every body was to prepare against the next Saturday.

L. C. J. Was that agreed upon then?

Pendergrass. Yes, it was by all the company; so we parted that day. Some time the next week I met Mr. Porter, and Mr. Porter asked me, if I had a horseman's sword? I told him, No: says he to Mr. Cranburne, Let capt. Pendergrass have one of the horsemen's swords that you have got. Says Mr. Cranburne to me, If you will come to my house you shall make choice of one yourself, for I have several at home. Said I, Mr. Cranburne, I cannot go that way, but I will take one of your choosing, if so be you will leave it at my lodgings: he said he would do it, and did; he left it at my lodgings in Suffolk-street, which sword I have still. The day following I met him, and he asked me if I had received the sword? I said, I had it; and he said it was very well. After this, I did not see Mr. Cranburne till Saturday the 22d, at which time I came to Mr. Porter's lodgings between nine and ten o'clock in the morning, and the prisoner at the bar was there, and I heard Mr. Porter give him a message to go to sir William Parkyns for some horses, I know not how many. The prisoner went, and in some time after came back again, and brought an account that the king went out that Saturday the 22d to Richmond; so every body was to get ready: and Mr. Cranburne said, that Mr. Charnock desired that Mr. Porter would send a list of his men; upon which Mr. Porter wrote a list of his men, and gave it to the prisoner to carry to Mr. Charnock, and bid him meet him at the Blue-Posts; and Mr. Porter, and Mr. De la Rue, and I, took coach, and went down to Spring-garden, and when we came to the Blue-Posts, there were some persons that I think Mr. De la Rue had appointed to come there: the prisoner comes thither, and brought the list back, with a list of Mr. Charnock's men underneath. I know not who the men were, for I saw it only on the one side of the table in Mr. Porter's hand; at the same time the prisoner brought an account, that the king did

not go abroad that day, and presently after we had the same account from other hands; and captain Porter and I went out of town, and we heard no more of it.

L. C. J. Are you sure that he did agree to this matter before the 15th?

Pendergrass. Yes, I am sure of it; he agreed to it Friday the 14th, at the Rose-tavern, in Covent-garden.

L. C. J. On the 15th, it seems they were disappointed; are you sure there was an agreement to pursue it the 22d?

Pendergrass. Yes, I am sure there was, my lord.

L. C. J. Was the prisoner there?

Pendergrass. Yes, my lord, I am sure that the prisoner at the bar was there.

Cranburne. Pray, Mr. Pendergrass, was there any discourse about this thing when I was there?

Pendergrass. Yes, Mr. Cranburne, you cannot but remember there was.

Cranburne. What hour did I come there, pray, Sir?

Pendergrass. Truly, I cannot be positive to an hour; but you were there while the discourse was.

Cranburne. Whether I did stay there all the while, and who was in the company?

Pendergrass. All the company broke up about six o'clock; there was Mr. King, capt. Porter, Mr. Kendrick, Mr. Cranburne, Mr. Keyes, and myself.

Cranburne. Was Kendrick there when I was there?

Pendergrass. Yes, I am sure of it; I will do you all the justice in the world that I can.

Sir B. Shower. You say, Sir, he did agree upon the 14th to this design; pray what words did he use?

Pendergrass. He did agree that we should attack the king the next day.

Sir B. Shower. Pray, Sir, if you can recollect yourself, what did the prisoner say, or whether you took him to agree by being silent?

Pendergrass. He said, he hoped we should execute our business the next day.

L. C. J. What day was that?

Pendergrass. That was the 14th of February, and the same night I gave account of the matter to my lord Portland.

Mr. Phipps. Did he agree to be one in the execution of the design?

Pendergrass. Yes, he did; he discoursed the matter to me himself.

Att. Gen. My lord, we have done with our evidence.

L. C. J. Well, then, what say you to it for the prisoner?

Sir B. Shower. My lord, what we have to say on behalf of the prisoner in this respect is this: Here are but three witnesses produced, and as to one of them, De la Rue, there is no evidence that he gives your lordship and the jury that affects this matter, but only that there was a list given by capt. Porter, and carried by the prisoner to Mr. Charnock, and so brought

back again. But he does not recollect, nor swear to any message that was sent from Porter by the prisoner to Mr. Charnock: now, my lord, the bare carrying of a note of names will be no evidence of treason. Mr. De la Rue does not swear to any privity of the prisoner, what the list was for, nor to the delivery of the list, which is the overt-act in the indictment; nor upon what account this list was written, or sent, or brought back again, or any word that proceeded from captain Porter to him upon giving the list, or any word when it was brought back again. So that as to De la Rue's testimony, we must submit it to the memories and recollection of your lordship and the jury; we think he only proves a plot in general, of which there is no peradventure, every body is satisfied that there was such a horrible conspiracy: those that have been condemned and executed for it, have owned it, and so it can never be doubted; but he does not say any thing to affect the prisoner at the bar; for as to the drinking of healths, and being present when those healths were drunk, though it be an evidence of disaffection to the government, or too much good manners and complaisance to the company a man is in; yet that disaffection, or civil temper, or complaisance, we hope are no evidences of treason. It is plain the prisoner did depend very much upon captain Porter; he was in truth his servant to go of his errands, and expected an office from him, God knows when; but it does not appear by any particular action, that he did any thing that can be treason, upon Mr. De la Rue's evidence. Then, as to what Mr. Pendergrass says, I must confess his evidence comes home: for he says there was a design of the assassination, and some agreement of the prisoner to it; but I must beg your lordship's favour to observe, upon Mr. Pendergrass's evidence, if that stand alone, it will be but one witness, and then we are safe by the purview of this act of parliament.

L. C. J. Ay, and by the law, before the making of that act.

Sir B. Shower. Then, as to capt. Porter, I must beg leave to say, if our witnesses are come that were absent at the other trial, and they prove what is in my instructions, it will be very much questionable, whether there be any credibility due to his testimony: then if you take off his testimony, there is only the evidence of Mr. Pendergrass; and if he be to be believed, to which I have nothing to say at present, in the case of a man's life, upon an indictment of treason, where the law requires two credible witnesses, his single testimony is not sufficient to convict the prisoner. We beg leave to call our witnesses, and then we shall leave it to your lordship, and the jury.

Mr. Phipps. As to the particular overt-act laid in the indictment, the carrying about the list, only Mr. De la Rue speaks to it, and sir Bartholomew Shower has given it an answer, and I shall not repeat it.

L. C. J. Look ye, for that, if any one overt-act is proved by 2 witnesses, it is well enough.

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Sol. Gen. Besides, they mistake, my lord, extremely; for captain Porter and Mr. Pendergrass speak both of them to that particular as to the list.

Sir B. Shower. We do not deny it; the question is, Whether you have two credible witnesses?

Cranburne. Pray, Mr. Pendergrass, do you remember what captain Porter said to you, and I, when we came down to the Blue-Posts, leaning upon the rail?

Pendergrass. Indeed, Sir, I do not.

Cranburne. I would have you recollect yourself; as we stood against the rails in Spring-garden, when we came down from the Blue-Posts, after the design miscarried, Mr. Porter said, Mr. Charnock and they might thank themselves if it were discovered; 'For,' says he, 'I never communicated a word of this thing to any of my party.'

Pendergrass. Indeed, I do not remember a word of it, Sir.

Mr. Phipps. My lord, we have one piece of evidence to offer against the testimony of captain Porter: he says, that he sent Cranburne with Gunn from the Cock-pit to see for hackney horses, and that Cranburne came to him to the Sun-tavern, and there they had some discourse about executing the design the next day; and being asked, who was by, when he communicated the design to Cranburne? and particularly, whether Mr. Gunn was by? He says he came in afterwards, but was not there at the time of the communication about the design. Now we shall prove that Gunn came in with the prisoner, and was with him all the time, and there was no such discourse happened.

Sir B. Shower. Call Jeffery Gunn, and Mary Gerrard. [They appeared.] Your lordship will observe, what captain Porter swore, that he went into the room to Cranburne, and Gunn was not there: now, if we falsify him in that particular, we shall submit to your lordship how far he is to be believed in the rest.

Att. Gen. Pray, sir Bartholomew, ask your witnesses what you will, but make no descants upon their evidence till you have heard them.

Then the two Witnesses were sworn.

L. C. J. Well, look ye, you are both upon your oaths, consider what you say, speak the truth, and tell all that you know, and nothing but the truth. Which do you begin with?

Mr. Phipps. Jeffery Gunn—Pray Mr. Gunn, did you go to the Sun-tavern at any time with Mr. Cranburne?—*Gunn.* Yes, I did.

Mr. Phipps. What day of the month was it?

Gunn. I cannot positively tell the day, it was of a Friday.

Sir B. Shower. Was it of a Friday, in February, or January?

Gunn. It was in February.

Mr. Phipps. Was it before the plot broke out?—*Gunn.* Yes, it was.

Mr. Phipps. How long was it before the plot broke out?—*Gunn.* I cannot tell that, truly.

Mr. Phipps. Whence did you go?

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Gunn. I was at the Cock-pit, and I went from thence to the Sun-tavern.

Sir B. Shower. Whom did you meet there?

Gunn. I saw captain Porter there.

Sir B. Shower. What room were you in?

Gunn. We went into a room next the street.

Sir B. Shower. Who was there with you?

Gunn. There was Mr. Cranburne, and I, and Mr. Keyes.

Sir B. Shower. How long was it before Mr. Porter came in to you?

Gunn. He came in about half a quarter of an hour after I was there.

Sir B. Shower. Were you there from the beginning till Mr. Cranburne went away?

Gunn. Mr. Cranburne and I went from the Cock-pit together.

Sir B. Shower. How long did you stay there?

Gunn. I was there about an hour and a half.

Sir B. Shower. Were you out of the room at all in that time?

Gunn. Yes, I was out of the room once.

Sir B. Shower. How long were you out of the room?

Gunn. I went home to my lodging.

Sir B. Shower. Were you ever with Mr. Cranburne at the Sun-tavern at any time besides this?—*Gunn.* Never in my life.

Sir B. Shower. Whom did you leave with him when you went out?

Gunn. Captain Porter and Mr. Keys, as I remember.

Sir B. Shower. Were you there before captain Porter came to him?

Gunn. I was with Mr. Cranburne, and captain Porter came in about a quarter of an hour after; we came from the Cock-pit together.

Sir B. Shower. Pray recollect yourself, and tell us upon your oath, were you there when captain Porter came in?

Gunn. Yes, I think I was there when capt. Porter came in.

Sir B. Shower. Did you go and leave him there?

Gunn. We went all out together. I was there about an hour and a half.

L. C. J. Nay, but you said you were absent some time.

Gunn. I went home, and came back again.

Sir B. Shower. When you went home, did you leave Mr. Cranburne behind you?

Gunn. Yes, I think so.

Mr. Phipps. Did you leave captain Porter with him?

Gunn. I think captain Porter was with him then.

Mr. Phipps. But, upon your oath, was you in company with Mr. Cranburne at the Sun-tavern, when captain Porter came first in?

Gunn. Captain Porter went in and out several times.

Sir B. Shower. Did you see captain Porter before you went to your own house?

Gunn. Yes, sure.

Mr. Phipps. Then it cannot be true what Mr. Porter says, that Gunn did not come in till afterwards.

Att. Gen. Now, Mr. Gunn, I would ask you a question or two first, Were you there all the while that Mr. Cranburne was there, or did you go home?—*Gunn.* I went home.

Att. Gen. Did you come back again?

Gunn. Yes, I went home and eat some victuals.

Att. Gen. How long were you absent?

Gunn. I came back in half a quarter of an hour.

Att. Gen. How far is it to your house?

Gunn. It is not above 100 yards.

Sir B. Shower. Did Mr. Porter come in to you before you went home, when you first came in with Cranburne?

Gunn. He came in after we were in the room.

Mr. Phipps. Captain Porter said, when he came into the room Gunn was not there.

L. C. J. He did not say positively, but, as he remembered; now I would ask you a question or two.

Sir B. Shower. Pray, my lord, our inference from this evidence is this: Captain Porter says, that upon Friday the 21st of February he was with Cranburne at the Sun-tavern, and out of one room into another; he came to Mr. Cranburne, and talked with him of this design, and after that Gunn came into the room, after the communication was over: now this man swears he went from the Cock-pit with Mr. Cranburne, he was with him in the room at first when captain Porter came; some time afterwards he went to his own house, and left captain Porter with Mr. Cranburne, and came back again, and they came away together: now, we say, these two are inconsistent; for captain Porter swears that Gunn was not there till after the communication was over.

L. C. J. As he remembers.

Mr. Phipps. Nay, I think he was positive he came in afterwards.

L. C. J. As I remember, he was not positive; but call captain Porter again.

Mr. Phipps. When you came back from your house, who were in the room?

Gunn. The same company as I left, as far as I remember.

Mr. Mountague. Was captain Porter in the room when you came back?

Gunn. Indeed I cannot directly tell, I believe he was.

L. C. J. Pray observe what your witness says: he says, captain Porter came in and out, and was there several times before he went away.

Gunn. Yes, my lord, he was so.

L. C. J. And you were absent some time; but were you there some time before Porter came in?—*Gunn.* Yes, I believe I was.

Then Captain Porter came in.

Att. Gen. Look ye, captain Porter, you see that man there?—*Porter.* Yes.

Att. Gen. Pray give an account of what you know of that man's coming in to you at the Sun-tavern.

Porter. I came several times out of sir George Barclay's room into theirs, and to the best of my remembrance, Mr. Cranburne was there before Gunn came in.

Sir B. Shower. Do you remember whether the first time that you went out of sir George Barclay's room to speak with Mr. Cranburne, Mr. Gunn was there?

Porter. To the best of my remembrance he was not; to the best of my remembrance, Mr. Gunn, I saw Mr. Cranburne in the room before you was there.

Sir B. Shower. Did you not order Gunn to come with him to the Sun-tavern?

Porter. Yes, Sir, I did.

Sir B. Shower. Cannot you tell whether they came together?

Porter. I was not in the room when they came in first, but to the best of my remembrance he was not there when I came in the first time.

L. C. J. Now, Gunn, you hear what captain Porter says; before you went away to your own house, did Mr. Porter come into the room to you?

Gunn. Indeed, my lord, I am not positive, I think he did.

Att. Gen. Neither of them is positive, and it is a circumstance not very material; for it seems he was absent, and then the discourse might be.

L. C. J. No, it is not material, but you see upon a strict examination what it comes to.

Sir B. Shower. They are agreed upon it, I perceive, to be positive on neither side.

Mr. Phipps. Mr. Cranburne, pray ask Mrs. Gerrard what you have a mind.

Cranburne. Pray what do you know of captain Porter's going out in disguise, and wearing false hair and vizards, and going upon the highway, and such things?

Gerrard. I know not what Mr. Cranburne means. [At which the people laughed.]

Sir B. Shower. It is no laughing matter, when a man is upon his life.

L. C. J. No, no, let him have fair play; answer the question.

Cranburne. Do you know any thing of your master's going abroad in disguises?

Gerrard. I do not know any thing of my master's going upon the highway.

L. C. J. Did he go out with vizards, or any such things?

Gerrard. I never saw him wear a vizard or false beard in my life, but he had once a patch on when he was forced to keep out of the way, upon the account of the Dog-tavern business in Drury-lane.

Mr. Phipps. See if Mr. Edward Boucher is here. [He was called, but did not appear.]

Sir B. Shower. Call Mrs. Burton. [Which was done, but she did not appear.]

Mr. Phipps. Is William Hardyman here? [He was called, but did not appear.]

Sir B. Shower. Then call Simon Dawson, and we have done. (Which was done.)

Cryer. They are all called, but they do not appear.

Sir B. Shower. My lord, we must submit it to your lordship's directions, upon the evidence that has been given, as to the credibility of these witnesses, and whether what capt. Porter says, and what Gunn says, be consistent; so that you can be satisfied there are two lawful credible witnesses to prove any overt-act.

L. C. J. Yes, sure; but I would have you debate it, if you believe there be any thing in it.

Sir B. Shower. I submit it to your lordship's directions.

L. C. J. The question is, Whether I should give any directions at all or no, or whether there be any occasion for it?

Cranburne. I declare this openly before this honourable court, and so many noblemen as are here, that Mr. Porter never made me acquainted with this design, till what he swore here.

L. C. J. I cannot tell; it is sworn by two witnesses.

Cranburne. I do declare, though capt. Pendergrass says he does not remember it, that captain Porter did declare in Spring-garden the 22d, when he came out of the Blue-Posts by the rails, If this design miscarry, says he, Mr. Charnock may thank himself: for I never communicated this secret to any of my friends.

L. C. J. But hark ye, do you consider what you say, If this design miscarry? Pray what design was that?

Cranburne. He never named any thing but the design, he did not say what it was.

L. C. J. But why were you employed to carry a list from captain Porter to Mr. Charnock, and to bring a list back again from him to captain Porter?

Cranburne. I did carry the note, but there was nothing mentioned what the list was for.

L. C. J. Then you were there on Friday the 14th, and there the design was proposed to assassinate the king the next day, and you engaged in it.

Cranburne. Not a word of it true, my lord.

L. C. J. Ay, but Mr. Pendergrass swears it, and that you were hearty in the matter, and hoped you should do your business the next day.

Cranburne. I cannot help it if he does swear it.

L. C. J. Then you were at the meeting at the Sun-tavern, the 21st.

Cranburne. My lord, you hear what Gunn says.

L. C. J. As to that, they are neither of them positive; but you did there promise and undertake the matter, that captain Porter is positive in, that it was agreed by you all to do it the 22d; and Mr. Pendergrass says, when you were disappointed the 15th, you all agreed to pursue the same design the Saturday following.

Cranburne. My lord, I did not dine at the Blue-Posts that day.

L. C. J. But you were there; I think, in-

deed, Mr. Pendergrass says you came in after dinner, and had some steaks.

Cranburne. I never heard directly nor indirectly of this design, till what I heard them swear here.

L. C. J. Gentlemen of the Jury, You do understand for what crime this prisoner at the bar is indicted: it is for high-treason, in designing and compassing the death of the king, which was to be effected by an assassination in the most barbarous and wicked manner, that any attempt of that nature can possibly be made, being to surprise the king, and murder him in his coach.

The question, gentlemen, is, Whether this prisoner be guilty of this crime or no? There have been three witnesses produced that have given evidence against him, captain Porter, Mr. De la Rue, and Mr. Pendergrass; and they do all tell you that there was such a design on foot to assassinate the king, as he came from hunting at Richmond, after he came on this side the water, in the lane between Brentford and Turnham-Green. There were diverse persons engaged in this design, which sir George Barclay was come from France to promote and manage: captain Porter, as it does appear upon his evidence, was a person that was principally engaged, and at that time was hearty in the prosecution of it.

As to Mr. Cranburne, captain Porter tells you he was a man that he had had a long acquaintance with, and had employed him, and designed to employ him as an officer under him, in case a revolution happened, which it seems about that time, and some time before it, was expected. Captain Porter was to have been a captain, and I think he designed to promote Cranburne to be his quarter-master; and he sent him to buy arms; and preparations were made for that business; but that is not the thing that we are now upon; the matter that now properly falls under our consideration, is this: the coming over of sir George Barclay, the latter end of January, or the beginning of February last; upon which, as it seems, Mr. Porter was engaged; and having an interest in this Cranburne, and there being horses to be furnished to attack the king and his guards about Turnham-Green, this man, Cranburne, was a person that was engaged to be one of the horsemen that were to make the attack; and he tells you that he did employ him to provide horses and swords, and to prepare the pistols; and that he did engage in it, and particularly that the design was to be executed on Saturday the 15th of February, and that he was then ready to go with capt. Porter; but on that Saturday the king did not go abroad, whereby the design was disappointed for that time: afterwards, there was a meeting at the Sun-tavern in the Strand, where he met with sir George Barclay, and others of them; and there comes to that tavern Mr. Cranburne and others, and they were in another room, and captain Porter says he came to them, and did discourse about pursuing the design the very

next day, which was agreed, and Cranburne was ready to go the next day.

Then he tells you further, that the next day being Saturday the 22d, the second time that this assassination was to have been executed, upon the desire of Mr. Charnock, who was a person also that was engaged in this design, captain Porter writes a list of the men he could bring, and sent it by Cranburne to Charnock; Cranburne carries the list to Mr. Charnock, and brings it back again with an addition of the names of Mr. Charnock's men underneath.

Mr. De la Rue is called, and he swears to that very circumstance, that Mr. Cranburne was sent by captain Porter with a list to Mr. Charnock, and brought it back again from Mr. Charnock, with an addition of other names.

Then Mr. Pendergrass tells you, that he was with this Mr. Cranburne, the prisoner at the bar, the 14th of February, and there was a discourse of going in pursuance of this design the next day, and the prisoner agreed to it, which he is positive in: he tells you, that when they were disappointed the 15th, being at the Blue-Posts, they then agreed to pursue it the next Saturday; Cranburne was one of them that agreed.

Captain Porter and De la Rue inform you that healths were drank to the late king, and the late queen, and the prince of Wales, as they called him, and then at length, as the concluding health, captain Porter, or some of them in the company, having an orange in his hand, squeezed it, and drank a health to the squeezing of the Rotten Orange, which was pledged by all, and particularly by Mr. Cranburne, as is proved by both captain Porter and De la Rue.

So that now, Gentlemen, I must leave it to you, whether this is not evidence sufficient to prove this man guilty of the treason whereof he is indicted, that is, of designing and intending the assassination of the king, and being engaged as a party to execute this design, whenever there was an opportunity.

The counsel insist upon it, on the behalf of the prisoner, that what captain Porter says is no evidence: in the first place, they urge that he is not a man of credit, for they have mentioned that he used to be disguised, and wear a vizard mask, and go abroad under odd circumstances, and therefore his reputation they hope is not good enough to make him a credible witness against the prisoner: now the prisoner's witness being produced, says she never knew him go in disguise, or wear a vizard mask, but once he wore a patch, because he was under some ill circumstances about a riot in Drury-lane; every body understands what the meaning of that was, his drinking of healths at a riotous assembly, upon the 10th of June, and he being under some prosecution for that, occasioned him to wear that disguise, but it was not done to hinder any person, or do any mischief.

But then, say they, he is mistaken in his

evidence, of the meeting at the Sun-tavern the 21st of February, the day before the last, that this design was to have been executed, for whereas he says, that Gunn was not there when he came to them, yet Gunn was in the company at that time, and whereas he swears positively that they discoursed of going upon the same design to assassinate the king the next day, as was agreed the Saturday before; Gunn heard no such discourse. Gunn is called, and he tells you he did come to the Sun-tavern at that time, with Cranburne and captain Porter, he came into the room, and he heard no such discourse. They did open it, indeed, that Gunn had been there all the while, and if so, then if there had been such a discourse, he must have heard it. Gunn has been examined, and does tell you he was not there all the while, but went out and was absent for some time, about half a quarter of an hour.

They have made a question, whether captain Porter came in when Gunn was there? He says truly he thinks that captain Porter did come into the room while he was there, before he went out, but he cannot tell certainly; he was there some time, while he was there. Then captain Porter was called again, and captain Porter does say he knows Gunn was there, but whether he was there at that time he came in, he cannot say positively; but Gunn says captain Porter was going in and out several times, as Porter says himself; and Gunn was absent for some part of the time. So that I cannot see any sort of contradiction between the evidence that Porter gives, and the evidence that Gunn gives; the one is uncertain, and so is the other as to that circumstance.

But, Gentlemen, they would infer, that if there was any such discourse while Gunn was there, it must be of necessity that Gunn must have heard it; but it is not necessary the discourse should be when Gunn was there: captain Porter swears positively, that there was such a discourse of going the next day to pursue the design, and he says he thinks Gunn was not present at that time when the discourse was, and Gunn says he was absent some part of the time.

And so I must leave it to you: upon the whole matter, if Mr. Cranburne, the prisoner

at the bar, did consent and agree to act in this bloody and wicked design, then you are to find him guilty; if you are not satisfied of that upon the evidence you have heard, or you think there is any inconsistency, or incoherence in the testimony on the one side, and the other; and that there is good reason to disbelieve the evidence against the prisoner, then you are to acquit him. You have heard your evidence, and you had best consider of it.

Cl. of the Crown. Who keeps the jury?

Cryer. There is an officer sworn.

Then the Jury withdrew to consider of their verdict, and about a quarter of an hour after returned.

Cl. of Ar. Gentlemen, answer to your names, John Caine?

Mr. Caine. Here. (And so of the rest.)

Cl. of Ar. Are you all agreed of your verdict?—*Jury.* Yes.

Cl. of Ar. Who shall say for you?

Jury. Foreman.

Cl. of Ar. Charles Cranburne, hold up thy hand, (which he did). Look upon the prisoner; how say ye, is he guilty of the high-treason whereof he stands indicted, or not guilty?

Foreman. Guilty.

Cl. of Ar. What goods or chattels, lands or tenements, had he at the time of the treason committed, or at any time since?

Foreman. None, to our knowledge.

Cl. of Ar. Then hearken to your verdict as the court hath recorded it. You say that Charles Cranburne is guilty of the high-treason whereof he stands indicted, but that he had no goods, chattels, lands, or tenements, at the time of the high-treason committed, or at any time since, to your knowledge, and so you say all.—*Jury.* Yes.

Mr. Caine. My lord, the jury humbly desires they may be discharged from their attendance to-morrow.

L. C. J. We cannot do it, unless the jury be full without them; if you come early, we shall dispatch you presently.

Then the Prisoner was taken from the bar, and the Court adjourned till seven o'clock the next morning.

388. The Trial of ROBERT LOWICK, for High Treason: 8 WILLIAM III. A. D. 1696.*

April 22, 1696.

THIS day the justices of Oyer and Terminer holden for the county of Middlesex, met, and the court was resumed by proclamation in usual form.

Clerk of the Arraignments. Keeper of Newgate, set Robert Lowick to the bar, (which was done). You the prisoner at the bar, Robert Lowick, those men that you shall hear called and personally appear, are to pass between our sovereign lord the king and you, upon trial of your life and death; if therefore you will challenge them, or any of them, your time is to speak unto them as they come to the book to be sworn, and before they be sworn.

Mr. Mompesson. If your lordship pleases to favour me with one word for the prisoner at the bar, I shall not trouble your lordship with any thing that was urged by the gentlemen that were of counsel yesterday, but I shall rely upon something that has not yet been spoken to. My lord, they have not laid any time or place where the consent or agreement was, for the forty men that were to set upon the king and his guards: there is a time laid before where they met and discoursed of the ways and means how to assassinate and kill the king; but when it comes to the 'Assenserunt, consenserunt, et agreaverunt,' with submission, this being another act, there ought to be another time and place laid, and for that I shall cite your lordship two or three cases; for men may meet and propose, and discourse, and consult of such things, though they be very ill things, and yet that may not be treason. It is the agreement that is the treason, and so it was held in captain Blague's Case about taking the Tower. They may meet at one time and place, and at another time and place they may agree, in Dyer, 68 B. and 69 Pl. 28. A man was indicted for murder, That he at such a place in and upon the person that was murdered, 'insultum fecit, et ipsum,' the person that was murdered, 'cum quodam cultello,' of such a price, 'percussit;' and he does not shew the place where he struck him, nor had the indictment the words, 'ad tunc et ibidem,' and therefore the court held it void: so it is likewise ruled in Goodrick's Case, Hell. 35 et 119, and therefore in indictments for murder, since they generally set forth not only the time and place of the assault, but likewise of the blow; so likewise in things of a more inferior nature, as rescues returned by the sheriff, that the Capias was served, but does not shew where the rescue was; or though he shews where the arrest was, and an 'et' coupled the rescue to it, yet it was adjudged an ill return, Dyer 69, Pl. 29,

* See Holt, 688.

10 Edw. 4. 15 Fitz. Ret. Vice. 32 Bro. Ret. Det. Bre. 97, and Error 193. Palm 564, and in Noy 114, there are these words, Note, It was moved in discharge of rescue, the return was, that they, viz. A. B. aforesaid, the bailiffs, 'ad tunc et ibidem vulneraverunt,' &c. And the aforesaid George, &c. 'Rescuserunt' without 'ad tunc et ibidem,' referred only to the 'vulneraverunt,' and not to the 'rescuserunt,' and therefore the return was adjudged insufficient; for, my lord, although in conveyances, a clause or word in the beginning or end may refer to the whole, yet in indictments, every sentence must be certain, plain, and express, and have its own time and place: therefore in Noy's Rep. 122, Raymond was indicted for stopping a cross-way leading from a certain ville called Stoake, into a ville called Melton, in the county of Dorset, and the indictment was quashed, because in the 'county of Dorset' shall refer only to Melton, and not to both: so an indictment of forceable entry into a messuage 'existens liberum tenementum' of J. S. is not good for want of the words 'ad tunc,' though the participle 'existens' does strongly imply that it was his house at that time, 3 Cro. 754. Het. 73. Noy, 131. Palm. 426. Bridg. 68. 2 Cro. 214, et 610. Sid. 102. Lat. 109, &c. And my lord Coke tells us in Calvin's Case, 5 B, that indictments of treason, of all others, are the most curiously and certainly indited and penned; and all those that I have seen and observed, have contained more certainty than the indictment now before your lordship. In Reginald Tucker's Case, the indictment was, That he and Thomas Place apud Bridgwater, in Com. Somerset. prædict. compassaverunt, to kill and depose the king, &c. and to bring their treasonable purposes to effect, they the said Reginald Tucker and Thomas Place, the same day and year, at Bridgwater aforesaid, in the county aforesaid, against the king, with a great multitude of people, arrayed in a warlike manner, viz. with swords, &c. 'seipsos illicite et proditorie insimul ad tunc et ibidem congregaverunt et assemblaverunt et guerram publicam contra dictum Dominum Regem apud Bridgwater prædict. in Com. prædict. dicto vicesimo Die Junii Anno primo supradicto proditorie paraverunt, ordinaverunt et levaverunt.' So in the indictment of Gate, as it is set forth at large in a plea in bar of Dower, brought by his wife, he with force and arms, 'apud villam de Ware,' &c. assembled with a great many persons, 'et bellum crudele contra dictam Dominam Reginam apud Ware, prædict. ad tunc falso et proditorie publicavit et levavit, ac insuper ad tunc et ibidem falso et proditorie,' proclaimed the duke of Northumberland, to be lieutenant-general of their forces; 'et etiam falso et proditorie apud Ware prædict.

'ad tunc,' proclaimed the lady Jean Dudley queen. This is in Bendlowe's Reports, published by serjeant Rowe, fol. 55, placito 91. So in the earl of Leicester's Case, Plowd. Com. 385, the indictment is laid much after the same manner, and many other indictments, which at present I am unwilling to trouble your lordship with; and this being one of a new form and of the first impression, I hope your lordship will hold it insufficient. And, my lord, when they go farther, and say, 'Et quilibet eorum proditorie super se suscepit esse unum,' there is no place or time alleged where that was done, which of necessity should be mentioned: for it is a constant rule in our books, that what is issuable, ought to have a place where it may be tried. Now, this is issuable, and the most material thing in the indictment is, for compassing the king's death. The overt-acts are, That Christopher Knightley the prisoner, and two others, did consult to kill the king; and afterwards did agree how to do it, viz. by forty horsemen, quorum these should be four, and every one of them did agree to be one; then comes the other overt-act of providing arms for them. Now suppose they should not prove the last, viz. the providing arms; then, my lord, they must resort to one of the other overt-acts, that these four did consult and agree to kill the king; or that these four did agree the manner how to do it, as is laid in the indictment; and it is plain they must fail of proof of either of these; for by the not prosecuting any one of the name of Christopher Knightley, but preferring a new indictment against one Alexander Knightley, it appears that Christopher Knightley was not there; and the proving these three others making a consult and agreement, is not a proof of the same overt-act that is laid in the indictment, as it ought to be by the late act; unless they can prove that a consult of three is a consult of four: and if it be answered, that it is alleged, that 'Quilibet eorum super se suscepit,' then will that come to be issuable, and the most material part of the indictment; and consequently a place ought to have been laid where it should be tried; this, my lord, is a distinct sentence of itself, it is in a parenthesis, and though you take it away, the sense of what remains is perfect and intire; and consequently this sentence is or should be intire of itself, and therefore ought certainly to be expressed. Besides, if your lordship pleases, it is not positively laid, what these persons severally undertook to be, there is indeed mention made before of forty horsemen, agreed upon to set upon the king, then comes the parenthesis, 'Quorum iidem Christophorus Knightley, Robertus Lowick, Ambrosius Rookwood et Carolus Cranburne forent quatuor, et quilibet eorum proditorie super se suscepit esse unum.' It is perhaps expressed fully enough by the word 'Quorum,' that it was agreed these should be four of the forty horsemen; but there wants the repetition of the word 'Quorum,' to express what they severally engaged to be; and the word 'et' cau-

not join and connect the sentences: for 'forent' and 'suscepit' differ not only in number, but also in mood and tense, and the sense is not necessarily coherent; for it might be true, that the majority of the company might agree these should be four, and yet they themselves might not severally engage therein, and one or some of them might undertake it, and yet the company not agree to it; and it cannot be mended by intendment. There was Vaux's Case, in the 4 Rep. 44; he was indicted for murder, for persuading a man to take Cantharides; it was laid, That he 'persuadebat eundem Nicholaum recipere et bibere quendam potum mixtum cum quodam veneno vocat. Cantharides;' and the indictment says, 'Quod predictus Nicholaus nesciens predictum potum cum Veneno predicto fore intoxicatum, sed fidem adhibens dictæ persuasioni Willielmi recepit et bibit;' but does not say, 'venenum predictum,' but yet it adds, 'Per quod predictus Nicholaus immediate post receptionem veneni predicti' languished and died; here, one would think, was a sufficient implication, that he took and drank the poison; but it was ruled, that none of these words were sufficient to maintain the indictment; for the matter of the indictment ought to be plain, express, and certain, and shall not be maintained by argument or implication, and therefore for want of those words the indictment was held insufficient, and the man again indicted for that offence; and there seems much more uncertainty in this indictment, and therefore I humbly pray your lordship that it may be quashed.

Sir B. Shower. My lord, we think the objection is fully put, and therefore we desire to have their answer to it.

Att. Gen. (sir Thomas Trevor). We think, my lord, this objection will receive a very plain answer. The indictment sets forth, That at such a place the prisoner at the bar did imagine and compass the death of the king: there is a particular case where the imagining was, and that they, to accomplish that treason, in compassing and imagining the death of the king, did, among others, 'postea eisdem die et anno apud parochiam prædictam,' meet and consult, &c. so there is the same place set forth again, wherein they did meet and consult of the ways and means, and time and place, when, where, and how to assassinate the king: and immediately it follows, 'et consenserunt et agreaverunt,' &c. that forty men, whereof they were to be four, and every one of them undertook to be one, should do so and so. Now, my lord, say they, it is not said that the agreement that there should be forty men to do it, was at the same time and place where they did meet and consult about the ways and means: but, my lord, with submission, it is very plain, that the agreement for forty men, and the particular agreement for them to be of the number, is but the effect of the consultation that is mentioned just before: for it is said, they consulted how they should do it, and they agreed to do it in this manner; the particular manner

is set forth immediately after that, it is said they did consult of the manner; so that, my lord, it is part of the former sentence; a particularizing of what they did agree upon at that consultation; but it is no distinct overt-act: if it had been a distinct overt-act, then the cases that have been cited by the counsel, do shew, that there should be a particular time and place mentioned for every overt-act; but this is only a part of that overt-act that was mentioned generally before: this tells you particularly what the means were they did agree upon, and the sentence is not complete till you have gone over this; so that, my lord, with submission, it had been very improper when they agreed at such a time and place, of the means and ways how it should be effected, then to set forth that it was at the same time and place where they did consult of the ways and means, that cannot be proper; for it is not laid at first, that there was any particular way proposed, but only in general, they consulted of the ways and means; therefore, my lord, all this that Mr. Mompesson has said, will not be pertinent to this case, it is impossible to have been otherwise; it is but a part of the sentence; and it is not complete till you have gone over the several particulars: as to the Case of a 'Rescous,' that is, the offence upon which the matter is to be grounded; the 'Verberavit' and 'Vulneravit' are not the rescuing; but where there is not one sentence complete, till you come to the end of these words, there it must be all taken together; so it is here, they consulted of the way, and agreed this to be the way, which they set forth in particular: it is joined to the former part of the sentence, and the whole is not complete without it.

Sol. Gen. (sir John Hawles). With submission, my lord, it cannot be otherwise, nor can they make it sense otherwise.

L. C. J. (sir John Holt). They say you might and should have put in, 'ad tunc et ibidem.'

Sol. Gen. With submission, my lord, I say it cannot be repeated again: indeed, if you would make it like the case, as Mr. Mompesson would have it, that forty men did agree to it, and forty men did it, it were necessary to name time and place, as it is in the case of murder: that he did agree to murder him, and afterwards knocked him on the head, there you shall lay time and place where he agreed, and where he did the act, for there is an act done; but in this case there is no act done, but only an agreement that forty should do it, whereof these four were to be part of the number. Now, they cry, you do not say what these four were to be for. Yes, we do: the forty were to do such an act, and these were to be four of that forty, and every one of them undertook to be one; so that it cannot be expressed otherwise than it is; for what they say of the indictment's being not in the same form that other indictments are, that will be no argument at all; for it does not follow, that there must be one expressed form of an indictment; of right there

are divers forms of indictments, and all of them good, because indictments are to be framed according to the particular case, and they cannot put me an instance of such a particular case as this. As to that of the mistake of the name of Knightley, that unquestionably can be no objection at all: for how does it appear to the court, that this is against the same person that was before indicted by the name of Christopher? there may be another Christopher, for aught they know: but I will suppose, that the consult was proved not, as it is laid, that there were to be four; but only that they were to be three of them, it would be well enough against the prisoner at the bar, if he be proved to be one.

Mr. Conyers. First, we have here laid a time and place for the treason alleged in the indictment, and also for the two overt-acts, how, when, and where it was to be done, and the providing of arms for it; and for this particular of the forty men, that they would have us put the 'ad tunc et ibidem' to that, is but part of the overt-act, which was before alleged; for the first overt-act mentioned, is the meeting and consulting, and there we lay both time and place; that on such a day, and at such a place, they did meet and consult of the way and manner how to do such an act: and then we continue on the sentence, by particularizing how it was to be effected; that they did agree there should be forty horsemen to do it, whereof they were to be four: this is but a part of the overt-act, which is the consulting and agreeing upon the ways and means; this particular means agreed upon, being but the result and effect of the consultation before: so that we conceive there is no want of time or place upon which to take issue in this case.

Mr. Cowper. My lord, I think, with submission, there is nothing in their objection, and I take it to have received a full answer already: yet I would ask one thing of the gentlemen of the other side, had the sentence run without the words 'de iis modis et mediis,' &c. which follow after the word 'consultavit,' and before the words 'et agreeavit;' in this manner, That they did then and there traitorously treat, propose, consult, and agree, that forty horsemen, or thereabouts, with guns, and so forth. If then there had been any colour to think it necessary, that it should be laid in this manner, That they did then and there traitorously treat, and then and there traitorously propose, and then and there traitorously consult, and did then and there traitorously agree: and if not, then I would desire them to tell me why 'then' and 'there' is more necessary to one verb 'did agree,' than it is to all the rest, in sense and common speaking. The only use of a conjunction copulative, is to derive the force of some words, in a sentence foregoing, down to a sentence following, to avoid repetition: and here, though after the consultation be put, many words that relate to that matter, by way of parenthesis; yet the 'ad tunc et ibidem' still does refer to all the verbs following, being

joined by the conjunction copulative; it does not vary the case at all, the putting in that parenthesis; it is notwithstanding but as one sentence: and the supposing that the parenthesis stood out, makes it very plain, there can be no colour to say there wanted a repetition of the 'ad tunc et ibidem' to every verb.

Sir B. Shower. With submission to your lordship's judgment, there is no answer made to this objection. I do agree, if there had been several verbs, and no other words had intervened, that an 'et' would have coupled all together, and you need not have repeated 'ad tunc et ibidem' to every one: but here is a fact after the verbs, that makes one complete entire sentence; and if this of the forty men were left out, it had been a good sentence, that they did propose and treat how, where and when; that is a sentence of itself, the consulting and the treating of the ways and means: but then they say, 'and they did agree and assent that forty should do it:' now there is no necessity for the interpreting of these words, That they should consult and agree at the same place and time; there is no necessity to conjoin this agreement for the forty men with the consultation; they might propose and consult at one time and place, and not agree, and afterwards agree at another time and place: it is not a specification, or, as they call it, a specific account of the consultation, nor a necessary effect of it, so as to make it necessary to join them together; they might meet and consult at one time and place, and at another time and place they might agree that forty should do it; and therefore when you say at one time and place they did consult and propose, and afterwards they did agree; it is not necessarily implied, that it must be at the same time and place; and when it is not necessarily implied, we think it necessary in indictments, for certainty-sake, to have 'ad tunc et ibidem' inserted again.

Mr. Mompesson. My lord, Mr. Solicitor says, That as to other precedents, that does not make it necessary that this should be like them; and that it is no argument that it ought to be so here. My lord Coke, in Calvin's case, tells us, That by precedents the law is known, and that indictments of treason are of all things the most curiously penned; and it is common to infer the law is so, because usually it is so in the precedents of indictments. Mr. Solicitor says likewise, That there may be a Christopher Knightley besides an Alexander; but I cannot take that for an answer to the exception I urge, which is the want of 'ad tunc et ibidem' at the 'Quorum, and the 'Quilibet; for the 'Quilibet' may come to be in question as the most material part of the indictment, because the agreement of the four upon the meeting of the four is alleged as an overt-act. Now, with submission, they must prove the assembly of the whole four, or they do not prove the overt-act expressly laid: then as to the 'Quilibet suscepit,' which is the most material part, it has no time nor place.

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Att. Gen. No sure: we do not need to prove all four, for it is a distinct offence in each, and if any one undertook, it is well enough against him: and for the time and place we tell you it is part of the former sentence, and makes but an intire one.

Mr. Mompesson. As for the residue of the verbs, if they had been omitted, it had been good sense; but this is a perfect intire sentence of itself, when it tells you what they consulted and treated of, as in the Case of the Rescue that I put; if it had stopped there, it had been a good sentence without the 'Vulneraverunt.'

Att. Gen. The 'Rescous' is the offence in that case, the other is distinct: but here, in this case, nothing can be plainer than that all is one act, as we have laid it, That at such a time and place they did consult and treat of the ways and means; but then there is no agreement mentioned till after we have said they did consult of the ways and means, and did agree that this should be the way: this is certainly one entire sentence that shews what the agreement was upon the consultation as the result of it.

Mr. Cowper. As to what sir Bartholomew Shower says, That we ought to repeat the 'ad tunc et ibidem,' unless the sense of the words implies a necessity that the consultation and the agreement should be at one time and place: My lord, there can be nothing in that, for it does not arise from the necessity of the thing one way or the other; but we take it as an intire sentence, and that the whole matter is sufficiently connected, and laid to one time and place, though it might be divided, it must be taken, as alleged, to be one intire fact, or else it recurs to the same objection, that 'ad tunc et ibidem' must as well be put to every verb; for it is possible they might propose at one time and place, and consult at another, and debate at another as well as agree at another: so that nothing is to be argued from the necessity of the thing more in one case than the other; for one man might propose it in one place, and the rest might then shake their heads at it; and then they might again meet and consult at another place, and afterwards agree at a third: but when it is said 'then and there' they did meet, consult, and agree, it cannot be understood but that the agreement was at the same time and place with the meeting and consult.

Sir B. Shower. But this can be no answer that Mr. Cowper gives now, for proposing, and consulting, and treating, and debating, are all of the same signification; for one man's proposing to another, and the other's proposing to him, is consulting, treating, and debating; but now consulting and agreeing are different things.

Mr. Cowper. So is proposing and consulting: one may propose: but there must be at least two to consult: there is that nice difference between them.

Sir B. Shower. Every one must agree for himself, and that must be certainly laid with

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time and place, let the proposal and consultation be what it will.

L. C. J. Mr. Mompesson puts that Case in Dyer upon an indictment of murder, That on such a day, and at such a place,* the party made an assault upon the persons slain, 'et percussit;' but does not say, 'Et ad tunc et ibidem percussit,' and for not alleging that, the indictment was held nought.

Att. Gen. My lord, that is a different case from this, because 'insultum fecit,' and the 'percussit,' are different crimes; there is a great difference between an assault and a stroke: but here it is, That they did propose and consult of the ways and means, and agreed upon this particular way; that is the same thing; it is not an entire sentence till you come to the end of it, then it is complete when you shew what was the effect of the consultation; what they were agreed upon, and not till then.

Mr. Mompesson. A man's holding up his hand is an assault, but he must actually strike to be guilty of murder: so a man may debate, and yet not agree: it is the agreement that is the treason.

L. C. J. Read the Indictment.

Cl. of Ar. 'Decimo die Februarii anno Regni dicti Domini Regis nunc septimo, et diversis aliis diebus et vicibus, tam antea quam postea, apud Parochiam Sancti Pauli Covent-Garden, prædict,' in Comitatu prædict', falsè, malitiosè, diabolicè, proditoriè, compassaverunt, imaginati et machinati fuerunt, excogitaverunt, designaverunt et intendebant dictum Dominum Regem nunc occidere, interficere, et murdrare, et stragem miserabilem inter fideles subditos ipsius Domini Regis per totum hoc Regnum Angliæ facere, et causare, et ad easdem nefandissimas, nequissimas et diabolicas prodiones et proditorias compassationes, machinationes, et proposita sua prædicta perimplend', perficiend', et ad effectum redigend' ipsi iidem Christophorus Knightley, Robertus

* No indictment (as to the diversity in impeachments, see in this Collection the Case of lord Wintoun, A. D. 1716) can be good without precisely shewing a certain day and year of the facts alleged in it. See Leach's Hawk. Pl. Cr. b. 2, c. 25, s. 77, 78, and the authorities there cited. See, also, lord Kenyon's judgment in the King against Holland, 5 Term, Rep. 624, 625. But it is sufficient in an indictment for treason, as in other cases, that a time be laid before the finding of the bill under which may be proved any acts committed before the finding of the bill: and as to place in cases of treason within the realm, it is sufficient that an overt-act be proved in the county where the indictment is laid and the trial had. See in this Collection the Cases of Charnock, vol. 12, p. 1378; and of lord Balmerino, A. D. 1745. East's Pleas of the Crown, chap. 2, sect. 60, 61, and the authorities there cited; and for more, as to the place where treasons committed abroad or at home, shall be tried, see sect. 40, 41, of the same chapter.

'Lowick, Ambrosius Rookwood et Car' Cranburne, et quam plurimi alii falsi proditores (Jurator' prædictis ignoti) postea, scilicet eodem decimo die Februarii anno supradicto apud Parochiam prædictam in Com' prædicto, ac diversis aliis diebus et vicibus, tam antea quam postea, ibidem et alibi in eodem Com', falsè, malitiosè, advisatè, clandestinè, proditoriè, ac vi et armis conveniebant, proposuer', tractaver', consultaver', consenser', et agreaver', ad ipsum Dominum Regem nunc ex insidiis et dolo percutiend', *Anglice* 'to assassinate,' interficiend', et murdrand' et ad execrabilem, horrendam et detestabilem Assassination', *Anglice* 'Assassination,' et Interfectionem ill' citius exequend' et perpetrand' postea scilicet eisdem die et anno, ac diversis aliis diebus et vicibus, apud Paroch' præd' in Com' prædicto, proditoriè tractaver', proposuer' et consultaver' de viis, modis et mediis, ac tempore et loco ubi, quando, qualiter et quomodo dictum Dominum Regem sic ex insidiis facilius interficerent, et consenser', agreaverunt et assenser' quod quadragint' homines Equestres aut eo circiter, (quor' iidem Christophorus Knightley, Robertus Lowick, Ambrosius Rookwood et Car' Cranburne forent quatuor, (et quilibet eor' proditorie super se suscepit esse unum) cum bombardis, sclopis et sclopetis, pulvere bombardico et globulis plumbeis onerat', et cum gladiis, ensibus et aliis armis armat' insidiati forent, et essent in subessu, *Anglice* 'in ambush,' ad eundem Dominum Regem in Rheda sua, *Anglice* 'his coach,' existend' quando foris iret invadend'. Quodque quidam et competens numerus de hominibus illis sic armat' in satellites, *Anglice* 'the guards,' ipsius Domini Regis eum tunc attendend' et secum existend' aggressi forent, et eos expugnant et devincerent, dum alii eorundem hominum sic armat' ipsum Dominum Regem percuterent, interficerent, occiderent et murdrarent.'

Mr. Mompesson. The consult is like the assault, and the agreement is like the stroke.

L. C. J. Treby. It is a nice case as you would have it, but I think it is very natural as the king's counsel put it at first; they lay the consultation of the ways and means how it should be done, and then they conclude that thus it shall be done: all which makes but one intire thing.

L. C. J. They say they met that day at St. Paul Covent garden, that is in the beginning, and did consult how to kill the king; and they consented and agreed among themselves, that it should be done in this manner: doth not this refer to both time and place in the beginning? It is a continuing on of the same sentence, and makes all but one and the same act; it is the result of the consultation at that time and place.

Sir B. Shower. But, my lord, it might be at another place: they might consult at one place, and conclude at another.

Mr. Conyers. But it is laid to be at the same

place, for no other place does appear, and it is one continued sentence.

L. C. J. Treby. You would make the repetition so frequent and reiterated, that it would become absurd.

Att. Gen. Indeed I do not know what these gentlemen would have.

Sir B. Shower. We would have this indictment as all others are, the precedents are as we say, and we hope this shall pursue them, or else be quashed.

L. C. J. Look ye here, sir Bartholomew Shower; suppose this part should not be right, that will not vitiate the whole indictment.

Mr. Mompesson. But your lordship will not suffer them to give evidence of that part that is vicious.

L. C. J. Yes, yes; it comes within the first words of the time and place laid; they may give evidence of it, because this is but a setting forth for the manner agreed upon for the execution of the design that was before consulted and treated of; it is comprehended in the former words; and if they had omitted this out of the indictment, the indictment had never been the worse; there had been a sufficient overt-act alleged to prove the compassing and imagining the death of the king; for if people at such a place and time meet and propose the way and means how to effect it, do you think the indictment would not be good enough without laying the particular means agreed upon? Certainly it had been well enough if this had been omitted. Do you think they cannot give this in evidence as a proof of the overt-act? Certainly they may.

Sir B. Shower. The question will be, my lord, then upon the whole, Whether the conclusion of the indictment 'contra legiantie suæ debitum,' shall be taken distributively to every fact? And if so, then there ought to be time and place alleged to every fact.

L. C. J. Suppose you lay several overt-acts, and prove but one, yet he is to be found guilty of the high-treason, which is the imagining and compassing the death of the king, which is the crime laid in the indictment; then suppose this was left out of the indictment, they might give it in evidence as a proof of the overt-act, that it is well laid for time and place; and therefore though it be expressed, and not so fully and particularly laid, we cannot quash the indictment for it, because the indictment would have been good, though that had been omitted.*

L. C. J. Treby. That is certainly true, it is no cause for quashing the indictment.

Sol. Gen. The indictments against the Regicides† were for compassing the death of the king, and they gave in evidence that he was put to death, though they charged in the indictment, only the compassing and imagining the death of the king.

L. C. J. Ay, sure, that is an overt-act with a witness, the indictment was not laid for murdering the king, but for compassing his death, which is the treason according to the act of parliament of 25 Ed. 3, and as an overt-act they gave the cutting off his head in evidence.

Att. Gen. The indictment says, they compassed and imagined the king's death, and they agreed to do it in this manner; if this be not all one intire sentence, I know not what is.

L. C. J. As to your case, Mr. Mompesson, which you quote out of Dyer, it is possible a man may make an assault at one time, and at another time make an assault and give a stroke; but this is all one act, it does but specify what was generally consulted of and proposed.

L. C. J. Treby. Pray, do you think a man may demur upon a common action of battery, where it is said first, at such a time and place, 'Insultum fecit, verberavit, et vulneravit,' because there is not a place set to every word.

Mr. Mompesson. Indictments ought to be very curiously penned, and what is good in an action will not be good in an indictment, with submission.

L. C. J. Treby. But suppose you shewed it for cause upon special demur.

Mr. Mompesson. My lord, I cannot tell what it would amount unto.

L. C. J. You cannot quash the indictment at this time; that is not possible, because the indictment is good as to the rest, supposing this was not so well as it might be.

Mr. Mompesson. Then, my lord, I am in your lordship's judgment, whether they shall be admitted to give evidence in this particular thing?

L. C. J. They may certainly give in evidence the agreement to have forty men to kill the king, as a proof of the consultation, agreement, and consent to kill the king; and the consenting to have forty horsemen is in evidence of their treating, proposing, and consulting to kill the king.* Then for your objection of 'Quilibet suscepit' to be one; that is well enough, it is all still but one sentence.

Sir B. Shower. One of which is it? for they have not laid in the indictment what is, whether it be one of the four, or one of the forty.

L. C. J. Whether it be one of the four, or the forty, is not material; for cannot one be found guilty, and the rest acquitted? The one is not charged with the act of the other, but they are several offences, and each must answer for himself. In all indictments, offences are several. Suppose an indictment of conspiracy, and it is laid in the indictment that four did conspire; cannot you prove that two conspired? no question you may. It is not certainly necessary that every one should be proved to have conspired. Suppose it were alleged that four did beat a man, and does not say 'Quilibet eorum' beat him, you may give in evidence that one did beat him.

* See East's Pleas of the Crown, chap. 2, s. 46, and Laver's Case as there cited.

† See vol. 5, p. 947.

* See East's Pleas of the Crown, c. 2, s. 57, 58. See, also, in this Collection, vol. 5, p. 977.

Sir B. Shower. No question of that in case of a battery, but in the case of a conspiracy there must be more than one.

L. C. J. Nay, I will ask you even in an action of conspiracy, where the very gist of the action is conspiring together, cannot two be found guilty, and the rest acquitted? In riots there must be three or more. It may be you will lay ten, but it is sufficient, I hope, if you prove it upon any three of them.

Att. Gen. The difference is betwixt contracts and crimes; for contracts they are joint, but crimes they are in their own nature several.

Sol. Gen. Besides, my lord, though they be out of time, yet this is not to the abatement of the indictment, but to the evidence; how do they know but we will give it in evidence that Christopher Knightley was one?

L. C. J. Treby. Mr. Mompesson moves it as a caveat against your giving it in evidence.

Sir B. Shower. If in an outlawry against divers, they leave out these words, 'Nec eorum aliquis comparuit,' that is every day held to be nought, and for that reason we say, the 'Quilibet eorum suscepit' is necessary too, and without being laid cannot be given in evidence, and if it be laid, it ought to have time and place.

L. C. J. Treby. The default of appearance must be a several thing, and when he lays it jointly 'non comparuerunt,' it may be true that all did not appear, if any one made default; but when you charge men with a fact done, though in the plural number, yet it is a distinct separate charge upon every one.

Cl. of Ar. Robert Lowick, those men that thou shalt hear called, and personally appear, are to pass between our sovereign lord the king and you, upon trial of your life and death; if therefore you will challenge them, or any of them, your time is to speak to them as they come to the book to be sworn, and before they be sworn.—George Ford.

Lowick. I do not except against him.

Cl. of Ar. Hold the book to Mr. Ford.

Cryer. Look upon the prisoner. You shall well and truly try, and true deliverance make between our sovereign lord the king, and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to your evidence. So help you God.

Cl. of Ar. Thomas Trench.

Lowick. I have nothing to say against him. [He was sworn.]

Cl. of Ar. John Wolfe.

Lowick. I do not except against him. [He was sworn.]

Cl. of Ar. James Bodington.

Lowick. I challenge him.

Cl. of Ar. John Raymond.

Lowick. I say nothing against him. [He was sworn.]

Cl. of Ar. George Hawes.

Lowick. I do not except against him. [He was sworn.]

Cl. of Ar. Thomas Glover.

Lowick. I challenge him.

Cl. of Ar. Matthew Bateman.

Lowick. I do not except against him. [He was sworn.]

Cl. of Ar. James Partherith.

Lowick. I challenge him.

Cl. of Ar. Joseph Blisset.

Lowick. I challenge him.

Cl. of Ar. Alexander Forth.

Lowick. I challenge him.

Cl. of Ar. Francis Chapman.

Lowick. I challenge him.

Cl. of Ar. Nicholas Roberts.

Lowick. I challenge him.

Cl. of Ar. Thomas Playsted.

Lowick. I challenge him.

Cl. of Ar. John Hall.

Lowick. I challenge him.

Cl. of Ar. William Partridge.

Lowick. I challenge him.

Cl. of Ar. Peter Levigne.

Lowick. I challenge him.

Cl. of Ar. Thomas Moody.

Lowick. I challenge him.

Cl. of Ar. Thomas Ramage.

Lowick. I do not except against him. [He was sworn.]

Cl. of Ar. Edward Townesend.

Lowick. I challenge him.

Cl. of Ar. William Gunson.

Lowick. I challenge him.

Cl. of Ar. John Wyborne. (He did not appear.)—William Strode.

Lowick. I challenge him.

Cl. of Ar. William Wild.

Lowick. I do not except against him. [He was sworn.]

Cl. of Ar. William Pitts.

Lowick. I do not except against him. [He was sworn.]

Cl. of Ar. William Smith.

Lowick. I do not except against him. [He was sworn.]

Cl. of Ar. Moses Cook.

Lowick. I challenge him.

Cl. of Ar. Benjamin Bolthy.

Lowick. I do not except against him. [He was sworn.]

Cl. of Ar. Elias Fletcher.

Lowick. I have nothing to say against him. [He was sworn.]

Cl. of Ar. Crier, countez. George Ford.

Cryer. One, &c.

Cl. of Ar. Elias Fletcher.

Cryer. Twelve good men and true, stand together, and hear your evidence.

L. C. J. Now the rest of the jury that have appeared are discharged.

Cl. of Ar. Cryer, make proclamation.

Cryer. Oyez, If any one can inform my lords, the king's justices of Oyer and Terminer, the king's serjeant, or the king's attorney-general, before this inquest be taken, of the high treason, whereof the prisoner at the bar stands indicted, let them come forth, and they shall be heard; for now the prisoner stands at the bar upon his deliverance, and all others that are bound by recognizance to give evidence

against the prisoner at the bar, let them come forth, and give their evidence, or else they forfeit their recognizance.

The names of the twelve sworn are these:—George Ford, Thomas Trench, John Wolfe, John Raymond, Geo. Hawes, Matthew Bateman, Thomas Rammage, William Wild, Wm. Pitts, Wm. Smith, Benjamin Boltby, and Elias Fletcher.

Cl. of Ar. Robert Lowick, hold up thy hand, (which he did). You that are sworn, look upon the prisoner, and hearken to his cause. He stands indicted by the name of Robert Lowick, late of the parish of St. Paul Covent-garden, in the county of Middlesex, gentleman; for that he, together with Christopher Knightley, late of the same parish and county, gentleman; Ambrose Rookwood, late of the same parish and county, gentleman; and Charles Cranburne, late of the same parish and county, yeoman, not having the fear of God in their hearts nor weighing the duty of their allegiance, but being moved and seduced by the instigation of the devil, as false traitors against the most serene, most illustrious, most mild, and most excellent prince, our sovereign lord, William the Third, by the grace of God, of England, Scotland, France and Ireland, king, defender of the faith, &c. their supreme, true and rightful, lawful, and undoubted lord, the cordial love, and true and due obedience, fidelity and allegiance which every subject of our said lord the king that now is, towards him our said lord the king should and of right ought to bear, withdrawing, and utterly to extinguish, intending and contriving, and with all their strength, purposing, designing and conspiring the government of this kingdom of England, under him our said lord the king that now is, our right, duly, happily, and very well established, altogether to subvert, change and alter; as also the same our lord the king to death and final destruction to put and bring, and his faithful subjects, and the freemen of this kingdom of England into intolerable and most miserable slavery to Lewis the French king to subjugate and enthrall, the 10th day of February in the 7th year of the reign of our said sovereign lord the king that now is, and divers other days and times, as well before as after, at the parish of St. Paul Covent-garden aforesaid, in the county aforesaid, falsely, maliciously, devilishly, and traitorously, did compass, imagine and contrive, purpose, design, intend, our said lord the king that now is, to kill, slay, and murder; and a miserable slaughter among the faithful subjects of our said lord the king, throughout this whole kingdom of England to make and cause; and the same their most wicked, impious, and devilish treasons, and traitorous compassings, contrivances and purposes aforesaid, to fulfil, perfect, and bring to effect, they the said Christopher Knightley, Robert Lowick, Ambrose Rookwood, and Charles Cranburne, and very many other false traitors to the jurors unknown; afterwards, to wit, the same 10th day of February, in the

year abovesaid, at the parish aforesaid, in the county aforesaid, and divers other days and times, as well before as after, there and elsewhere in the same county, falsely, maliciously, advisedly, secretly, and traitorously, and with force and arms, did meet together, propose, treat, consult, consent, and agree, him our said sovereign lord the king that now is, by lying in wait and wild, to assassinate, kill and murder: and that execrable, horrid, and detestable assassination and killing the sooner to execute and perpetrate; afterwards, to wit, the same day and year, and divers other days and times, at the parish aforesaid, in the county aforesaid, traitorously did treat, propose, and consult, of the ways, manner, and means, and the time and place, where, when, how, and in what manner, our said lord the king, so by lying in wait, the more easily they might kill, and did consent, agree, and assent, that forty horsemen, or thereabouts; of whom the said Christopher Knightly, Robert Lowick, Ambrose Rookwood, and Charles Cranburne, should be four; and every one of them traitorously took upon himself to be one, with guns, muskets, and pistols, loaden with gunpowder, and leaden bullets, and with swords, rapiers, and other arms armed, should lie in wait, and be in ambush, the same our lord the king in his coach being, when he should go abroad, to set upon, and that a certain and competent number of those men, so armed, should set upon the guards of him our said lord the king then attending on him, and being with him, and should fight with them, and overcome them, whilst others of the same men so armed, him our said lord the king to assassinate, kill, slay, and murder; and they the said Christopher Knightley, Robert Lowick, Ambrose Rookwood, and Charles Cranburne, their treasons, and all their traitorous intentions, designs, and contrivances aforesaid, to execute, perpetrate, fulfil, and bring to effect, afterwards, to wit, the aforesaid 10th day February, in the 7th year aforesaid, at the parish aforesaid, in the county abovesaid, divers horses, and very many arms, guns, pistols, rapiers, and swords, and other weapons, ammunition, and warlike things, and military instruments, falsely, maliciously, secretly, and traitorously did obtain, buy, gather together, and procure, and did cause to be bought, obtained, gathered together, and procured with that intent them in and about the detestable, horrid, and execrable assassination, killing, and murder of our said lord the king that now is, as aforesaid, to use, employ, and bestow: and the same premisses the more safely and certainly to execute, do, and perpetrate, he the aforesaid Christopher Knightley, with one Edward King, late of high-treason, in contriving and conspiring the death of our said lord the king that now is, duly convicted and attainted, by the consent and assent of divers of the traitors and conspirators aforesaid, the said 10th day of February, in the 7th year abovesaid, traitorously did go, and come to the place proposed, where such intended assassination, kill-

ing, and murder of our said lord the king, by lying in wait, should be done, perpetrated and committed, to view, see, and observe the conveniency and fitness of the same place for such lying in wait, assassination, and killing, there to be done, perpetrated and committed; and that place being so viewed and observed, afterwards, to wit, the same day and year, his observations thereof to several of the said traitors and conspirators did relate and impart, to wit, at the parish aforesaid, in the county aforesaid; and the aforesaid Charles Cranburne the same day and year there in order, the same execrable, horrid, and detestable assassination and killing of our said lord the king, by the traitors and conspirators aforesaid, the more readily and boldly to execute, perpetrate, and commit, advisedly, knowingly, and traitorously did bear and carry among divers of those traitors and conspirators forwards and backwards, from some to others of them, a list of the names of divers men of those who were designed and appointed our said lord the king, so as aforesaid, by lying in wait, to kill and murder, against the duty of the allegiance of them the said Christopher Knightley, Robert Lowick, Ambrose Rookwood, and Charles Cranburne; and against the peace of our said sovereign lord the king that now is, his crown and dignity, as also against the form of the statute in such case made and provided. Upon this indictment he has been arraigned, and thereunto hath pleaded Not Guilty, and for his trial hath put himself upon God and the country, which country you are; your charge is to inquire, whether he be guilty of the high-treason whereof he stands indicted, or not guilty: if you find him guilty, you are to enquire what goods or chattels, lands or tenements, he had at the time of the high-treason committed, or at any time since, to your knowledge: if you find him not guilty, you are to enquire whether he fled for it; if you find he fled for it, you are to inquire of his goods and chattels, as if you had found him guilty: if you find him not guilty, and that he did not fly for it, you are to say so, and no more: and hear your evidence.

Mr. Mountague. May it please your lordship, and you gentlemen of the jury; this is an indictment of high-treason against Robert Lowick, prisoner at the bar; and the Indictment does charge him with compassing and imagining the death of the king, and endeavouring to subvert the government, and inslave this kingdom of England, and bring it under French tyranny and slavery; and the Indictment sets forth that Robert Lowick, the prisoner at the bar, the 10th of February, met several false traitors, and there consulted and treated how to assassinate his Majesty; and agreed, that forty horsemen do get together, some to attack the guards, while others were to assassinate the king in his coach; and the Indictment charges him likewise with getting together horses and arms for this purpose; to this he hath pleaded Not Guilty. We will call

our evidence, and prove the fact against him, and we do not doubt but you will do your duty.

Att. Gen. May it please your lordship, and you gentlemen that are sworn, this is an indictment of high treason, in conspiring and compassing the death and destruction of the king; the nature of our evidence against the prisoner at the bar is this.

You will hear, gentlemen, by the witnesses, that about Christmas last a conspiracy and design was set on foot to assassinate the king; and accordingly to accomplish it, there were several persons sent over from France by the late king James, who were part of his guards, and particularly sir George Barclay was to be the head of them; he was a lieutenant of the guards there, and he was sent over in January last, and there were a great many troopers sent over, who were to be under his direction, particularly Mr. Harris, who will give you an account, that he was sent over by order of king James, and he was told particularly king James had a service for him to do in England, and he hoped it might be an opportunity to advance him. He was to observe the orders of sir George Barclay, and by what token he should know him; he was to meet him in Covent-garden, and he was told he might find him there twice a-week in the square, about six o'clock, after it was dark; and that he might know him, he told him, he would have his white handkerchief hanging out of his pocket; accordingly Mr. Harris came over, and Mr. Hare came with him, and they came and did meet with sir George Barclay; and they, together with sir George Barclay, and several others here in England, Mr. Porter, Mr. Charnock, and sir William Perkins, did enter into consultation how to effect it: There were several meetings about it, and you will find the prisoner at the bar was at several meetings to that purpose; and they did undertake among them to provide so many men as might make about the number of forty, which they thought sufficient for the execution of this design.

Gentlemen, you will hear that the prisoner at the bar did treat with several persons to be engaged in it; particularly about the 5th of February, he sent to one Bertram, and asked him if he would be engaged in a design for king James's service, that was quickly to be executed, without asking of questions; and afterwards, I think, he undertook he would: So about the 14th of February he met him again, and that was the day before the first time they intended to attack the king, and then being so near the time when it was to be executed, he thought it proper to acquaint him with the thing he had engaged him in; and he did acquaint him, that the next morning they were to be ready to attack the king and his guards, and bid him be sure to get his boots and other things ready for that purpose, and he gave him a guinea in order to it. Bertram, it seems, on the 15th of February did not come, and the king it seems did not go abroad that day, so they were disappointed at

that time; but the Sunday after Bertram met him, and Mr. Lowick complained that he had not come upon the Saturday according as he had undertaken; and he told him it would have been the same thing, he would have disappointed them if the king had been in the field.

Gentlemen, you shall find, that as he thus engaged Mr. Bertram, so he was to provide several others; and did declare, that at his own charge he had got two or three; he complained of it as a hardship put upon him, that whereas Mr. Harris had 6s. a-day subsistence, and was only to take care of himself, he, Mr. Lowick, had at his own charges engaged and provided several.

You will find, gentlemen, that Mr. Rookwood, who was tried yesterday, had several meetings about it with Mr. Lowick and Mr. Harris; they did think it to be a barbarous thing: but however, they were resolved to obey orders, and the prisoner in particular said he would obey orders, though he thought it a very wicked thing.

Gentlemen, you will find by the evidence how the matter was carried on; the prisoner was to be engaged in it, and did not only embark himself in person, but engaged others, and did treat with them about it. We shall call our witnesses, who will give you a full account of it, and then we shall leave it with you, who we question not will do justice. First call George Harris. [Who appeared, and was sworn.]

Sol. Gen. Pray will you give an account to my lord and the jury, what you know of the intended assassination, and what part the prisoner at the bar had in it?

Mr. Conyers. Begin from the first, and tell your whole knowledge as you did yesterday.

Harris. On the 14th of January, new stile, I was ordered to wait on king James at dinner; after dinner was over, I was called in, where was col. Parker and Mr. Hare at the same time, and king James told me he was very sensible of the good service I had done him; and now he had an opportunity of doing something for me: I was to go into England, and there to be subsisted, and I was to follow the orders of sir George Barclay; the king told me I should find sir George Barclay in Covent-garden, with a white handkerchief hanging out of his pocket, on Mondays and Thursdays between the hours of six and seven in the evening, and that was the sign I was to know him by; and he ordered me to go to Mr. Carroll, that is secretary to the late queen, and col. Parker went along with me, and he ordered me ten lewidores, and Mr. Hare as much, which Mr. Carroll gave us; and if that were not sufficient, or if we were wind-bound at Calais, we had orders to apply to the president of Calais to be furnished with what we wanted: accordingly we went, and the wind not serving when we came to Calais, we were forced to stay there, and our charges were paid to our landlady by the president of Calais, according to the order we received at St. Germain's; when

the wind served fair we went on board, and came to Rumney-marsh, to one Mr. Hunt's house, and from thence he furnished us with a couple of horses; and we came the sandy way to one Mr. Tucker's, and from thence to Mr. Cross's, and from thence to Gravesend, and from thence to London: we came up in the night-tide, and being late when we came to town, Sunday night, we lay at an inn at the lower end of Gracechurch-street; the next day we went to look for sir George Barclay, but not finding him in Covent-garden, according to what king James told us, I admired at it; but one Mr. Berkenhead meeting my comrade the next day, said, sir George Barclay desired to see us, and appointed us to meet him, which we did that night; where sir George Barclay asked us how the king and queen, prince and princess did; he told us at that time he had no money for us, but in a few days we should have money; and accordingly he sent us money. We had five guineas, but it was at twice: two guineas at one time, and three at another, and this was for a month's subsistence at five shillings a-day, guineas going then at thirty shillings. And afterwards when major Holmes delivered the horse, upon Saturday the 15th, we had another guinea, that made up what we had to be six shillings a-day when we had horses, and five shillings a day when we had none: and as for Mr. Lowick, the first Saturday which was designed for the assassination, I happened to be at Mr. Counter's lodging's in Holbourn, a confectioner's; and there I see Mr. Lowick come in.

Mr. Conyers. Who lodged there, pray, Sir?

Harris. Sir George Barclay and Mr. Counter had lodgings there; and Mr. Lowick came in there, but I cannot say he staid there any time, I think he went out presently afterwards. The next week I met Mr. Lowick in Red-lion-fields, and discoursed with him there about this matter, and I told him what a barbarous and inhuman thing it was that we should be the murderers of the prince of Orange, and that it would render us odious to the world, and that we should be a continual reproach to ourselves; he did agree it was so: but in conclusion, Mr. Lowick said he would obey orders, and he said sir George Barclay, he was sure, would not do it without orders. That day when we were walking out, we met sir George Barclay and major Holmes riding in the highway up towards Islington, and we spoke to him, for Mr. Lowick told me the thing was discovered, and his name was given up, and other gentlemen's, and I think another; and so he told me that one Harrison told him of it, and forewarned him that night from lying in his lodging; and he told him that he believed it would not be safe for the rest to lie in their lodgings, or to that effect.

Att. Gen. When he said he would obey orders, what was the discourse about?

Harris. We were talking of murdering the prince of Orange: and not only that, but I do

believe that Mr. Lowick is so sensible that what I say is true, and he is a man of so much conscience and honour, that he will not contradict any thing that I affirm or have said here. On Saturday the 22nd we dined at the Castle, a tavern or a cook's shop, at the end of Red-lion street. I was much in a sweat, and he asked me what made me so? I told him I had been getting captain Rookwood's party ready; and I told him (laughing) that captain Rookwood said I should be his aid du camp, and so I was getting the men together: says he to me, You may very well do it, for you have six shillings a-day, and I have nothing. Mr. Lowick, you know what I say to be true; I know not why you lift up your hands; but you did tell me I might very well do it, having six shillings a-day, and you had nothing, and yet brought a couple of men at your own charge, and that their horses could not be discharged unless you went. These were his words, my lord, or to this effect.

Att. Gen. What do you mean by being discharged?

Harris. I mean this, that I believe he paid for them; and they were waiting at a house till he came.

Mr. Conyers. Why were they to be discharged that day?

Harris. The reason why they were to be discharged that day, was, because captain Rookwood had told him before, that the prince of Orange did not go out that day; and therefore we went together to walk towards Islington.

L. C. J. What day was that?

Harris. The second Saturday that it was to have been executed. I was not a spy upon any man's actions: I cannot tell what they did any more than I tell you: I do not wrong you any way in the world, Sir, I am sure on it.

L. C. J. When was it that you spoke with Mr. Lowick about murdering the king?

Harris. It was Monday, Tuesday, Wednesday, or Thursday, I cannot be exact to the day, but it was one of these days, after the first Saturday; I cannot be positive what the day was.

L. C. J. Well, it was between the two days?—*Harris.* Yes, it was.

L. C. J. How did you know of that design of murdering the king?

Harris. I was informed of it by captain Rookwood the first Saturday, and I met Mr. Lowick, and had this discourse about it: and afterwards they informed me that Mr. De la Rue did not lie at his lodgings, and the thing was discovered, and they believed that Rue had discovered it: And I desire you will call Mr. De la Rue as to this matter; for I believe he will own it.

Sol. Gen. How came you to trust him with such a discourse?

Harris. Because we met there at Counter's lodgings, and we had several times discourses of it; there was major Bernard and capt.

Rookwood besides, and I always declared against it as a barbarous and inhuman thing, not to be answered before God or man, and that we should be odious to all the world if the thing were effected, as I believed it would not be. I would never shew my head after such a thing.

Sol. Gen. Do you remember who began the discourse of this matter?

Harris. I cannot tell that. I cannot come to every particular.

Sir B. Shower. You said just now, you apprehended Mr. Lowick to be a man of conscience and honour; pray what were his sentiments about it?

Harris. His sentiment was, that he would obey sir George Barclay's orders; and he was sure sir George Barclay would not do it without orders.

Sir B. Shower. Did not he declare it to be a barbarous design?

Harris. I cannot remember every particular thing that he said; for I am not a spy upon any man's actions.

Lowick. When you were talking of that design that you speak of, pray, did I consent to any such thing?

Harris. I tell you how far you consented; you said you would obey sir George Barclay's orders, and you was sure he would not do it without orders.

Mr. Mompesson. Did you see any of sir George Barclay's orders?

Harris. No, I did not, I was to follow his orders; but what orders he had I cannot tell.

Sol. Gen. What did sir George Barclay tell you you were to do?

Harris. Sir George Barclay declared, on the first Saturday, that we were his Janizaries, and talked of attacking and bringing away the garter: I cannot say this gentleman was by then; and afterwards sir George Barclay went out and returned, and came in again into the room, and declared that we were men of honour, and that we were to attack the prince of Orange.

Mr. Mompesson. Did sir George Barclay give the prisoner at the bar any orders?

Harris. I do not tell you he did.

Mr. Mompesson. You say you met sir George Barclay and major Holmes upon the road going to Islington: How do you know the prisoner was there?

Harris. Why, was not I with him? I am very sorry to come upon this account; but you know it is truth all that I say; and I am sure you are sensible I do you no wrong: He met sir George Barclay and major Holmes, and he went down and said something to sir George Barclay in the highway, what it was I do not know; but I stood, and captain Rookwood and Mr. Bernard said something to him, which you very well know.

Att. Gen. What was it?

Harris. I cannot tell, Sir.

Att. Gen. We do not desire you to tell what you cannot tell: Is this all you know?

Harris. It is all at present that I recollect.

Sol. Gen. Then pray swear Mr. Bertram.

[Which was done.

Mr. Conyers. Pray will you give an account to my lord and the jury what you know of this intended assassination, and how far the prisoner was concerned in it.

Bertram. My lord, about the beginning of February last, major Lowick came to me, and asked me if I would espouse a thing with him that might be for my advantage; I told him that I thought I might espouse any thing that he thought fit to engage in.

Mr. Mompesson. Whom did you tell so?

Bertram. Major Lowick: and he told me it was well, and desired me to ask no more questions: I did not; but it went on to the 14th of February, when he desired me to be at his lodgings at 12 o'clock. I was so about that time, but he was not within, and I stayed till he came in, and he took me up into his chamber, and told me he believed they should ride out in some little time; and he told me he believed the king was to be seized in his coach, and he gave me a guinea to buy me necessaries.

L. C. J. What necessaries?

Bertram. I cannot say he named any.

Att. Gen. But for what purpose were those necessaries?

Bertram. I do not know that he named any thing, indeed.

Att. Gen. Well; did he tell you when you were to be ready?

Bertram. If you please to give me leave, I will tell you: he desired me not to be out of the way; and the next morning I was to meet him at the purl house in Hart street. I did not meet him; and the next time I saw him, I am not positive whether it was the next day after the fifteenth when I was to meet him at Hart street, but did not so; but the next time I saw him, he asked me why I did not meet him according to his appointment? I told him, I had some reason for it; and he answered me again, that he believed, if the king had been in the field, I would have done the same; but I have not seen him since, till I saw him at the bar.

Att. Gen. Had you no discourse of horses that you were to provide?

Bertram. I do not remember any particular thing more than I have told you.

Att. Gen. Did he not tell you what the design was you were to go about?

Bertram. He did not tell me of any other design than as I tell you, for he believed I knew of it: I thought so at least: The first time I knew of it was from Mr. Charnock.

L. C. J. What did he tell you was the design that you should engage in for your advantage upon Friday the 14th, when he gave you the guinea?

Bertram. He told me, he believed they should ride out very suddenly, and that the king was to be seized in his coach.

L. C. J. Did he tell you when the king was to be seized?

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Bertram. No, he did not tell me when; but this was the 14th, the next morning I was to meet him at Hart-street, but did not.

Sol. Gen. Who did he tell you the king was to be seized by?

Bertram. He did not nominate any one else, for he obliged me not to ask him questions, nor I did not.

Sol. Gen. Did he name himself to be concerned?

Bertram. He named himself so far as that he believed he should ride out very suddenly.

Sol. Gen. Was it the next morning, or the next day?

Bertram. I cannot say that he named any particular time.

Att. Gen. Will they ask him any questions?

Sir B. Shower. No, I think we shall not.

Mr. Mountague. Pray, Mr. Bertram, will you answer me one question, What did he say to you when he checked you for not coming according to his appointment?

Bertram. I took it as a kind of a check: he told me, that if the king had been in the field, he believed I would have done the same.

Sir B. Shower. There is one thing we must a little examine this gentleman to: were not you under a necessity before that time that he gave you the guinea? Pray what condition were you in?

Bertram. Under necessity, Sir! I was never very plentiful of money of late.

Sir B. Shower. Did he never give you a guinea or two before in charity, and out of compassion to your necessities?

Bertram. He has given me money several times before: and I believe if I would have asked him for any money, he would have given it me.

Att. Gen. Was this money given you for charity, or for any other, and what purpose?

Bertram. I did not ask him for any thing: but he gave it me, and said, there is a guinea to buy you necessaries.

Att. Gen. What was the discourse before that?

Bertram. I told you, he said, he believed they were to ride out very suddenly, and he believed the king was to be seized in his coach, and he desired me not to be out of the way.

Mr. Cowper. And when he gave you the guinea to buy you necessaries, was it immediately after this discourse?

Bertram. Sir, it was at the same time.

Lowick. Did not I give your wife a guinea two months before this?

Bertram. Yes, Sir; I acknowledge I was informed you did, I was not in town then.

Lowick. Pray let the court know that.

L. C. J. Did he tell you the king was to be seized in his coach, before he told you they were to ride out very suddenly?

Bertram. No, afterwards; and then he gave me the guinea.

Sir B. Shower. His words are not coupled together, they have no relation to one another.

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L. C. J. No; but he told him they were to ride out very suddenly, and the king was to be seized in his coach, and gave him a guinea to buy him necessaries at the same time.

L. C. J. Treby. There is no doubt he was engaged in the design with those other persons.

Mr. Conyers. And afterwards he rebuked him because he had not met him; and he said, it would have been the same thing if the king had been in the field.

Mr. Mountague. What day in the week was it that you failed him?

Bertram. It was on a Saturday.

Juryman. Pray, my lord, we desire to know, who he did understand by the king that was to be seized.

L. C. J. What did he call the king?

Bertram. He said nothing but the king.

L. C. J. Who did you understand by that?

Bertram. I leave it to the court, I am not to interpret things.

L. C. J. Treby. Did he name the prince of Orange, or king James? Did you think king James was to be seized?

Bertram. My lord, I tell you what he said, I am not to interpret his words.

Att. Gen. Do you believe he meant king James, or this king, that was to be seized?

Bertram. I believe it might be the king here.

L. C. J. Take the words as they are; he asked him before, Whether he would engage in a design that might be for his advantage? On Friday the 14th of February he meets him at his lodging, and tells him, he was to ride out suddenly, and that the king was to be seized in his coach, and appointed him to meet him the next morning, and gave him a guinea to buy him necessaries.

Mr. Mompesson. Pray, has not Mr. Lowick given you clothes, linen and other things at any other time?

Bertram. Sir, you have been always ready to serve me, I must acknowledge, and you have been very kind to me.

Lowick. If you please to give an account of my character, whether ever I was guilty of any bloody thing?—*Bertram.* No, Sir.

Sir B. Shower. How long have you known Mr. Lowick?

Bertram. I believe I have known him this 20 years.

Sir B. Shower. What behaviour has he been of?

Bertram. He has always had very good behaviour, and the best; he has had the best character of all mankind.

Sir B. Shower. Did you ever know him inclined to do a rash action?

Bertram. Never in my life.

Sir B. Shower. Did you ever know him do a malicious action?

Bertram. No; but he had always the character of a good man, and was always ready to serve any man in his necessities, and to do good; he has that general character abroad.

L. C. J. Where does he live?

Bertram. He lived last at Brownlow-street, but he has no wife nor family, and so has no fixed being.

L. C. J. What was his way of living?

Bertram. He was bred a soldier, and has been abroad.

L. C. J. Where?—*Bertram.* In Ireland.

L. C. J. In whose service?

Bertram. In the service of king James.

Lowick. He knows particularly, that once I was upon a party, and saved five officers from being killed in cold blood.

L. C. J. What countryman is he?

Bertram. Yorkshire.

Mr. Mompesson. Was he accounted of a cruel or a bloody nature?

Bertram. No; of a quite contrary.

Juryman. My lord; I desire to know for what cause he gave him or his wife a guinea.

Bertram. I know not what that guinea was for that he gave me the 14th of February, any otherwise than as I have told you.

Mr. Mompesson. What was the guinea given to your wife for?

Bertram. For that guinea given to my wife, it was out of his own kindness and goodness to my family and me.

Att. Gen. What was the other guinea for? You are upon your oath.

Bertram. Indeed, Sir, I cannot tell; he gave it me to buy me necessaries.

Att. Gen. Was there nothing else mentioned, what necessaries those were to be?

Bertram. No, Sir; upon my oath there was not any particular mentioned.

Att. Gen. What made him so kind to you, pray?

Bertram. We were both born in a town, and I believe we are near related.

Sir B. Shower. You say you are townspeople, and have been long acquainted, and you knew him in Ireland; pray, did you ever know that he saved any people's lives?

Bertram. I was not in that action myself, but all that were in it gave that relation, that he was very favourable, and did save people's lives, particularly one captain Harlow, and brought him and other prisoners, and I remember the thing: it was about a fortnight before the business of the Boyne, upon a Sunday morning, that they took those prisoners, and he did persuade several parties that he commanded, to decline killing as much as they could: I was not in this action, but this I heard of all that were in it, and from the prisoner.

Sol. Gen. When he gave you that guinea, did not he speak any thing of a horse that was to be provided for you?

Bertram. Not a word: I never did see a horse upon that account, nor was I master of a horse, nor was I told I should have a horse in any respect whatsoever.

Juryman. How could you ride out, as you say they were to do, without a horse, or without knowing any thing of a horse to be provided for you?

Bertram. I did not know of a horse.

L. C. J. But he said you were to ride out speedily.

Bertram. No: he said in general, we should ride out suddenly.

Att. Gen. Who was there besides yourself?

Bertram. Nobody.

Att. Gen. Then that 'we' must mean you and him. And how were you to ride out without a horse? Pray mind what you swear.

Bertram. I was to meet him the next morning, but did not.

Att. Gen. Pray, what could you understand by that, that you were to ride out suddenly, and had no horse?

Bertram. That was understood, that if I did ride out, I must have a horse.

Att. Gen. Who should you have it from? Had you a horse of your own?

Bertram. No, I had not.

Att. Gen. Did you intend to hire a horse?

Bertram. No, I did not.

Att. Gen. Did not you ask where you were to have a horse?

Bertram. No, I did not ask nor inquire, nor was it promised me I should have a horse.

Att. Gen. Did he tell you where you were to ride?

Bertram. The next morning I was to meet him.

Att. Gen. For what? To ride out was it?

Bertram. I cannot really tell whether it was upon that account or not.

Att. Gen. Whether did he tell you where he was to ride?—*Bertram.* Indeed, he did not.

Juryman. It is very strange that you did not ask him where he was to go, nor ask him for a horse.

Bertram. I was so senseless, that I neither did ask him about a horse, nor ever knew of any that was to be provided for me.

Juryman. Did you understand what was meant by the riding out suddenly?

Bertram. I did take it to be about the business, the seizing of the king.

Juryman. Did he compare it to attacking him in the field?

Bertram. No, he did not; but he said, he believed the king would be seized in his coach; he made no comparisons.

Mr. Mountague. Pray, Mr. Bertram, why did you not meet him? What reasons had you for not doing it?

Bertram. I thought it not requisite to meet him.

Mr. Mountague. What! had you no mind to the thing?

Bertram. No, I had not; because I thought the thing very unlawful.

Att. Gen. Pray what was that thing you speak of, that you thought was unlawful?

Bertram. I thought it was about seizing and killing the king.

L. C. J. Pray, mind; there is nobody desires you should speak more than the truth; but on the other side, being upon your oath, you are to speak the whole truth; for if you

conceal any part of the truth, though you have a kindness for your countryman, Mr. Lowick, who has been kind to you, you will forswear yourself, for you make a different representation of the matter, and make it appear quite otherwise than it is; pray do not strain one tittle, but let us have all the truth.

Bertram. I do not believe I strain one bit.

Mr. Mountague. Then tell my lord why you did not meet him?

Bertram. I did believe it was about seizing and killing the king, and I did think it to be illegal.

Mr. Mountague. Why did you think it was about that?

Bertram. Because Mr. Charnock had told me of it before.

Att. Gen. How did you know that was what Lowick spoke to you about?

Bertram. I did suppose it to be the same, because he desired me at first to ask no questions, no more did I; but I took it always to be the same thing.

Att. Gen. What did he say to you?

Bertram. He told me he had a business to propose to me, if I would engage in, that would be for my advantage, but I must ask no questions; talked of riding out suddenly, and that the king was to be seized in his coach; and having heard of it from Charnock, I thought it was the same business.

Att. Gen. Then, my lord, we have one witness more. Call capt. Fisher. [He did not appear.] If he does not appear, we shall let them go on, and when he comes in, we can examine him afterwards.

L. C. J. Is he a material witness?

Sol. Gen. We do apprehend he is a very material witness.

L. C. J. If you think him a material witness, it will not be proper for them to enter upon their defence, till they have heard the whole accusation.

The Court staid for Mr. Fisher's coming for near an hour, and at last he came in and was sworn.

L. C. J. Who is this?

Att. Gen. This is one captain Fisher.

Sol. Gen. Pray, captain Fisher, do you know Mr. Lowick, the prisoner at the bar?

Fisher. I have not talked with Mr. Lowick since the 8th of February, and then he talked that he would be ready to serve his master to the uttermost of his power.

Att. Gen. What master?

Fisher. King James.

Att. Gen. What particular service?

Fisher. He named no particular service, but only that he would be ready to serve his master to the uttermost of his power.

Att. Gen. Where was this?

Fisher. At the Cock in Bow-street.

Att. Gen. Who was in company?

Fisher. There was Mr. Harrison.

Att. Gen. Pray, give an account of what you know of this barbarous, bloody design.

Fisher. I believe there was a design to seize the prince of Orange.

Att. Gen. What do you know of it? You say you believe it.

Fisher. I believe it by my knowledge, because I was concerned in it.

Att. Gen. By whom was that design carried on?

Fisher. By sir George Barclay and Mr. Harrison.

L. C. J. What was the design?

Fisher. We were to fall upon the prince of Orange.

L. C. J. You called him so, the prince of Orange?—*Fisher.* Yes, mylord.

Att. Gen. Well, tell us what happened.

Fisher. It was to have been done the 15th of February, and we met accordingly the 14th, but the king not going abroad, it was put off.

L. C. J. Who met on the 14th?

Fisher. I met only Mr. Harrison and sir George Barclay, then it was put off till the 22nd; upon the 21st, we met at the Three-Tuns in Holborn, and from thence we came to the Sun-tavern in the Strand, and there was nobody but Mr. Harrison and I together, and sir George Barclay came to us; I believe there were about 14 or 16 in the house; there sir George Barclay told me, Mr. Lowick was to meet me and two more at an inn by St. Giles's Pound, and that we were to go together to seize the prince of Orange the 22nd.

L. C. J. Did you meet him?

Fisher. I did not meet him, it being put off by the king's not going abroad.

L. C. J. This does not affect Mr. Lowick at all.

Att. Gen. It does not, we acknowledge; but at that time which you speak of, the 8th of February, had you any knowledge of the assassination?

Fisher. There was no assassination at that time, at least, it was not then declared.

Att. Gen. What was your discourse about then?

Fisher. There was notice of the king's preparing to come for England.

Att. Gen. You say Mr. Harrison was there?

Fisher. Yes, and talked very little about the matter, but only that there were preparations for the king's coming.

Att. Gen. What did Lowick say to you?

Fisher. I have told you all that Mr. Lowick said to me.

Att. Gen. Repeat it again.

Fisher. He said he would be ready to serve his master to the uttermost of his power.

Mr. Cowper. Had you no discourse about an act of parliament?

Fisher. Mr. Lowick said it was not convenient to talk with more than one at any time, for there was an act of parliament on foot, that under two witnesses nothing should affect a man's life in treason.

Att. Gen. The act of parliament was then a-making.

L. C. J. When Mr. Lowick said he would serve his master, what discourse had you about it?

Fisher. Mr. Lowick said not a word within, but at the door he said he would serve his master to his power.

Att. Gen. What was that they would not talk with above one at a time?

Fisher. Nothing that was thought treasonable practices should be discoursed before above one at a time; so I understood it.

Sol. Gen. Then, my lord, we have done.

Sir B. Shower. May it please your lordship, and you gentlemen of the jury; I am of counsel in this case for the prisoner at the bar, and we do hope here is not evidence sufficient to convict him of high-treason; the question is not, Whether there was a plot or a conspiracy to assassinate the king, or to prepare for an invasion; but all that you are to consider, gentlemen, is, whether the evidence against Mr. Lowick be sufficient to convince you, that he did design to seize and assassinate the king; there are three witnesses produced; but we think this last witness, Fisher, his testimony does not hurt him in the least. We know your lordship will declare and direct the jury, that the evidence in a case of treason ought to be plain, not only with respect to the fact, that it was done, but also of such facts as are the evidences of a man's intentions; and those are not to be construed by strains and intendments, or implications, unless they be such as evidently, naturally, and to common understanding express the intention, it cannot be good evidence in treason: now we say, that captain Fisher has said nothing at all that will affect the prisoner; for all that he says is, that the 8th of February he said he was ready to serve his master to the utmost of his power, and any words as well as these may be construed to make a man guilty of treasonable intentions; for it might be a recollection of favours received, or it might be a grateful intent to serve him upon particular occasions; but that is no evidence upon this indictment. Suppose it was to serve him upon the supposed intended invasion, yet, with submission, that is not evidence of the overt-act laid here; here is no overt-act mentioned of preparing arms, or encouraging men, or seducing the king's subjects, in order to the better restoring of the late king James, or the expected landing of the French, or the like. All that is laid to the prisoner's charge is, the compassing the king's death, and a design to assassinate him in his coach; and in order to the assassination, he was to buy arms and horses: now all that he says is quite of another nature, of a quite different strain, and has no tendency to this matter; and nothing he says that Lowick should say, but is applicable the other way, and tends more naturally to the invasion, than to the assassination. Your lordship observes, there was some notice taken of what Mr. Lowick should say, concerning the act of parliament, that he would not talk with above one at a time: how far, when life

is concerned, such loose discourse ought to be enforced before a jury, I must leave to your lordship; though a man may be innocent, yet he may be cautious, and the more innocent, perhaps the more cautious; but that is applicable to the invasion too, and has no relation to the treason in this indictment more than any other. It shews he was more wary than others were, but it is not applicable to the fact that he now stands charged with. Then the whole of the evidence depends upon the testimony of Mr. Harris and Mr. Bertram; and we think they are not two witnesses to one thing, and what they say must be strained, and intended, and presumed, to make evidence of treason; for what Mr. Harris says about the discourses between him and the late king James, about receiving orders from sir George Barclay, and his passage over from France, and the several stages he and Mr. Hare travelled, and the discourses between sir George Barclay and him: your lordship will acquaint the jury, that is no evidence to affect Mr. Lowick, nor what Berkenhead and Hare agreed upon does any way affect Mr. Lowick; for those things may be all true, and yet Mr. Lowick innocent of what he stands charged with in this indictment; he says, That upon the first Saturday he saw Mr. Lowick at the confectioner's, but he cannot say he staid there at all; there was not a word spoken by Mr. Lowick that he remembers then, but what he says that seems to touch, and the only thing that touches Mr. Lowick in all this evidence is, that upon Monday, Tuesday, Wednesday or Thursday, it is a pretty large time, between the 15th and the 22nd, he was talking with Mr. Lowick about the barbarity of this business, and that Lowick after all said he would obey orders: now with submission, my lord, to make that to have relation to the assassination must be by a forced, strained intendment; he does not declare what the orders were; nay, he does not affirm there were any orders for the assassination, but only that he would obey orders; here is no order by writing, no order by parole that Mr. Lowick declared he would obey. As to what Lowick declared about his intention of riding out and seizing the king in his coach, that cannot be intended; the order that he was to obey to assassinate the king, that order does not appear; there are no footsteps of it in all the evidence; so that there is nothing in testimony that will hurt Mr. Lowick: then upon the 22nd, when they dined together, Mr. Harris says, that there was a discourse of two men; but it does not appear, nor does the witness give any account what those two men were to be for: it is true, two men he was to get discharged; but that is not evidence that these men were to make a part of those forty; neither the words before nor the words after can have that construction; nay, it does not appear it was for any purpose at all: now in the case of life, where a man stands at the bar, we hope such an evidence shall not be construed to make a proof of a treasonable intention, that these were to as-

sassinate the king, or to make part of the forty that were to do it; when it does not appear they were there, nor who they were, nor any sort of notice taken or given upon what account they were provided. And then as to Mr. Bertram's evidence, it is palpable that his evidence, and whatsoever he says, cannot amount to make one witness to prove an overt-act within this statute, and that there must be two witnesses the law requires. What does Mr. Bertram say, to prove any man guilty of treason, but only by intendment, thought or suspicion? it is true, Mr. Bertram's evidence would be good enough to commit a man upon suspicion of treason, but to convict him it cannot be. He says, that in the beginning of February he spoke to him, and told him he would employ him in a business that would be for his advantage, but he must ask no questions: This is very dark, for the meaning of it does not appear what was intended by it; it might be one thing as well as another; it might be to employ him in his family, or it might be to send him of a journey, or it might be the taking of a farm; but to apply that as an evidence of a charge of high treason, that we think is very hard, and we hope your lordship will think so too: but then he comes and tells you further of a discourse upon the 14th, of his riding out suddenly, and that the king was to be seized in his coach; but he does not say that he was to seize him, nor that he would be concerned in it, nor that he knew of it, nor did declare at what time it was to be done, nor any thing certain whether it was a prophecy, or a dream, or a story that he related again, or what it was; there is no connection between the riding out suddenly, and the other words of seizing the king in his coach: Then he says he gave him a guinea to buy him necessaries; the man acknowledges Mr. Lowick several times had given him in charity, money, cloaths, and other things, and gave his wife a guinea, as you observe, in charity; but he gave him this guinea on purpose to buy him necessaries; and it is hard that a man's charity to a countryman, to a townsman, to an ancient acquaintance of twenty years standing, to a person that he had been familiar with formerly, and known to have lived well, should be misinterpreted and strained, to make it a giving him money as subsistence, and a reward for the doing such a mischievous bloody act: we say, his charity to this man formerly is inconsistent with the supposition that he could be privy to such a barbarous design now; and we hope the jury will consider the character that that very man has given to my client; for the same witness gives you an account of his behaviour all along, that he was not given to rash and barbarous actions, nor guilty of any malicious thing; nay, that he prevented mischief, and the killing of people in cold blood. We must leave it to the jury's consideration, and your lordship's direction. All these things that they say may be true, and Lowick be not guilty; and the acquitting of Mr. Lowick will be no reflection upon the witnesses, nor any

discredit to the testimony that has been given of this conspiracy; but we hope it is doing justice to this man, the witnesses not coming up to the proof of what is laid in the indictment. We must beg your lordship's patience a little longer, and call some witnesses to give you an account how long they have known Mr. Lowick, and what his real character is; they will tell you he is a peaceable, good man, and shew you that his temper and inclination was rather to a sober, quiet life, than to lead him to such action, and that they cannot think him likely to be tempted to be concerned in such a design; and then we must leave it to the jury. Call Mrs. Yorke.

Lowick. I believe there is nobody here that knows me, but will give me that character. [Mrs. Yorke came in, and was sworn.]

Sir B. Shower. Pray, Mrs. Yorke, how long have you known Mr. Lowick?

Yorke. About a dozen or fourteen years.

Sir B. Shower. What sort of disposition is he of?

Yorke. He is a civil, honest man as ever I saw in my life, or ever knew of; and I never heard otherwise from any one that knew him.

Sir B. Shower. What was he in his actions? Was he malicious, or good-natured?

Yorke. As good a natured man as ever I saw.

Mr. Mompesson. Has he the reputation of a cruel, bloody-minded man?

Yorke. Quite the contrary. He lodged in my house half a year; it is not quite a year ago since he lay at my house. He was the most obliging man that ever lay in my house. He was so civil to all the lodgers, that they admired him for his goodness, and made them in love with him.

L. C. J. How came he to lodge at your house?

Yorke. He came from his other landlady; they could not agree; his other landlady was a sort of a shrew, and therefore he did not care for staying there; and I desired his company, because I knew him to be so obliging and civil a man.

L. C. J. Where is your house?

Yorke. In Bloomsbury.

L. C. J. What is his way of living? Is he a man of an estate?

Yorke. I cannot tell; I did not enquire into that.

L. C. J. Had he no employment to get his living by?

Yorke. I do not know any thing of that; I never enquired into it; he paid me very honestly for my lodging, and he is a very good man, for any thing I know.

Sir B. Shower. Then call Mrs. Mosely. [She came in, and was sworn.]

L. C. J. Well, what do you ask this gentleman?

Sir B. Shower. Pray, Mrs. Mosely, will you tell my lord and the jury, do you know Mr. Lowick?—*Mosely.* Yes, Sir, I do.

Sir B. Shower. How long have you known him?—*Mosely.* Near twenty years.

Sir B. Shower. Pray give an account, upon your knowledge, what disposition and temper he is of, whether he is rash, malicious, bloody, and ill-natured.

Mosely. He is a peaceable, virtuous, honest man, and a man that I never heard or saw that creature that could speak any ill thing of him in my life; nor I never heard him speak any thing maliciously of any creature in my life, to do them a prejudice: so far from that, that he is a man has a character, perhaps, above any man that I could speak or hear of in my life. I speak it even above my own relations; they may have some passions; but I never see that gentleman in a passion in my life. He has lain in my house several times, and he has had company come to him, but never any that was scandalous one way or other. I never saw him fuddled; nor ever heard him swear, nor any one accuse him of any of those things.

Mr. Mompesson. Call Dr. William Mew. (He did not appear.)

Sir B. Shower. The prisoner has something to say for himself, my lord; but we must submit to your lordship's consideration, and the jury's, whether there be any evidence but what is dark, and favours of suspicion only; suspicious it is; but whether there be any evidence that is plain and direct as the law requires in cases of high-treason, we must leave it to your consideration, for we apprehend there is none.

Lowick. My lord, as to this business, the thing that I stand accused of, the Assassination, I know nothing in the world of it, nor never did, directly or indirectly; and if I am convicted, and could, to save my life, be the death of the poorest child in the world, I would not save my life to do it.

L. C. J. Look you, I would put you to make answer to some things; you were at sir George Barclay's at the confectioner's in Holborn; and it is sworn he came over upon such a design. Then you were with Mr. Harris at Red-Lion-Fields, and there he was speaking to you of the horridness of the design that was to be executed upon the king's person the Saturday before, and he told you he did mislike it; and thereupon you answered that you would obey orders, and that sir George Barclay had orders for it, otherwise he would not do it.

Lowick. Sir George Barclay never spoke one word of it to me.

L. C. J. Every body knows now upon what design he came over from France, and when Mr. Harris shewed dissatisfaction with the thing, you made that answer to his discourse.

Lowick. He never said one syllable to me of it. I trust to your lordship's judgment and the jury's mercy.

L. C. J. And then I would have you answer to another thing; when you dined together on the Saturday the 22nd, what were those two men that could not be discharged without you?

Lowick. My lord, I know nothing in the world of two men.

L. C. J. You went to discharge them, for the king did not go abroad that day.

Lowick. I know nothing of it.

L. C. J. He swears this, and that is as to him; but then as to Bertram, what design was that that you were to engage Bertram in for his advantage, and he was to ask no questions?

Lowick. My lord, he is a poor man, and my countryman, and I have at all times, from time to time, for this seven years, helped to subsist him and his family, that he will not deny; and I have several times given him both clothes and money.

L. C. J. Then I would ask you again, When he came to your lodging on Friday the 14th of February, and you told him the king was to be seized in his coach, and said that we were to ride out very suddenly, and you appointed him to meet the next morning; and because he did not meet you blamed him, and said, it would have been the same thing if the king had been in the field. Look you, I would have you give answer to this if you can.

Lowick. I remember nothing in the world of it, not a word I assure you; and to the best of my remembrance, I did not see him in two days after.

Att. Gen. My lord, I must beg leave to answer to the objection that the counsel for the prisoner have made, that there are not two witnesses to prove the overt-act laid in the indictment, and so the law is not satisfied. In answer to that, I desire your lordship's favour to observe how the evidence is, and then we shall see whether there are not plainly two positive witnesses of the overt-act, by agreeing to assassinate the king. The first witness is Mr. Harris; your lordship observes, that Mr. Harris gives an account that Mr. Lowick was at sir George Barclay's lodgings the first day that it was to have been executed; and that afterwards between the 15th and the 22nd, those being the first and second days that this was to be done, when he and Rookwood, and the prisoner Lowick, were walking together in Red-Lion-fields; and there had some discourse about the intended assassination, and the barbarity and bloodiness of it, and Mr. Harris and Mr. Rookwood were averse to it. Mr. Lowick said he would obey orders, and he was sure sir George Barclay would not do it unless he had direct orders for it; that was twice repeated by him, as Harris swears: and afterwards Mr. Harris tells you, that the 22d he dined with Mr. Lowick, and Mr. Lowick observed that Mr. Harris came in in a great sweat, and asked him how it happened; he said he had been about to get Rookwood's party that were to seize the king; for he was to have one party. Says Mr. Lowick to him, you need not grudge to do it, you have six shillings a day, I have nothing; and yet I, at my own charge, am to provide two. This is as positive evidence as well can be of his being privy to the design; and his engaging people at his own charge, shews a great deal of forwardness and zeal in the prisoner to the business. My lord, I think this is positive and plain evidence, and not only made out by inferences and constructions, as sir B. Shower

says, but plain, positive proof. The first day he was with several of them, and when they discoursed of the thing afterwards, he declared he would obey orders; and what could those orders be but for what they were discoursing of? And nothing was discoursed of but this design they were engaged in, and this was to justify the thing, and take off the apprehension of the barbarity of it: This is Harris's testimony. The next witness is Bertram, and he tells you, that the 5th of February the prisoner sent for him, and when he came to him, he asked if he would engage in a business that might be for his advantage, and ask no questions; so at that time he did not acquaint him what the thing was, but that shews it was a thing that was to be kept secret at that time, in regard he did not think fit to acquaint him at the first instance. But the 14th of February when he met him again, the day before the first time that it was to be put in execution, Bertram swears he told him that they were to ride out the next morning: that must be Lowick and Bertram, for there was nobody else there; and that the prince of Orange was to be seized in his coach. Was it possible the prisoner could be ignorant of it? when he engaged him to go upon a design without asking questions; sent for him the day before, acquainted him they were to ride out the next morning, and that the king was to be seized in his coach, and bid him be ready against next morning, and gave him a guinea at that time; the witness says it was for necessaries, but he does not pretend that it was for charity, as formerly. And that must be for necessaries for that purpose that they were then discoursing of, when he desired him to be ready the next day, and gives him money to buy him necessaries: what can that be, but necessaries for what he was to be ready for? And then he did not come the next day, and he tells you why, because he thought it a very wicked and unlawful thing, and so he disappointed him; and the next time Lowick chid him, and told him, he would have served him so if the king had been in the field. This is plain, though I believe Bertram does speak as tenderly as he can, being his friend and old acquaintance, and is willing to say as little as he can of him: so that I believe nobody thinks but what Bertram says against the prisoner is true, and what he swears is plain and positive. To shew that Lowick did engage in the design, he acquainted him with it the 14th, by telling him the king was to be seized, and they were to ride out, and he was to be ready the next day.

L. C. J. He does not say they were to ride out the next day.

Sir B. Shower. No, the words were, We are to ride out suddenly.

Att. Gen. I think he did say they were to ride out the next morning.

L. C. J. No, call him in again.

Mr. Cowper. The words were, We shall ride out suddenly, and bid him meet him next morning; and afterwards chid him for not meeting

accordingly, and told him it had been the same thing if the king had been in the field.

L. C. J. If you cannot agree upon the evidence, you must call in the witness.

Mr. Mountague. My lord, we are agreed upon the evidence, it was suddenly.

L. C. J. Well then, there is no occasion; have you done on both sides?

Counsel. Yes, my lord, we submit it to your lordship.

L. C. J. Gentlemen of the jury, this prisoner at the bar, Robert Lowick, is indicted of high-treason, for compassing and imagining the death and destruction of the king by an assassination; you have heard what evidence has been given upon this indictment. And in the first place, it is proved to you that there was a design to assassinate the king, which was to be carried on under the conduct and management of sir George Barclay. The question that you are now to consider of is, Whether the prisoner at the bar was concerned or engaged in the prosecution of that design? There have been two witnesses produced, who have given their evidence, and have been very strictly examined, and observations have been made upon the testimony they have given.

The first witness is Mr. Harris; and he gives you some account of the original of this design. He tells you how he was at St. Germain's, and introduced to the late king James, who did express a great kindness for him, and told him that he had an opportunity of doing something for him that would be for his advantage: and that he and one Hare, who was present at that time, should go into England, (for it seems they were both together introduced by colonel Parker) and should be subsisted in England, and thereupon directions were given them what course they were to take; which was to go to Calais, and to each of them ten lewidores were given for their charges; and they were acquainted, that if it happened that if they should lie there so long for want of a wind to bring them over hither that their money was spent, provision should be made for their supply there. They had farther directions, that when they came into England, they should apply themselves to sir George Barclay, and follow his orders, with instructions how to find him; being told that Sir George Barclay would be walking in Covent-garden every Monday, and every Thursday night, about the hours of six or seven o'clock, and that they should know him by a white handkerchief that was to hang out of his pocket.

Mr. Harris further tells you, That they did come to Calais in order to embark for England, and there they happened to stay a considerable time, even so long that their money would not defray their expences there, and they found it true as it was promised them; for the president of Calais paid the reckoning for them at the place where they lodged; and afterwards they came into England, and landed in Kent, and came to Rochester, and from thence to London.

About the latter end of January, old stile (for it should seem it was the 14th new stile, which is the 4th old stile, they were at St. Germain's), he tells you that he did go, the first Monday after their arrival, into Covent-garden, to look after sir George Barclay, but then missed him. But afterwards his companion, Mr. Hare, met with one Berkenhead, and complaining that they had not met with sir George Barclay according to the directions they had abroad; whereupon, by the means of Berkenhead, they were brought to the speech of sir George Barclay, who gave them reception, and owned that he had authority to subsist them: but said he had not then money, but shortly should, and when he had, they should be sure to receive their subsistence. He tells you, that after this, sir George Barclay gave them subsistence money, paying them at the rate of five shillings a day when they had no horses, and when they had, six shillings a day: so they put themselves altogether under his command and conduct. He has given you an account what discourse he had with Mr. Rookwood, from whom he discovered what the design was in which he was to be engaged. And the design to assassinate the king was first intended to be put in execution on Saturday the 15th of February; at which day Mr. Harris and others being at sir George Barclay's lodgings, sir George said, they were his Janisaries, and afterwards caressed them, and said they were men of honour, and told them that they were to attack the prince of Orange and his guards; but it seems the king not going abroad that day, they lost that opportunity.

Truly, then Mr. Harris began to be a little troubled, when he understood the meaning of his being under sir George Barclay's conduct. And he says that after that first Saturday the 15th, and before the next Saturday the 22d, he met with Lowick, Rookwood, and Bernarde, and he was complaining of his being engaged in such a design as this was. He called it then the murder of the prince of Orange, and said it was a barbarous thing, and he did not like it, nor Rookwood neither; but as for Lowick, whether he disliked it, or no, I know not, but he made answer to him, I will obey orders: says he, sir George Barclay has orders for it, or otherwise he would not do it.

Then you are told farther, that after this, on Saturday the 22d, Mr. Harris dined with Lowick at a cook's at the end of Red-lion-street, and being there together, Harris being in a sweat, and was asked the reason by Lowick, he said he had been giving of orders for the getting some men together that were to go under Rookwood; and Lowick told him he might very well do it, for he had pay 6s. a day; but says he, I am to subsist two men, and have nothing at all. Mr. Harris wished him to go to sir George Barclay, and complain of it to him, but he said he would not: but it seems, it being then understood by them that the king did not go abroad that day, Lowick said he must go and discharge the two men,

and went about it. This is the sum and substance of Mr. Harris's evidence against Mr. Lowick.

The next witness is Bertram, and he tells you, that some time before the 15th of February, which was, as I told you, the very first day that they did design to assassinate the king, Mr. Lowick sent for him, and told him, that he would put him upon a business that should be for his advantage, if he would undertake it without asking any questions: this was some time before, but the certain day Bertram does not remember; but he tells you farther that on Friday the 14th of February, he was with Lowick at his lodgings, and he said unto him, that the king, he did believe, was to be seized in his coach, and we are to ride out suddenly; and then he gave him a guinea to buy him necessities, and withal bid him meet him at the purl house in Hart street next morning; and Bertram tells you, he had understood what this design was, for he had it before from Charnock, and did forbear to go the next morning, because he did dislike it. After this Mr. Lowick met him and chid him for disappointing of him, in not meeting him as he directed, for, says he, it would have been the same thing if the king had been in the field. This is the sum and substance of the evidence that Bertram has given against him.

Now Bertram being cross-examined on the behalf of the prisoner, says, he hath known him a great while, and that he is a man of a peaceable and fair disposition, very charitable, and that he has given him money before, and particularly a guinea to his wife in his absence.

Indeed I might have mentioned the evidence of Fisher to you, but that is but circumstantial, and does not come home to the case; but being given it may be mentioned; and that is, about the 8th of February, Fisher had some discourse with Lowick, and it seems there was notice taken of the intended invasion, and Lowick said he would serve his master faithfully; and that the witness thought was meant of the late king; and he said at another time, that he would not discourse with above one at a time, because of the late act of parliament that was then a passing, relating to high treason, that required two witnesses. Now, I say, this is not any proof against the prisoner, but it is a circumstance that may shew his inclination to the late king.

The counsel for the prisoner have insisted upon the insufficiency of the evidence that has been given on behalf of the king, and have said, that the late act of parliament requires two witnesses, which is true, but not two witnesses to any one overt act; but if there be two witnesses, one to one and another to another overt act, that is sufficient; but they say that it is not so in this case.

In the first place, they object against the evidence that is given by Harris, they say it is short, that must be left to your consideration; whether the evidence that is given by Harris concerning Mr. Lowick, does prove to your satisfac-

tion, that he consented and agreed to the assassination of the king, you are to weigh the evidence; when it is sworn that when Harris, Rookwood, and the prisoner were walking in Red Lion Fields, and talking of this horrid design, and Harris complained that it was a barbarous thing to murder the prince of Orange, as they called him, you must consider what answer Lowick did make about obeying of orders; then his subsisting of men at his own charge without pay, and complaining of his having no pay, and his discharging them the last day that the assassination was intended, that I must leave to you, whether or no this is not an evidence, if you believe the witness, to satisfy you that he was engaged in this design.

Then, gentlemen, he has also been desired to give an answer to this question, and to tell upon what design he was to employ Bertram that should be for his advantage; but he was to ask no questions; and afterwards whether he did tell him the king was to be seized in his coach, and they were to ride out suddenly, and bid him meet him the next morning, and when he did not meet him, he said, It would have been the same thing if the king had been in the field. If this be an evidence of Mr. Lowick's engaging in, and agreeing and consenting to the design, then here will be another witness against the prisoner besides Harris.

Gentlemen, you are to judge of this matter and of the evidence. It is true, we are not to put in the case of a man's life, any forced and violent constructions upon any words or discourses; but if the evidence be plain and clear, though he did not say in express words, that he did design to assassinate or kill the king; yet, if upon the whole discourse that past between them it appears plainly, clearly, and satisfactorily to you that he did consent and agree to this design, or was engaged in it, here is another witness, I say, to prove him guilty, besides Harris; you are to consider the whole evidence, the subject matter of discourse, and if you are satisfied, I say, that he was engaged in such a design by the proof of Bertram, as well as of Harris, then there are two witnesses, which is as much as the law requires.

But, indeed, the counsel have called several witnesses to prove that the prisoner has lived very peaceably and quietly; one woman says, she has known him twelve years, and that he lodged at her house, and that he was a man of great temper and candour, and not disorderly, but had a general good esteem and character: And then there is another, Mrs. Moseley, that proves the like, and says, she has known him these twenty years, and she says no man has a better character: And Mr. Bertram hath said, that he was not of a rash or bloody temper.

Now, gentlemen, I must leave it to you, upon the evidence that you have heard, there are these witnesses that have been produced, and there are these circumstances that appear in the case; if you are satisfied upon this evi-

dence that has been given. that the prisoner Mr. Lowick did consent to, and engage himself in that design of assassinating the king, then you are to find him guilty ; if you are not satisfied, you are to find him not guilty ; you have heard your evidence, and had best consider of it.

Then an officer was sworn to keep the Jury, who withdrew, and staid out about half an hour, and then returned.

Cl. of Ar. Gentlemen of the jury, answer to your names. George Ford.

Mr. Ford. Here. (And so of the rest.)

Cl. of Ar. Are you all agreed of your verdict?—*Jury.* Yes.

Cl. of Ar. Who shall say for you?

Jury. Foreman.

Cl. of Ar. Robert Lowick, hold up thy hand, (which he did). Look upon the prisoner ; how say you, Is he guilty of the high-treason whereof he stands indicted, or not guilty ?

Foreman. Guilty, my lord.

Cl. of Ar. What goods or chattels, lands or tenements had he at the time of the treason committed, or at any time since ?

Foreman. None to our knowledge, we do not find any.

Cl. of Ar. Then hearken to your verdict, as the court hath recorded it. You say that Robert Lowick is guilty of the high-treason whereof he stands indicted, but that he had no goods, chattels, lands or tenements at the time of the high-treason committed, or at any time since to your knowledge, and so you say all ?

Jury. Yes.

L. C. J. Discharge the jury.

Cl. of Ar. Gentlemen of the jury, the court discharges you, and thanks you for your service.

L. C. J. Mr. Attorney, will you have the prisoners set to the bar ?

Att. Gen. Yes, if your lordship please.

Then the keeper of Newgate brought Rookwood and Cranburne, and all three were set to the bar.

Att. Gen. If your lordship please to give judgment against the prisoners that are convicted.

L. C. J. Ask them what they have to say for themselves in arrest of judgment.

Cl. of Ar. Robert Lowick, hold up thy hand ; you stand convicted of high-treason, in conspiring the death of the king by assassination, what can you say for yourself why the court should not give judgment against you, to die according to law ?

Then the Keeper bid him kneel.

L. C. J. No, no, he need not kneel ; if you have any thing to say, Mr. Lowick, we will hear you.

Lowick. I throw myself upon the king's mercy.

Cl. of Ar. Ambrose Rookwood, hold up thy hand, (which he did). You stand convicted

of the same high-treason, for conspiring the death of the king by assassination, what can you say for yourself, why the court should not give you judgment to die according to law ?

Rookwood. All that can be said has been said already, and so I shall say no more.

Cl. of Ar. Charles Cranburne, hold up thy hand. Thou standest convicted of high-treason, in conspiring the death of the king by assassination, what canst thou say for thyself, why the court should not give thee judgment to die according to law ?

Cranburne. I have nothing to say but what I have said already.

Cl. of Ar. Then, cryer, make proclamation.

Cryer. O yes, all manner of persons are commanded to keep silence while judgment is in giving, upon pain of imprisonment.

L. C. J. You, the prisoners at the bar, Robert Lowick, Ambrose Rookwood, and Charles Cranburne, you have been indicted, and upon full and clear evidence have been convicted of high-treason ; a treason that was advanced to the highest degree both of malice and mischief against the king and kingdom ; you designed to assassinate the king with an intent to subvert the state, and by the introducing of a foreign power to destroy the ancient liberty and constitution of England.

Our French and Popish enemies, by whom you were employed in this bloody enterprise, did very well know, that the wisdom and courage of his present majesty has rescued this kingdom from that slavery and oppression which they often threatened to bring upon us ; they knew that under his government we have been protected in the enjoyment of our religion, laws and liberty for several years, and that his majesty is the head of the Protestant interest, and the protector and preserver of the liberty of Europe ; and that upon the preservation of his life, and the safety of his person, the good and happiness of multitudes of people do depend, which the French king's pride and ambition has been ready to take hold of any opportunity to enslave and oppress.

Your being engaged in such a horrid design against so precious a life, and to be the bloody instruments to give that dismal stroke, which would have brought misery and desolation upon so many men, renders you worthy to undergo a greater and more severe punishment than by the law of England can be inflicted ; but that there is no greater provided for such criminals, is to be imputed to the ancient honesty and integrity of Englishmen, who, when they framed this constitution of government, never imagined England should produce such degenerate wretches, as would endeavour by plots and contrivances to betray their country to a foreign yoke, and subject themselves and their fellow-subjects to the slavish dominion of strangers.

Your crime being so great, it is now high time for you seriously to reflect upon it ; and though you deserve to suffer the greatest of punishments, yet I have that compassion for your persons, that I wish heartily you would

make use of that opportunity which is now put into your hands, to repent. And since you are adjudged by the law unworthy to live here, that you will make preparation to appear at another tribunal, where you must have another trial, and, without an hearty and sincere repentance, receive a more severe sentence. I hope this calamity, and the judgment that is to fall upon you, will be an admonition to you to take better advice in the last part of your time which is left you, than you have done in the whole course of your lives, and that you will be wiser than to follow the direction of those guides whose principles and doctrines have so far perverted and corrupted you, as to engage you in such a bloody design. I shall leave you to make that preparation for another world, which is proper for men in your condition, and pronounce the judgment of the court, which the law hath appointed and the court does award:

‘That all of you be conveyed from hence to the prison from whence you came, and from thence every one of you is to be drawn upon a hurdle to the place of execution, where you are to be hanged by your necks, and to be cut down while you are alive, your privy-membres are to be cut off, and your bowels are to be cut out of your bodies, and burnt in your view; your heads are to be cut off, and your bodies to be divided into four parts, and your heads and quarters are to be disposed where his majesty shall appoint. And I pray God to have mercy on all your souls.’

Cranburne. I humbly desire the liberty of my wife and relations to come to me, and such divines as I shall desire may have free recourse to me.

L. C. J. You shall have that liberty that is allowed to all persons in your condition.

Rookwood. I must beg the same favour to have some few friends and relations come to see me without a keeper.

L. C. J. You shall have a warrant for your friends to come to you.

Rookwood. I beg your lordship that you would please to specify it in the warrant, because they would not grant it hitherto without a keeper being by.

L. C. J. You mean, you would have your brother permitted to come to you.

Rookwood. Yes, and some few relations.

L. C. J. What is usually done in such cases, let it be done.

Lowick. My lord, I desire the same thing, that my sister may come to me, and that the little time I have, I may be in private with my friends.

Att. Gen. If your lordship please, they may give the names of those they would have admitted to them, and then the keeper will attend your lordship for your direction.

L. C. J. That the keeper must take care of, lest they allow such a liberty as may endanger an escape; for their being alone may prove a dangerous thing.

Att. Gen. It is reasonable they should tell who they are, before they be admitted.

L. C. J. You allow them, I suppose, to have private discourse in the same room, if a keeper be by.

Cranburne. No, my lord, we never had.

Att. Gen. Such as your lordship thinks proper to be admitted to them may have discourse with them in private, if the keeper be in the room, but no others but such as your lordships shall allow; for we know what has been the effect of a liberty of access to some prisoners.

L. C. J. Let us have a note of those names that you would have come to you, and we will give directions that shall be proper in it.

Cl. of Ar. Sheriff of Middlesex, you must take them into your custody till execution is done.

Then the Keeper took away the Prisoners.

On Wednesday, April 29, Ambrose Rookwood, Robert Lowick, and Charles Cranburne, were drawn to Tyburn, where the two former delivered the following Papers to the sheriffs.

MAJOR LOWICK'S PAPER.

In the name of the Holy Trinity, Father, Son, and Holy Ghost, Amen. In the first place, I die in the religion I was baptized, viz. Roman Catholic, and humbly beg the prayers of all good people for a happy resurrection, and of all Catholics for the good of my soul.

As for being engaged in this for which I die, it was never so positive that I had a horse from the beginning to the very last, nor never see any allowed me, or the two men I was to provide, as was sworn against me at my trial; nor had I any on that account; nor was I at any of their meetings when they settled any such thing. And as for any order or commission from king James, I never see any since I came last into England, which is now about five years; and I am confident none that knows king James will believe he would give any such order.

Indeed, I must confess, I believe king James was a-coming to assert his own right; and I should, if on shore, have done any thing in my power to have assisted him; and, in order to that, I should have been very glad to have had a horse, but never had any.

And as for being concerned in any bloody affair, I never was in my life, but have done my endeavour to prevent, as much as I could, on all occasions; and if the killing the most miserable creature in the world, or greatest enemy, would now save my life, restore the king, and make me one of the greatest men in England, I first would choose to die, because against the Law of God.

If any who are now sufferers on this account, think I have been too forward, and a promoter to this design, I do now declare it was never my inclination to do any rash thing. However, I beg their pardons, and of all the world I have offended, either in thought, word, or

any action whatsoever, and do freely forgive my enemies; and hope, through the mercy of my Saviour Jesus Christ, to have remission of all my sins. Good God preserve the king, queen, prince, and princess, and all that royal blood of Stuarts; and may England never want one of that direct line to govern them, and make them once more happy! I have had the honour to serve my royal master in several commissions, and the last as major, and strove ever to serve him to the best of my power, and ever to be just to those whom I had the honour to command. Lord Jesus, into thy hands I recommend my spirit! O Jesus, receive my soul!

ROBERT LOWICK.

BRIGADIER ROOKWOOD'S PAPER.

Having committed the justice of my cause, and recommended my soul to God, on whose mercies, through the merits of Jesus Christ, I wholly cast myself, I had once resolved to die in silence; but second thoughts of my duty to others, chiefly to my true and liege sovereign king James, moved me to leave this behind me.

I do therefore, with all truth and sincerity, declare and avow, that I never knew, saw, or heard of any order or commission from king James for the assassinating the prince of Orange, and attacking his Guards; but I am

certainly informed that he, the best of kings, had often rejected proposals of that nature when made unto him.

Nor do I think he knew the least of the particular design of the attacking the Guards at his landing, so much talked of, in which I was engaged as a soldier, by my immediate commander, much against my judgment; but his soldier I was, and as such I was to obey and act according to command.

These twelve years I have served my true king and master, king James, and freely now lay down my life in his cause. I ever abhorred treachery, even to an enemy; if it be a guilt to have complied with what I thought, and still think, to have been my duty, I am guilty. No other guilt do I own.

As I beg all to forgive me, so I forgive all from my heart, even the prince of Orange, who, as a soldier, ought to have considered my case before he signed the warrant for my death. I pray God may open his eyes, and render him sensible of the much blood, from all parts, crying out against him, so to prevent an heavier execution hanging over his head, than what he inflicts on me.

AMBROSE ROOKWOOD.

After which they were executed as traitors, according to their sentence.

389. The Trial of PETER COOK, at the Old-Bailey, for High Treason :
8 WILLIAM III. A. D. 1696.

Saturday, May 9, 1696.

THIS day being appointed for the trial of Mr. Peter Cook, upon an indictment of high-treason found against him by the grand jury for the city of London, upon the commission of gaol-delivery of Newgate, holden for the said city, upon which indictment he had been arraigned, and upon pleading not guilty, issue had been joined; and the court having been adjourned unto this day for the trial by public proclamation in usual manner, the court was resumed, and the names of the men returned to serve on the jury having been called over, according to the pannel, and the defaulters recorded; the court proceeded as follows:

Cl. of Arr. Set Peter Cook the prisoner to the bar. [Which was done.] You prisoner at the bar, those men that you shall hear called, and personally appear, are to pass between our sovereign lord the king and you, upon trial of your life and death; if therefore you will challenge them, or any of them, your time is to speak to them as they come to the book to be sworn, and before they be sworn.

Cook. Sir, I desire you would not name them too fast, for my eyes are very bad.

Cl. of Arr. John Ewer.

Cook. Who must I apply myself to, Sir? I

desire to know whether he is a freeholder in London?

Cl. of Arr. I know nothing to the contrary, Sir, he is returned as such by the sheriff; you had best ask him himself, he can best tell.

Cook. Are you a freeholder in London, Sir?

Ewer. Yes, sir, I am a freeholder.

Cook. Sir, I challenge you.

Cl. of Arr. Henry Sherbrook.

Cook. Sir, are you a freeholder in London?

Sherbrook. Yes, Sir, I am.

Cook. I challenge you.—No, Sir, I beg your pardon, I do not challenge you.

Cl. of Arr. Then hold Mr. Sherbrook the book: [Which was done.] Look upon the prisoner: you shall well and truly try, and true deliverance make between our sovereign lord the king and the prisoner at the bar, whom you shall have in charge according to your evidence. So help you God.

Cl. of Arr. Joseph Billers.

Cook. Are you a freeholder, sir, in London?

Billers. Yes, I am. [Challenged.]

Cl. of Arr. John Brand.

Cook. Pray, sir, don't go too fast? Are you a freeholder in London, Sir?

Brand. I am no freeholder in London.

L. C. J. Treby. What say you, Mr. Attorney?

Att. Gen. (Sir Thomas Trevor.) My lord, I

would not have any body that is not a freeholder serve. So he was set by.

Cl. of Arr. William Hull.

Hull. My lord, I am no freeholder in London.

L. C. J. Treby. Why, what estate have you?

Hull. What I have, is in leases.

L. C. J. Treby. What, leases for years, or leases for lives?—*Hull.* Leases for years, Sir.

L. C. J. Then he cannot serve upon the jury.

Cl. of Arr. Edward Leeds.

Cook. Hold, sir, let me see; are you a freeholder in London, Sir?

Leeds. Yes, Sir. [Challenged.]

Cl. of Arr. Thomas Clark.

Cook. Hold, Sir, I pray let me look upon my paper. I challenge him.

A Stander-by. He does not appear.

Cl. of Arr. Nathan Green.

Cook. Where is he, Sir? Are you a freeholder?

Green. Yes, I am, Sir. [Challenged.]

Cl. of Arr. Thomas Emes.

Cook. Are you a freeholder, Sir?

Emes. Yes, I am.

Cook. Were you one of sir John Freind's jury?—*Emes.* Yes, I was.

Cook. Then I challenge you for cause, and I give you my reason.

Serj. Darnall. I pray, let us hear your reason; give your reason for your challenge.

Cook. It is for being of sir John Freind's jury.

Serj. Darnall. Then you challenge him for cause.

Cook. Yes, that he was of sir John Freind's jury.

L. C. J. Treby. Well, brother Darnall, how is that a cause of challenge? You are the prisoner's counsel, let us hear what you say to it?

Serj. Darnall. My lord, what we have to say to it, is this; here are some persons returned upon this pannel, that were formerly jurors in a cause that was tryed for the same species of treason that this gentleman, the prisoner, is charged with in this indictment; and I think the witnesses at that trial did mention in their evidence my client, as being present at those very consults, about which they gave their evidence; these gentlemen gave credit to those witnesses, and found the verdict against the person then accused. We humbly submit it to your lordship and the court, whether we may not for this cause challenge this person as not indifferent, it being for the same cause and consult that the other was tried for.

Att. Gen. Sure Mr. Serjeant is not in earnest in this objection.

Serj. Darnall. My client thinks it a very good objection, that he is not indifferent, and I desire he should be satisfied in it.

Att. Gen. If he thinks so, he may except against him; but if he insist upon it as a cause of challenge, we desire you would put the case, and my lords the judges determine it.

Serj. Darnall. I have told you what the case is.

L. C. J. Treby. But you hear the king's counsel insist upon it, to have you make it out in point of law.

Serj. Darnall. My lord, I have stated the case as my client desired, and we submit it to you.

L. C. J. Treby. Well, there is nothing in it.*

Serj. Darnall. Then my client, if he will not have him serve, must challenge him peremptorily; which he did.

Cl. of Arr. Francis Byer.

Cook. Sir, are you a freeholder?

Byer. Yes, I am. [Challenged.]

Cl. of Arr. James Denew.

Denew. I am no freeholder.

Cl. of Arr. Henry Hunter.

Cook. Hold, hold, my lord, I challenge him as being one of sir John Freind's jury.

Mr. Baker. Nay, that was not allowed in Mr. Emes's case; but you challenged him peremptorily, and so you must now, if you have a mind to it.

Cook. I challenge him.

Cl. of Arr. John Hall.

Cook. Are you a freeholder in London, Sir?

Hall. Yes, I am, Sir. [Challenged.]

Cl. of Arr. John Cullum.

Cook. Sir, are you a freeholder in London?

Cullum. Yes, Sir. [Challenged.]

Cl. of Arr. John Cox.

Cox. My lord, I am no freeholder in London.

Cl. of Arr. John Hedges.

Cook. Hold, I pray, Sir, let me look upon my paper, Sir: are you a freeholder in London?

Hedges. Yes, Sir, I am. [Challenged.]

Cl. of Arr. Thomas James.

James. My lord, my name is not Thomas.

Sher. Buckingham. He is returned, it seems, by a wrong name; we did not know it.

Serj. Darnall. Then you cannot swear him.

Cl. of Arr. Thomas Poole.

Cook. Are you a freeholder in London, Sir?

Poole. Yes, Sir.

Cook. I challenge him, as being of sir John Freind's jury.

Att. Gen. That has been over-ruled already.

Cook. I challenge him.

Cl. of Arr. Peter Parker.

Cook. Are you a freeholder in London?

Parker. Yes, Sir, I am.

Cook. I challenge you, Sir, as being one of sir John Freind's jury.

Mr. Baker. Nay, you cannot offer it again.

Cook. I challenge him.

Cl. of Arr. George Grove.

Cook. Where is he? Are you a freeholder in London, Sir?

Grove. Yes, Sir. [Challenged.]

Cl. of Arr. Nathaniel Wyersdell.

Cook. Are you a freeholder in London?

Wyersdell. Yes, Sir, I am. [Challenged.]

* See the seventh Resolution in the Case of the Regicides, Vol. 5, p. 985, and the Case of Charles Cranburne, p. 221 of this Volume.

Cl. of Arr. Samuel Blewit.

Cook. Hold, pray, are you a freeholder, Sir?—*Blewit.* Yes, I am. [Challenged.]

Cl. of Arr. John Wolfe. [Challenged.]

Cl. of Arr. Joseph Wolfe. [He did not appear, and was said to be no freeholder.]

Cl. of Arr. William Smith.

Cook. Are you a freeholder, Sir?

Smith. Yes, I am. [Challenged.]

Cl. of Arr. Edward Fenwick.

Cook. Are you a freeholder, Sir?

Fenwick. Yes, Sir, I am.

Cook. I do not challenge him.

Cl. of Arr. Then swear Mr. Fenwick.

[Which was done.]

Cl. of Arr. Benjamin Hooper.

Cook. Stay, Sir, pray stay a little, where is he?—*Cl. of Arr.* There he is, Sir.

Cook. Which is the gentleman? Are you a freeholder in London, Sir?—*Hooper.* Yes, Sir.

Cook. I challenge you.

Hooper. I thank you, Sir.

Cl. of Arr. Nathaniel Long.

Cook. Are you a freeholder, Sir?

Long. Yes, Sir.

Cook. I challenge him as being one of sir John Freind's jury.

Cl. of Arr. The court has adjudged that no cause of challenge; therefore I take no notice of it, but as to a peremptory challenge.

Cl. of Arr. Richard Chiswell.

Cook. Are you a freeholder in London, Sir?

Chiswell. Yes, Sir. [Challenged.]

Cl. of Arr. John Child.

Cook. Hold, pray, a moment; I have not crossed these last in my paper, but I challenge this man as being one of sir John Freind's jury.

Mr. Baker. You have had that answered over and over again, as no objection; it is nothing but a peremptory challenge.

Cl. of Arr. William Walker.

Walker. I was one of sir John Freind's jury.

Cook. I challenge him for the same reason.

Att. Gen. But that is no reason at all.

Cook. Then I challenge him.

Cl. of Arr. John Wells.

Cook. Sir, are you a freeholder?

Wells. Yes, Sir, I am. [Challenged.]

Cl. of Arr. John Hibbert.

Cook. Which is he, Sir?

Cl. of Arr. He stands upon your left hand; the man in the black peruke.

Cook. Are you a freeholder, Sir?

Hibbert. Yes, I am, Sir. [Challenged.]

Cl. of Arr. Daniel Wray.

Cook. Stay, Sir, are you Mr. Wray?

Wray. Yes, Sir, my name is Wray.

Cook. Are you a freeholder in London, Sir?

Wray. Yes, Sir.

Cook. I challenge you.

Wray. I thank you, Sir.

Cl. of Arr. John Petit.

Cook. Which is he?

Petit. I am the man, Sir.

Cook. Are you a freeholder in London, Sir?

Petit. Yes, Sir. [Challenged.]

Cl. of Arr. John Sherbrook.

Cook. I challenge him, as being one of sir John Freind's jury.

Mr. Baker. But you have heard that denied to be an exception over and over.

Cook. I challenge him.

Cl. of Arr. Stephen Blackwell.

Cook. Are you a freeholder, Sir?

Blackwell. Yes, I am. [Challenged.]

Cl. of Arr. William Hatch.

Cook. Pray give me time to mark them; pray, who is this man you now call?

Cl. of Arr. William Hatch.

Cook. Sir, are you a freeholder?

Hatch. Yes, I am. [Challenged.]

Cl. of Arr. Henry Beadle.

Cook. Are you a freeholder, Sir?

Beadle. Yes, I am.

Cook. I do not except against him. [Was sworn.]

Cl. of Ar. John Stredwick.

Stredwick. My lord, as I apprehend, I am no freeholder.

L. C. J. Treby. Why do you apprehend so?

Stredwick. It is my wife's estate, not mine.

Cl. of Ar. Then your wife has a freehold, it seems.—*Stredwick.* Yes, she has.

L. C. J. Treby. That is freehold enough; for you have an estate for your wife's life.

Mr. Baker. And after that too; for it is not given over to any body else, and she won't give it from him.

Cook. Sir, are you a freeholder in London, or no?

Stredwick. I apprehend, Sir, I am not.

Mr. Baker. He says he has an estate for his wife's life.

Cl. of Ar. Then he is a freeholder, What do you say to him?

Cook. Are you positive you are a freeholder in London, upon your word?

Stredwick. I think not.

Mr. Baker. Why, your wife's estate is yours for your life.

Cook. My Lord Chief Justice, if your lordship pleases, here is a man that says positively he thinks he is no freeholder; I desire your lordship's judgment, whether he be a freeholder or not?

L. C. J. Treby. Why, let him put his case, if he make a doubt of it.

Stredwick. I am not possessed of an estate myself.

L. C. J. Treby. But is not your wife an inheritrix?

Stredwick. Yes, my lord, she is.

L. C. J. Treby. Then you are seized of a freehold in her right; and, Mr. Cook, your own counsel will tell you, and satisfy you, that that is a freehold sufficient for this service.

Mr. Baker. His wife's father settled it upon her and her heirs.

L. C. J. Treby. No question, it is a sufficient freehold if the wife be living.

Mr. Baker. Yes, she is.

Cook. I challenge him.

Cl. of Ar. William Prince.

Cook. I challenge him, as being one of sir John Freind's jury.—*Prince.* I thank you, Sir.

Cl. of Ar. John Simmons.

Att. Gen. We challenge him for the king.

Cl. of Ar. Robert White.

Cook. Are you a freeholder, Sir?

White. Yes, I think so.

Cook. Pray tell me whether you are, or not?

White. Indeed I think so, Sir. [Challenged.]

Cl. of Ar. Edward Brewster.

Cook. Where is Mr. Brewster? Are you a freeholder, Sir, in London?

Brewster. Yes, Sir.

Cook. I challenge him. Pray, Sir, I desire to know how many I have challenged?

Mr. Baker. You have challenged 33.

Cook. How many besides those that are of sir John Freind's jury?

Mr. Baker. You have but two more to challenge, Sir.

Serj. Darnall. I thought you had heard the opinion of the court, Mr. Cook, that it will not hold as a cause of challenge that he was of sir John Freind's jury; therefore those are all reckoned among the peremptory challenges, and you can challenge but two more in all.

L. C. J. Treby. Not without cause, but as many more as you can have good cause against.

Cl. of Ar. John Reynolds.

Cook. I except not against him. [Was sworn.]

Cl. of Ar. Joseph Brookbank.

Cook. I have nothing to say to him. [He was sworn.]

Cl. of Ar. Adam Bellamy.

Bellamy. My lord, I am no freeholder.

L. C. J. Treby. Why, what estate have you?

Mr. Baker. He has estate enough, I know, for value.

Bellamy. I have only a lease.

L. C. J. Treby. A lease for years?

Bellamy. Yes, my lord.

Cl. of Ar. David Grill.

Grill. I am no freeholder, my lord.

Cl. of Ar. William Rawlins.

Cook. I accept of him. [He was sworn.]

Cl. of Ar. Samuel Roycroft.

Cook. Are you a freeholder, Sir?

Roycroft. Yes, Sir. [Challenged.]

Cl. of Ar. Thomas Parker.

Cook. How many have I to challenge, do you say?

Cl. of Ar. But one, Sir; What say you to Mr. Parker?

Cook. I do not except against him. [He was sworn.]

Cl. of Ar. James Robinson.

Cook. I have nothing to say to him. [He was sworn.]

Cl. of Ar. Joseph Morewood. [Challenged.]

Mr. Baker. You have challenged all your number now.

Cl. of Ar. My lord, we have gone through the pannel, we must now call the defaulters again. Thomas Clark.—*Clark.* Here.

Sir B. Shower. Was he here when he was called over?

Att. Gen. That is nothing, he is here now.

Sir B. Shower. But if there be a default of the jury, and the king's counsel have challenged any one, they ought to shew their cause; therefore we desire that they may shew their cause why they challenged Mr. Simmons?

L. C. J. Treby. The king has power to challenge without shewing cause till the pannel be gone through; but if there be a default of jurors when the king challenges, the king's counsel must shew cause.*

Sir B. Shower. Here is a default of jurors, my lord.

L. C. J. Treby. Nobody is recorded absolutely a defaulter, if he comes in time enough to be sworn.

Cl. of Ar. Swear Mr. Clark. [Which was done.]

L. C. J. Treby. When there is an apparent default of jurors, then they must shew their cause: but here his appearance, it seems, was recorded, and so he was no defaulter; and you might have challenged him for cause still.

Cl. of Ar. James Dry.

Dry. My name is not James.

Serj. Darnall. Then you cannot swear him: here are three mistaken in their names.

L. C. J. Treby. That is in the copy in your brief, brother, it may be.

Serj. Darnall. No, my lord, the officers admit it.

Att. Gen. My lord, we desire those gentlemen, that say they are no freeholders, may be sworn to that matter. [Which was accordingly done. And several of them that had stayed, did deny the having of any freehold upon oath, and some were gone away.]

L. C. J. Treby. Pray take care to estreat the issues, and return greater issues the next time.

Just. Rokeby. Truly, the court must put some great penalty upon them for trifling with the court in respect of their duty that they owe to the king and country, in regard of their estates.

Cl. of Ar. Pray let the officers be called who summoned this jury, Mr. Sheriff. [Which was

* See the Case of Horne Tooke, A. D. 1794, and of O'Connor and others, A. D. 1798. Leach's Hawkins's Pleas of the Crown, b. 2, c. 43, s. 3, and the authorities there cited. The words of the Ordinatio de Inquisitionibus (33 Edw. 1.) are, "Of inquests to be taken before any of the justices, and wherein our lord the king is party, howsoever it be, it is agreed and ordained by the king and all his council, that from henceforth, notwithstanding it be alledged, by them that sue for the king, that the jurors of those inquests, or some of them, be not indifferent for the king, yet such inquests shall not remain untaken for that cause; but if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court."

done. And they examined concerning their summoning those who made default, and the issues of those who were recorded as defaulters were ordered to be estreated.]

Then the Court not being able to proceed for want of a Jury, they ordered another pannel to be ready against Wednesday next, to which time, at seven in the morning, the court was by proclamation adjourned.

WEDNESDAY, May 13, 1696.

The Court being met according to the adjournment, the pannel was called over, and the defaulters recorded, and several excused for absence upon sickness, and being out of town before the summons. Then Mr. Serjeant Darnall desired, before the Jury was called, to move something against the pannel; and made his motion thus:

Serj. *Darnall*. If your lordship pleases, I have somewhat to offer to you before you go upon this new pannel, and I confess I think it is my duty to the court, as well as to the prisoner, to state the case as it is, and submit it upon the reason of law, and the authorities that I shall offer, whether the proceedings upon this new pannel will not be erroneous? My lord, the question is, Whether, as this case is, the prisoner has had a copy of the pannel of his jury by which he is to be tried, according as the late law requires? He had a copy of the former pannel, and upon that pannel nine were sworn, and their names all entered upon record, and made parcel of the record. Therefore now the question is, Whether he can be tried upon a new pannel? We are in a case that rarely happens; and in a case of life and death, I know your lordship will be careful not to vary from the ancient practice, or to make a new precedent, because of the consequences. It must be agreed in this case, that the old pannel upon which the prisoner took his challenges, and of which nine were sworn, is parcel of the record. Now, my lord, to add a new pannel, upon which twelve more shall be sworn, and all this appear upon record, and the prisoner tried upon the last pannel, will not this be error? I offer this before the jury be called and sworn, because we desire to be fairly tried; and we design to rest upon the fact in this case. If it should appear, That he is tried upon a pannel that is unduly made and returned, that will be of evil consequence one way or other. And can this be duly made, if another appear upon record before it? And can any body say it is quashed or abated? Or can it be so? My lord, in *Stamford's Pleas of the Crown*, p. 155, it is said, "If any of the pannel die after the return, and before their appearance, so that there are not enough left to make the jury, yet the pannel shall not be quashed, nor is it abated, but it is cause to grant a tales." And certainly, my lord, it is a stronger case, when by reason of challenges, which the law gives the prisoner liberty to make, there are not enough

left, that there shall not be a new pannel, but that a Tales shall be granted; for if a new pannel might be made, it cannot appear who were challenged, or who were admitted. And if your lordship pleases to consider, the intention of the law in giving the prisoner power to challenge, is, that he may have an indifferent jury; but that would be prevented by such a practice as this; for when it has been discovered upon the old pannel whom the prisoner chose, and whom he challenged upon the new pannel, the persons challenged may be set first, and those that were chosen may be omitted, or so postponed, that none of them whom he thought equal to try him, can serve upon the jury.* And truly, my lord, if I am rightly informed, that is the case upon this new pannel; some of those that were admitted and sworn are left out, and most of them, I think, are put last in the pannel whom he thought equal men to try him, and all those whom he challenged peremptorily are the first men in the pannel. This, my lord, is the case before you; and if this be admitted, the use and end of challenges, which are in benefit and favour of life, would be defeated. And for authorities in this case, besides the reason and ground of the law, many cannot be expected, because it is a fact that rarely happens. I find none of the ancient practisers ever knew it, but I find that a Tales ought to be granted; so it is said in several books, as in *Stamford*, 155, 156. whenever upon the principal pannel all the jury does not appear, or so many of them do not, that there are not enough left to make a jury, which is our very case; then in such case the pannel shall not be quashed or abated, but a Tales granted; so is 14 H. 7, 7. there the question was, Whether there should be a greater number returned upon the Tales than were in the principal pannel? And there the difference was insisted upon, and agreed, That where it is between party and party, where life is not concerned, it shall not; but where life is concerned, and the prisoner has power to challenge 35 peremptorily, there the judge may award as many upon the Tales as he pleases, that there may be enough to remain after the challenges; so that if this old pannel be not abated, and could not be quashed, and a Tales might be granted to consist of any number, I conceive the prisoner cannot be tried upon this new pannel, but it will be erroneous: and I humbly submit to your lordship whether you will proceed upon it.

Sir *B. Shower*. If your lordship pleases to spare me a word of the same side, with submission, We think there ought to have been an Habeas Corpora, with a Tales, such as had been before sworn being to be part of the jury now, and that is the proper way to bring

* In the Case of *Perry* and another, A. D. 1793, in this Collection, it was decided, that where a special jury is ordered, the first special jury struck and reduced according to law, must try the issue joined between parties.

the prisoner to his trial in this case ; the king's counsel cannot expect we should produce many precedents, for I believe this is the second of the kind that ever happened, at least within memory, that a trial in treason was put off ' *pro defectu Juratorum*,' though I have a precedent that I think is express in the case ; but we insist, in the first place, That a *Tales* does lie at common-law in the case of life ; and so the book that Mr. Serjeant cited in Stamford is express ; and then we say, that the answer which we expect, that we are now before justices of gaol-delivery, is not sufficient, because the justices of gaol-delivery, though they do not usually award process by way of writ, but before their coming, they command the sheriff to have his county ready there, and so in fact it is a *parol precept* ; yet when it is returned, then it is entered upon record, either ' *Præceptum est Vice Comiti quod venire faceret* ;' or, ' *Ideo veniat Jurata* ;' and the jury are entered upon record : so that take it to be before justices of gaol-delivery, yet the sheriff having returned a pannel, and that being upon the file, as appears before your eyes, in obedience to your command, and that copy of the pannel being delivered to us two days before Saturday last, we humbly submit it to your lordship, whether by force of the common-law, and of the late act of parliament, we ought not to be tried by that pannel : we insist upon it, that the act intends, and expressly designed, that not only the prisoner should have a copy of the pannel that the sheriff returned at any time after, but that he should be tried by the pannel that we had a copy of at first ; for it is not said a copy *toties quoties* the court shall think fit to award a precept for a new pannel, but the words of the act are, a copy of the jury duly returned by the sheriff ; now this we had, and your lordship knows it is not a returned pannel till it be in court, and then it becomes part of the record : my lord, I do agree, the justices in some cases have quashed and set aside pannels and juries, and ordered new ones ; and I confess there was an extraordinary case in the time of king Charles the second, which was upon the indictment against Whitebread, where, after the jury charged, and evidence given, the jury was discharged, and a new pannel made the next sessions, upon which Mr. Whitebread* was tried and convicted ; how just or regular that was, I will not insist upon now, but I am sure there were great complaints of that practice, and few precedents can be shewn of the like : but besides, the parties themselves waved it there, no objection being taken against it ; but we insist upon it in this case, that this being upon record, is part of the record, and so appears to the court : if the record indeed were to be made up upon a Writ of Error, perhaps it would be no Error, because it may

be they would leave it out ; but here it appears there was a pannel of record before you, and this must either be quashed, or altered, or continued on by process ; you have power to quash it, if it be unduly returned by the sheriff. If there be any evil practices for procuring the pannel, either by the prosecutor or the prisoner ; if there be no freeholders returned, or the same happen in any other respect not to be legally done according to the command or precept of the court ; but because there is a default of appearance of jurors, no pannel was ever quashed upon that account. Then say we, if it be not quashed, this pannel must continue ; for, what shall become of it ? Why should it not continue ? It is not within the act of parliament that gives the justices power to make a new pannel, as in the case of a grand jury when they are guilty of concealments, or refuse to find bills upon great evidence, but we have no such case before you, nor do I know any such rule as can reach this ; so that, we take it, there is no difference between this case, as before justices of gaol-delivery, and other justices ; that process does lie against the jury that does not appear even in treason and felony, there is no dispute ; and it is very properly so, if it be before commissioners of Oyer and Terminer ; first, a *Venire Facias*, and then upon default, a *Habeas Corpora*, that is the proper way ; then take it before justices of gaol-delivery, there it is entered upon record, ' *Præceptum est Vice Comiti*,' &c. and here is a pannel returned by virtue of this precept, and some of the jury do not appear, and so there are not enough to try the prisoner after a great many sworn and challenged, and this entered upon record. What shall become of that pannel, it cannot be quashed nor abated ? My lord, there is case that does warrant that opinion of a *Tales* in a case of felony ; and if there may be a *Tales*, then there may be a *Habeas Corpora*, and there are directions how the jurors shall be sworn again, upon their appearance on the *Habeas Corpora*, and that is Wharton's case in Yelverton 23.

Just. *Powell*, jun. Do not dispute that ; it is plain, that a *Tales* does lie in felony, upon a commission of Oyer and Terminer ; but can you shew me, sir Bartholomew, any where that upon a commission of gaol-delivery a *Tales* does lie ?

Sir B. *Shower*. Sir, I can only shew the reason of the law, and I cannot find that does contradict what we now contend for.

Just. *Powell*. I tell you, sir Bartholomew, there is no *Tales* but with a *Habeas Corpora* to bring in the first jurors, and that cannot be upon a *parol precept* on a commission of Oyer and Terminer, there goes a *Venire Facias*, which is a writ upon which the *Habeas Corpora* may be grounded, but there is no *Venire Facias* upon a commission of gaol-delivery.

Sir B. *Shower*. Why should there not be a precept in nature of an *Habeas Corpora* for a jury returned, on a precept as well as on a writ ?

Y

* See in this Collection, the Cases of Whitebread, vol. 7, pp. 79. 120. 311. And the Note to vol. 7, p. 497.

Just. Powell. No, it never was done; the commission of gaol-delivery is a general commission that does authorize the sheriff to impanel, and have a jury ready at the day appointed for the delivery of the gaol to try the prisoners; it doth import in itself a general precept for that purpose, before issue joined, which the sheriff cannot do in the case of a commission of Oyer and Terminer, but must have a writ of Venire Facias, after issue joined.

Sol. Gen. (Sir John Hawles.) In all cases that they cite, there is a writ of Venire Facias, upon which the after-process, by writ, may be grounded; but here is no foundation for any future process by writ, because it is only by parol precept.

Att. Gen. Sure these gentlemen don't think what they say; the pannel is not part of the record, and there is no record of it; nothing but the clerk's entry in a paper, or note, for his own memorandum.

Just. Rokeby. Brother Darnall, have you any book that says, justices of gaol-delivery must award a tales upon default of the jurors?

Serj. Darnall. No, my lord, I cannot say so.

L. C. J. Treby. Suppose all the jury had been challenged, or died.

Just. Powell. There could be no quashing of it, but it would fall of-itself, for want of a jury.

Just. Rokeby. If, according to your doctrine, we must keep to the first pannel, the consequence would be, there would be no trial at all.

Sir B. Shower. Stamford makes no difference that I can see.

Att. Gen. But these gentlemen have been told the difference upon which this matter is grounded; a Tales cannot be without a Habeas Corpora, and a Habeas Corpora cannot be without a Venire Facias; but a commission of gaol-delivery cannot award a Venire Facias, because that is not to be awarded till issue joined.

Baron Powis. The return of this pannel before justices of gaol-delivery, is an act of the sheriff, by virtue of the commission, and nothing appears of record till the jury are sworn.

Just. Rokeby. They object that it is upon record.

L. C. J. Treby. By the record, they mean the clerk's note.

Att. Gen. If you please to look upon the indictment, there is no entry at all, and that is all the record before you.

Just. Powell. Does it appear upon record, that nine were sworn?

Mr. Baker. No, there is nothing upon the record.

Cl. of Ar. It does not appear till the record is made up, and nothing is entered till 12 are sworn.

Serj. Darnall. There will be a great inconvenience, if a pannel may be changed at any time.

Just. Powell. This is a case that never happened before, and may be never may again.

Sir B. Shower. The law will hold the same, in case it does appear upon record, as well as

where it does not: but we say, a pannel returned in court is a record.

Just. Powell. No, it will not; because, when a jury does appear, and the twelve are sworn, then it becomes parcel of the record; and therefore Whitebread's case was quite another case, and was indeed held to be an extraordinary case; but that comes not up to us, for there a full jury was sworn, and evidence given.

Serj. Darnall. It may be the same jury will not be returned.

Just. Powell. But if you have a copy of the jury, you are at no mischief.

Serj. Darnall. Some that were in the former pannel are quite left out.

Sher. Buckingham. There are none left out, but what were not freeholders, that I know of.

Baron Powis. He says the fact is not true, as you have alledged it.

Sher. Buckingham. And Mr. Serjeant Darnall has been pleased to reflect upon us, as if we had packed this jury, by altering the places of the names, which, my lord, we do utterly deny, and we only left out those that were not freeholders.

Baron Powis. The sheriff says he has not postponed any of them, and only left out those that were not freeholders.

Serj. Darnall. If the law were as plain with us as the fact in that case, we should have a very good case of it.

Sher. Buckingham. Mr. Serjeant, I have both the pannels here; they may be compared.

Serj. Darnall. I said no harm, Mr. Sheriff, nor meant any reflection upon you.

Sher. Buckingham. Mr. Serjeant was pleased to say, the excepted men were put in the front, and those that were sworn were put last.

L. C. J. Treby. There is nothing at all in the objection.

Just. Powell. Really because it was opened as a reflection, it will be proper for the sheriff to clear it.

Sher. Buckingham. My lord, the answer I give to it, is, That particularly one that was sworn last time, is now at the very beginning of the pannel; and, in general, they are mixed promiscuously, without any design or study in the least. He says we have left out those that served before: I solemnly protest, I know not one man returned upon the last pannel that is left out, unless it appeared that he is no freeholder; and we had no reason to put in them, that we knew could not serve.

Serj. Darnall. That cannot appear to us, that they are not freeholders.

Just. Rokeby. But it appears to him, and therefore he did well to leave them out.

Sher. Buckingham. What I say, I am ready to give upon my oath.

Serj. Darnall. I say there is one Henry Beadle left out, and he was one that was sworn.

Sher. Buckingham. I will not say for a particular man; I protest that I did not know he was left out; if it be so, it was by mistake; for I know Mr. Beadle very well, and I take

him to be an honest man, and very well affected to the government as any man.

Serj. *Darnall*. We desire to be tried by men that are honest and well affected in the government.

Sher. *Buckingham*. There you have of them, Sir.

Serj. *Darnall*. Those that were sworn are put last of all, and there is not above one of them that is within possibility of coming ou again.

Sher. *Buckingham*. It will appear by Mr. Cook's challenges, and the other pannel, that they stood late before; and Thomas Clark, who was sworn the last time, stands tenth man upon the pannel.

Serj. *Darnall*. He was sworn after we had gone through the pannel, and took all our challenges, not appearing at first.

Sher. *Buckingham*. I tell you, they stand for the most part as they did, for ought I know.

Serj. *Darnall*. There is but one in threescore and ten, that can be sworn now, of them that were sworn before; and there were nine of them then sworn.

Att. Gen. That is a mistake. Indeed there are a great many added to the pannel, because there was a defect the last time, and therefore now they may perhaps stand later.

Serj. *Darnall*. I do not speak to reflect upon the sheriffs: I go according to my instructions.

Just. *Powell*. If it had been so, it had been well enough; for you must be contented, the court must take it as the sheriff returns it, and you have a copy of it.

Att. Gen. Here are four of them that were sworn before, that stood above sixty off in the old pannel.

Sher. *Buckingham*. The first man that was sworn, Mr. Sherbrook, stands within the first twelve now, as well as before.

Just. *Powell*. If they had been all new, there had been nothing in that.

Just. *Rokeby*. Truly, I cannot see but that the sheriff hath done like an equal, just, fair, and honest officer.

Att. Gen. They may challenge as they will.

L. C. J. *Treby*. You are to consider, that this happens because you run out as far as your utmost number, that time you challenged 35 peremptorily, and divers others for cause, so as not to leave enough for a jury; and from that alone arose a necessity of increasing the number of the pannel.

Serj. *Darnall*. It was our client that challenged them, we do not advise him whom to challenge.

Just. *Rokeby*. But you must take the consequence of it, which causes this addition to the pannel.

L. C. J. *Treby*. What do you complain of? They that are returned, are put in the same order as they were before; they that were sworn, were (for the most part) late in the pannel then, and so they are now. I do not find any thing done to the prejudice of the prisoner.

Serj. *Darnall*. If the christian names had not been mistaken, there had been perhaps enough to have been sworn.

L. C. J. *Treby*. That is a good argument for a new pannel, because the christian names were mistaken before.

Just. *Powell*. It was by defect of jurors, and therefore there was an absolute necessity of a new pannel.

L. C. J. *Treby*. I am of the same opinion. Wharton's case is well known: It was much cited as to another point in Bushel's case. It was a trial at the King's-bench bar at Westminster by a jury of Kent, upon an indictment of a murder. And I think you say the case of H. 7. was between party and party in appeal. And I believe Stamford's discourse, in the place cited, relates chiefly to appeals.

I shall not deny that a Tales may possibly be upon an indictment before justices of Oyer and Terminer; though it is not usual, nor do you shew, or our experienced clerks know any such precedent. I agree, that in the mentioned cases a Tales was proper; for in both cases (viz. of Appeal and Indictment removed into the King's-bench), the process for the jury, was as it ought to be, by writs of Venire Facias, &c. upon which a full jury not appearing, there must be a Tales. But in proceeding to trial before justices of Oyer and Terminer on such indictment as is here, though I will not say but they may proceed by writ of Venire Facias: and the usage is, that after (and never before) the prisoner hath pleaded not guilty, there goes a precept to the sheriff, under the seals of the said justices of Oyer and Terminer, returnable at such day as they shall adjourn to, for returning a jury to try it; (as was done lately, upon advice, in the Case of Rookwood, &c.) and upon the return of that, if, after challenges, there are not enough left to make a jury, whether those justices shall issue a precept in nature of a Habeas Corpora, or Distringas, with a Tales, or another precept in the same form as before, and without taking notice of the former, is a question not in judgment before us. For we are about proceeding to a trial on an indictment in this court of gaol-delivery, (which is the court wherein generally all capital crimes are tried, as well at this place as at the assizes) and, I think, here cannot be a Tales; I am sure it is not necessary. For, first, Here is never any writ of Venire Facias, &c. Secondly, Nor ever a precept for returning a jury to try a particular issue: but this court takes the pannels of juries returned by the sheriff, without any particular precept to him.

The course of proceeding by virtue of a commission of gaol-delivery, which is the law in this case, is this, viz. There is, antecedent to the coming of the justices, a general commandment or precept made, in writing to the sheriff by the said justices, to return juries against their coming, for the trying of all and singular prisoners in their gaol, whether they have pleaded before, or shall after. And for that

purpose it requires the sheriff to summon, out of all parts of his country whence the prisoners come, a great number of freeholders not a-kin to the prisoners, to be at the time and place appointed for holding the court. The sheriff, by virtue of this general previous precept, summoneth many for jurors, and prepares divers several pannels of their names, either at first, or afterwards, as appears necessary, and returneth and delivereth in one or more of these pannels, from time to time, as the court does need, and call for any: this, we know, in fact, is frequently done where the sessions of gaol-delivery lasts several days, and there is occasion. Though, in supposition of law, all these pannels are returned, and the trials thereupon had the first day of the sessions; and, in law, it is intended to be but that one day only. The return of this precept is thus, viz. 'Executio istius Præcepti patet in quibusdam Panellis huic præcepto annexis,' and the pannels are annexed, and there are often filed here divers pannels upon the same general precept, though sometimes but one. These pannels are thus delivered into court, and a jury taken out of them as there is occasion, only upon a Parol Award, that is, barely the court's calling for the same, without writ or precept in writing, or giving any day for the doing it. For this proceeding is *immediatè*, for the speedy delivery of prisoners; and the entry, after setting forth that the prisoner being arraigned pleads not guilty, is, 'Ideo immediatè veniat inde Jurata,' or 'fiat inde Jurata.' And this court's being instituted for the speedy delivery of prisoners, and warnings being given long before, of their coming, are the causes why it has been always held without doubt, that justices of gaol-delivery might inquire and try the same day.

If it fall out, that by reason of defaults, deaths, or challenges, there cannot be a full jury had out of a pannel, (as here there wanted three) which is an accident that the court cannot know, till they have gone through the pannel; I think in this case, that pannel goes for nothing, is utterly lost and void, and to be cast away or cancelled: for it does not answer the award of the court, which was to have a jury to try the prisoner presently. It is meant an effectual pannel that should afford a full jury of twelve unexceptionable men; and every pannel that comes short in this, is to be laid aside as a void thing; and then the court takes and makes use of another immediately, which may not be deficient, whereby the award is observed, and the present service dispatched.

Objection. It is objected, That the old pannel is parcel of the record in court, and, upon that, nine were sworn, and their names are all entered upon record; and now to add a new pannel, upon which twelve shall be sworn and try the prisoner; all this appearing upon record, it will be error.

Answer. This Objection stands upon two mistakes, both arising from not observing the difference between precepts and pannels, in a

court of Gaol-delivery and Venire Facias, or precepts and pannels in other courts.

1. It supposes that here will be two pannels, which will appear to relate to the trial of this prisoner, Mr. Cook.

2. It supposes that both these will become records, or parcel of the record in court.

If either of these suppositions prove to be a mistake, it will destroy the objection. I think both are mistakes.

1. Here is not, nor will be, nay, there ought not to be any pannel purporting to be returned for the trying of Mr. Cook, or any particular prisoner or prisoners. For the precept in this case is (not like a Venire Facias, which always respects a particular issue between parties therein named, but) general, requiring the sheriff to return jurors enough to try all the prisoners, not naming any. And the return, which is the answer to it by a pannel or pannels, is as general; the title of every pannel being 'Nomina jurator' ad triandum pro domino rege,' and no more; or 'nomina juratorum ad triandum inter dom. regem et prisonar' ad barram,' without naming any of the prisoners, and it were absurd if it should be otherwise: for the precept goes to the sheriff before the sessions, and his return is supposed to be made at the beginning of the sessions, when it is not known who of the prisoners will be indicted; or, if indicted, who will plead not guilty, or guilty, or a pardon, or other plea.

When, for the trial of a particular prisoner (or divers prisoners that are thought fit to be put upon trial by the same jury), a jury is about to be taken out of any pannel, the clerk, as he goes along, may take a note in paper of the name of every one that is sworn; or he may (and usually doth) write *jur.* on the said pannel, against the name of every one sworn: but this note or mark is no part of the record; it is not *ex institutione legis*, it is but a voluntary memorandum for the help of his memory. If he could safely trust to the strength of his memory, he need not write at all on this occasion; I mean, not till a full jury is sworn, who try the prisoner. But then, indeed, the clerk must (from his notes or memory) write the name of all the twelve, entering them on the record of the indictment, in this manner, viz. just after the 'Ideo immediatè veniat inde jurata coram præfatis justic.' &c. adding, 'et juratores juratæ illius, &c. scil. A. B. &c. dicunt, &c.' And it is by this only, that the names of those that are sworn, come to be of record; and it is this entry upon the body of the indictment alone, that is the record, that shews who were jurors sworn, to try this, or that, or other prisoner or prisoners.

So that if the old pannel were filed, and were a record, as the prisoner's counsel would suppose, yet it would not thereby be made appear, that the said pannel was returned, or used for, or in order to the trial of this prisoner.

2. The old pannel is not filed among the re-

cords of the court, nor ought to be. When such a pannel does not produce a jury, the clerks may and use to throw it by as a useless thing. But, however they use it, we cannot allow it to be a record. It was received *de bene esse*; it is abortive and comes to nothing. And it is not every thing that passeth in court in order to a record, that comes to be so. A frivolous plea that is rejected, is not recorded. A presentment or bill of indictment, before it is found, is not a record: And if an ignoramus be returned upon a bill of indictment, it never can be a record; and thereupon, the clerks do sometimes throw it away, though sometimes they keep it and put it on the file, only taking care to cross it; but if they do forget to cross it, yet it is not a record.

By all this it is apparent how great the difference is between a precept and pannels in this court, and a *Venire Facias* and a pannel returned thereupon, which is ever issued after issue joined, and doth always mention the particular parties and matter it relates to, and is a record, and a ground for an *Habeas Corpora* with a *Tales*, to be returnable at a certain future day. But, in this case, in this court, it is quite otherwise.

Sir B. Shower. Then, my lord, since there is a new pannel, we hope we stand in the same condition upon the act of parliament, to take exceptions to the indictment before this jury sworn, as we did before the other jury sworn, since all that is quite set aside.

L. C. J. Treby. Yes, truly, I think that may be.

Att. Gen. But these gentlemen would have done well to have given notice of their exceptions.

Sir B. Shower. My lord, I shall not stand upon an exception which I think I might take to the word 'Turmas' in the indictment, which, whether it be troops of men, or horses, or what it is, does not appear; but, I think, we have an exception to the chief overt-act laid in the indictment, and that, we presume, if my brief be right, will be sufficient to set aside this indictment: that Mr. Cook did agree with other traitors to send Mr. Charnock into France to the said late king James, and king James is never mentioned before in all the indictment; that is one exception that we have, that there is no late king James mentioned in the indictment before this. if my copy be right, if it be otherwise, I suppose they will find it: it is laid, That Mr. Cook did agree to send Charnock as a messenger into France, 'Eidem nuper regi Jacobo,' and no 'Rex Jacobus' is mentioned before. Then there is another exception, and that is this: they come and say, That whereas there was a war with France, which is only in the indictment by way of recital or rehearsal of an history, 'Quod cum per magnum tempus fuit et modo sit,' &c. Mr. Cook, the premisses knowing, did compass and imagine the king's death, and did adhere to the said king's enemies such a day. Now, my lord, I do think that this can never be maintained, for

that 'Cum quoddam bellum,' &c. being an historical narrative, is not positive enough: for adhering to the king's enemies being one of the treasons laid in the charge, there ought to be a war at the time of the adhesion, and of necessity then that ought to be presented by the jury; for though your lordships can judicially take notice of war or peace, yet you cannot take notice of it at such a particular time, and the reason is from the notion that is in my lord Coke in his third Institutes, cap. Treason, That adhesions to rebels is not adhesion to the king's enemies, for a rebel is not said to be an enemy; but it must be adhering to such an enemy, as between whom and the king there was war at that time; and consequently it ought to be more positively averred in the indictment than it here is; but as to the overt-act of Mr. Cook's consulting and agreeing to send Charnock over to the said late king James, to give him notice of what was agreed upon between them, when king James is not named before, that can never be got over, with submission.

Mr. Baker. It is a mistake of your copy, sir Bartholomew Shower.

Att. Gen. I have looked into the record, and it is 'Jacobus secundo nuper regi,' not 'dicto.'

Sir B. Shower. Then, with submission, my lord, they cannot try us now, for we ought to have a true copy of the indictment.

Mr. Baker. Upon demand. But you never demanded it.

Sir B. Shower. Yes, it was demanded.

Mr. Baker. Who demanded it?

Sir B. Shower. Our solicitor Burleigh.

Mr. Baker. No, he did not; I gave it him officiously.

Att. Gen. With submission, my lord, it is no objection at all, that their copy is wrong. That should have been before the prisoner had pleaded; for the words of the act are, That he shall have it so many days before, to enable him to plead, and he cannot be put to plead unless he have a copy of the indictment so long before: and at Rookwood's trial it was said by the court, it could not be alledged after plea pleaded.

Mr. Burleigh. The copy was given to me publicly in court.

Sol. Gen. Why did not your solicitor compare it with the indictment?

Att. Gen. They might have compared it by the clerks reading it to them; but they will not admit the prisoner's solicitor to see the original, because the act expressly says they shall not have a copy of the witnesses names.

Sir B. Shower. The officer is to deliver a true copy of the indictment.

Att. Gen. No: the party is to demand it by himself or his agent, and then he is to have it; and if he be denied, he ought to apply himself to the court, who will order the delivery of it; but we stand upon it, that they cannot take this exception now after they have pleaded, for the intent of the copy is to enable him to plead.

L. C. J. Treby. The copy, by the act of par-

liament, is to be delivered to the prisoner, his attorney, agent, or solicitor, if they require the same; and here it seems there was no requiring of it, but it was voluntarily given; and now you have lapsed your time of making the exception of wanting a copy, by having pleaded to the indictment, whereby you have in effect admitted and declared, either that you had a true copy of it, or that you did not think fit to require one; for the use of the copy is to better enable the prisoner to plead. But when you did plead, you took upon yourself to be well able to plead without the help of a copy, which you might have had upon the asking for.

Sir B. Shower. Then, my lord, there is another thing in the indictment, that in this overt-act there is a new time, and a new place, and a new verb, and a new fact alledged, and no nominative case: it is alledged, That Peter Cook, at first, with others, did so and so: and then the first of July to bring the treasons aforesaid to effect: there *et alibi &c.* (which is very loose, for I know not whence the *venue* must come) did traiterously with Charnock, Freind, &c. consult to procure 'Diversas Turmas et Legiones, &c.' to join with them in England, and then it comes *et ulterius* such a day, year, and place, did traiterously agree so and so, and not say who: Now this is neither by express words, nor rule of grammar to be referred to the prisoner at the bar; it does not say 'ipse idem Petrus Cook;' now, my lord, that the king's counsel thought it necessary in every overt-act is plain, because those words are put in every other clause of the indictment, in those clauses that go before, and those clauses that come after; then if they will take it, that this clause must refer to the next antecedent, that will not do, for the next precedent nominative case is either Freind or Charnock: So that this is without a nominative case, and the precedents in my lord Coke's entries 361, and all the other books have the nominative case repeated, where there is a new time, and a new place, and a new fact alledged: Now it might be true, that the prisoner at the bar might be present, and this same treason might be discoursed of and agitated, and there might be a consult about this business; and yet it is not necessarily implied that he must consent and agree to send Charnock into France, upon which the great stress of the indictment lies: therefore we say, these words having no nominative case, the indictment cannot hold.

Att. Gen. My lord, as to this objection, it will receive a very plain answer. Our indictment begins and sets forth, that Peter Cook, the prisoner at the bar, did imagine and compass the king's death, and did adhere to the king's enemies, and these are the treasons: and then it sets forth the overt act, that in execution of the traiterous compassings, imaginations, and adhesions aforesaid, 'Ipse idem Petrus Cook, together with sir William Parkyns, Mr. Charnock, sir John Freind, and others, did propose and consult to procure from the French king forces to invade this land; *et ul-*

terius, he and they did agree to send Charnock to the late king James.

Just. Rokeby. There is the first naming of James the second, late king of England, and there is no *eidem Jacobo*, I promise you.

L. C. J. Treby. Well, that mistake is over. Pray go on, Mr. Attorney General.

Att. Gen. My lord, as to this objection of sir Bartholomew Shower, he would have *ipse idem Petrus* repeated over again; and he says, that we lay a distinct overt act with a different time and place: now that is a mistake too; it is not a different time and place, but the same time and place; and it mentions that 'cum R. Charnock, J. Freind, &c. et cum aliis Proditoribus conveniebat, consultabat, &c.' which he says may refer to sir John Freind or Charnock: but if you look into the frame of the sentence, that can never be.

Just. Rokeby. Petrus Cook is the nominative case that governs all the verbs.

Att. Gen. And there is no other nominative case in all the indictments, but Petrus Cook, except it be in a parenthesis, and that saves the rule of grammar, if there were any thing in it, that it must refer to the last antecedent.

Sir B. Shower. When it comes to the clause that he did procure horse and arms, there the nominative case is repeated.

L. C. J. Treby. It would not have made it worse, if they had made it so here; but the question is, whether it be necessary?

Sir B. Shower. Indictments ought to be precisely certain; but this we say is not so.

Att. Gen. But here is as much certainty as to the person, as can be, that he did consult with such and such about such things; and further, the same day did agree with the same traitors to do so and so.

Just. Powell. Indictments, it is true, ought to be plain and clear; but I do not see but here is as much certainty as can be, that he did such a day consult, and further, the same day did agree with the same persons.

Sir B. Shower. Who did agree, my lord?

Just. Powell. He that did consult with them before, and that is Peter Cook.

Att. Gen. You would have had us to put it to every verb, I believe.

Sir B. Shower. In indictments no presumption ought to be used, but the facts ought to be directly and positively alledged.

Just. Powell. It is true, there should be no presumption; and there is none here, for certainly this is a plain assertion of fact.

L. C. J. Treby. Here are two things that are set forth: First, That Peter Cook did meet with sir John Freind, sir William Parkyns, and others, and then and there did consult with them, and consent to procure an invasion, and join an insurrection thereto. And secondly, further with the said traitors did agree to send Charnock into France. Now, what is the nominative case to this agreement? Is it sir John Freind, and sir William Parkyns? That is impossible: for they could not be said properly to meet and consult with themselves, every one

of them with his own self and the rest. And then the number, if it had referred to them, should have been plural: but here it is singular, [agreavit] and the sense is no more than this: that then and there Mr. Cook did meet with such persons, and did consult with them about such and such matters; and further did agree with them to do thus.

Sir B. Shower. The meaning is not to be forced and strained by inference or presumption, but it ought to be express and plain.

L. C. J. Treby. Nay, you cannot express it better; you may make a tautology of it, if you will.

Sir B. Shower. The paragraph is long, my lord, and therefore requires the more care to have those repetitions that are necessary.

L. C. J. Treby. Your objection to this paragraph is, that it is too long; but repeating the same nominative case to every verb would make it much longer.

Sir B. Shower. It cannot be understood to mean Peter Cook without presumption, which ought not to be in an indictment.

Att. Gen. And as to sir Bartholomew Shower's first objection, his copy is right too, and he mistook the place.

Sir B. Shower. You should have given me that for an answer.

Att. Gen. Nay, you should have taken more care, and not have made the objection.

L. C. J. Treby. Truly, I think it is hardly possible to have made this better, if it had been otherwise than it is.

Serj. Darnall. My lord, we think we have a good fact of it, which we rely upon, and therefore do not so much insist upon these exceptions; though, in duty to our client, we mention that which we think is necessary, and we submit to your lordship.

Cl. of Ar. Set Peter Cook to the bar. (Which was done.) You, the prisoner at the bar, these good men which you shall hear called, and personally appear, are to pass between our sovereign lord the king and you, upon trial of your life and death; if therefore you would challenge them, or any of them, your time is to speak unto them as they come to the book to be sworn, and before they be sworn.

Cryer. Call sir John Sweetapple.

Sir John Sweetapple. Here.

Cook. My lord chief justice, if your lordship please, I am advised—

L. C. J. Treby. Pray, Sir, speak out, that we may hear what you say: and let the Cryer make proclamation for silence. (Which was done.)

Cook. My lord, before the jury is called, I am advised, that if any of the jury have said already that I am guilty, or they will find me guilty, or I shall suffer, or be hanged, or the like, they are not fit or proper men to be of the jury.*

* See the objection to Mr. Raikes in the Case of O'Connor, O'Coigly, Binns, Leary, and Al-

L. C. J. Treby. You say right, Sir, it is a good cause of challenge.

Just. Rokeby. That will be a sufficient cause, if when they come to the book, you object that, and be ready to prove it.

Cook. Which is sir John Sweetapple? (He was shewn to him.)

Cl. of Ar. There he is.

Cook. I challenge him.

Cl. of Ar. William Walker.

Cook. Sir, have you said any such thing, that you believe me guilty?—Walker. No, Sir.

Mr. Baker. My lord, he is asking of the juryman the question.

Just. Rokeby. That is a fact the prisoner should prove upon him.

Att. Gen. My lord, he must not ask the jury that question, whether they have declared before, that they will find him guilty; that is to make them guilty of a misdemeanor.

Serj. Darnall. Is it any misdemeanor for me to say, I think or believe such a man is guilty?

Att. Gen. If he be summoned to be of a jury, and declare his opinion before-hand, it is a misdemeanor.

Serj. Darnall. But suppose it be before he was summoned?

Att. Gen. If you make any such objection, you must prove it, and not out of the juryman's own mouth.

Serj. Darnall. I think any man, my lord, that comes to serve upon the jury, may be asked any question that does not make him guilty of any offence or crime, or liable to any punishment: Now if any of these gentlemen that are returned upon this pannel, before the summons have declared their opinion that the prisoner is guilty, or ought to suffer; with submission, the prisoner may ask such a question, whether he have said so, yea or no?

Just. Powell. He cannot upon a Voyer Dire be asked any such question.

Just. Rokeby. It is not denied to be a material objection, but it must be made out by proof.

L. C. J. Treby. You put it too large, brother Darnall; you may ask upon a Voyer Dire, whether he have any interest in the cause; nor shall we deny you liberty to ask whether he be fitly qualified, according to law, by having a freehold of sufficient value; but that you can ask a juror or a witness every question that will not make him criminous, that is too large: men have been asked, whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny: but they have not been obliged to answer; for, though their answer in the affirmative will not make them criminal, or sub-

len at Maidstone, A. D. 1798, in this Collection. See too, Leach's Hawkins's Pleas of the Crown, b. 2, c. 43, s. 28; and the objection to the earl Mareschal, earl of Dumfries, lord Blantyre and lord Johnstoun, vol. 3, pp. 690, 691 of this Collection. See too Peake's Law of Evidence, c. 3. s. 2. art. Witnesses discrediting them.

ject them to punishment, yet they are matters of infamy; and if it be an infamous thing, that is enough to preserve a man from being bound to answer. A pardoned man is not guilty, his crime is purged; but merely for the reproach of it, it shall not be put upon him to answer a question whereon he will be forced to forswear or disgrace himself. So persons have been excused from answering whether they have been committed to Bridewell as pilferers or vagrants, or to Newgate for clipping or coining, &c. yet to be suspected or committed is only a misfortune and shame, no crime. The like has been observed in other cases of odious and infamous matters which were not crimes indictable.* But to keep to our case, it is true, a juror may be challenged being an alien, or being a villain; but where the matter apparently carries crime or shame, it should be proved; the outlawry should be proved, and so should the being a villain. Yet that is no crime, though it be an ignominy.

Serj. *Darnall*. But, my lord, I take this to be no manner of infamy at all; there is nothing of crime, nor nothing of reproach, but only a declaring of a man's opinion.

L. C. J. *Treby*. Truly, I think otherwise; I take it to be at least a scandalous misbehaviour, and deservedly ill-spoken of, for any man to prejudge, especially in such a heinous matter. I think it is a very shameful discovery of a man's weakness and rashness, if not malice, to judge before he hears the cause, and before the party that is accused could be tried. But it seems, by what the prisoner says, that he would ask all the jurors, whether they have not said that he was guilty, or that they would find him guilty, or that he should be hanged, or the like: which (presuming him innocent) is to ask, whether they have not defamed and slandered him in the highest degree; and to force them to discover that they have a mortal hatred to him, and come with a malicious resolution to convict him: which, admitting they are not punishable by our law, yet are things so detestably wicked and so scandalous, as are not fit to be required to be disclosed by and against themselves.

Serj. *Darnall*. Pray, my lord, what is more common than for a man to say, before he is summoned to be upon a jury, when he hears a fact reported concerning such a one, to say, I believe he is guilty, or, I am of opinion he is, and I am sure he will be hanged? and yet there is no crime in this.

L. C. J. *Treby*. Truly, brother *Darnall*, I know not how you may approve of such a man, but I'll assure you I do not. I take the question not to be concerning a man's discoursing suppositively; as, if upon hearing news, or a report of clear evidence, a man should say, Supposing this to be true, such a man is guilty, and I should find him so if I were of his jury. This might not be sufficient to set aside a juror:

* As to this matter, see Peake's Law of Evidence, chap. 3, s. 2.

For this has been a general discourse among the subjects upon occasion of this conspiracy; and it imports, that if evidence should not be true and clear, he would acquit him. And so he is, as he should be, indifferent. But if a man qualified for a juror, affirm positively that such a prisoner is guilty, and that he will find him so, whatever evidence or proof be given or made to the contrary; I think that may be a misdemeanor punishable as an owning and encouraging of falshood, perjury, and injustice, and a contempt and scandal to the justice of the kingdom: though I hope and believe that no man hath so demeaned himself.

Just. *Powell*. In a civil case it would be a good cause of challenge. If a man have given his opinion about the right one way or other, may you not upon a Voyer Dire ask him whether he hath given his opinion one way or other? I believe it may be asked in a civil cause, because he may have been a referee; but if you make it criminal, it cannot be asked, because a man is not bound to accuse himself; now the difference lies in the nature of the cause; it is not criminal in a civil case for a man to say he was an arbitrator in such a case, and, upon what appeared before him, he was of such an opinion.

Att. Gen. But, my lord, it is a different case to give an opinion about the right between party and party, where a man has been an arbitrator and so in the nature of a judge, and where a man is to go upon a jury in the case of life and death, and before the evidence given, he declares his opinion without hearing the cause.

Sir B. *Shower*. My lord, we know several of the trials have been printed, and the names of several persons mentioned, and upon reading of the trials, or conversing about them, men are apt to give their opinions one way or other.

Serj. *Darnall*. It is only an objection in case he has done it.

Just. *Rokeby*. But, brother, how can you ask him the question?

Serj. *Darnall*. If the court are of opinion that it is such a crime that it cannot be asked, as tending to make a man accuse himself of an infamous crime, then we submit it to you, and I confess we must not ask it; but we cannot apprehend that there is either crime or infamy in it, though we think it is an objection, and a good cause of challenge.

Baron *Powys*. I think, though it be not such a crime as infamous upon which a man is not to be credited, for that is infamy in the eye of the law, whereby a man is prejudiced in his credit; yet however, it is a shameful thing for a man to give his judgment before he hath heard the evidence; and therefore I think you ought not to ask him it, to make him accuse himself, if it be an opprobrious matter upon him.

Serj. *Darnall*. Truly, my lord, I always took it to be the rule, if the thing asked to the person returned be not criminal nor infamous, the party that is asked ought to answer to it.

L. C. J. Treby. I would fain know, if you should ask any of the jurymen this question, whether he be guilty of all the crimes that are pardoned by the last act of grace, he be bound to answer it?

Serj. Darnall. Undoubtedly we cannot ask any such question; no, not to any one of the things therein mentioned.

L. C. J. Treby. But yet you will force him to discover a crime (if it be one) that is unpardoned.

Just. Powell. Certainly you go too far, brother, for no man is obliged to charge himself with what is criminal; but whether this be criminal to say, 'I believe such a one will be hanged,' is of another consideration.

Just. Rokeby. But I think it must be proved upon him, if any objection be made.

Sir B. Shower. My lord, it will be no easy thing to bring witnesses to prove this matter, and therefore we would have it from his own mouth.

Just. Rokeby. And it is a very hard matter for a man to be put upon proving every discourse that he has had about the public affairs of the time.

Recorder. The reason of your exception is, that he has declared his opinion before-hand, that the party would be hanged or would suffer, that is a reproach and a reflection upon a wise man so to do; and if they can prove it upon him, let them do it: but whether you should ask him such a question, whether he be a fool or a knave for the giving an opinion one way or other, that is the question before us.

Serj. Darnall. My lord, we do not offer it to the court as an objection that he is not a wise man.

Att. Gen. But what a man does utter imprudently, may occasion a prejudice against him, and therefore ought to be proved, and not he to prove it himself.

L. C. J. Treby. Especially being a freeholder of London, and taking notice of what is done in London; and if he does take notice of the fact, and does previously give his opinion of a matter which he may be called upon a jury to try, this is an indiscretion and a reproach to him, and, I think, a misdemeanor.

Serj. Darnall. My lord, I acknowledge it is ill done of him, that is, indiscreetly and not wisely, and we would have discreet and wise men upon our jury.

Mr. Cowper. My lord, Mr. Serj. Darnall will make it so little a thing at last, that it will amount to no cause of challenge, if it were even proved against him, which we insist it ought to be, it being their objection, and the party not being bound to prove it against himself; but truly we think there is more in it than so, because it is an unjust prejudging of a man before he is tried and heard; and if so, it is a thing that he ought not to accuse himself of, and therefore we oppose the asking any such question.

Serj. Darnall. Our objection is not because it is an offence to declare a man's opinion upon

a fact reported, but because it shews he has a settled opinion against the person of his guilt, and so he is not so equal a man to try him?

L. C. J. Treby. And is that like an honest man and a freeholder of London, (who ought to be indifferent) to come with a settled opinion against a man, when he is to be one of his jury?

Serj. Darnall. Well, my lord, we have been heard, and submit it to the judgment of the court.

L. C. J. Treby. Truly, I think it reflects both dishonesty and dishonour upon him, and therefore these questions ought not to be asked. The question is not, Whether a man (if ever such a man there were) that hath so resolved and declared shall he sworn? No; he is not fit to serve upon a jury. But the question is, How this shall be discovered, by his own oath or by other proof? I think it ought to be made appear by other proof, if true. A man attainted of felony, forgery, false verdict, or perjury, ought not to serve on a jury, yet he shall not be examined concerning the same on a Voire Dire. And if there be in a court a copy of such judgment carefully examined and kept by himself, he shall not be forced to answer whether it be a true copy; though his answer could not subject him to any further penalty.

Serj. Darnall. My lord, I hope no gentleman of the jury has done it.

L. C. J. Treby. I hope no freeholder of London is so indiscreet or so unjust. But if any man in this pannel have any particular displeasure to the prisoner, or be unindifferent, or have declared himself so, I do admonish and desire him to discover so much in general; for it is not fit, nor for the honour of the king's justice, that such a man should serve on the jury.

Serj. Darnall. We hope so too. We hope that all that are returned upon the jury are discreet and impartial men.

Cl. of Ar. Well, Sir, what say you to this gentleman, Mr. Walker.

Cook. I challenge you, Sir.

Cl. of Ar. Nathaniel Long.

Sir B. Shower. My lord, we think he may ask if they have a freehold or no; because the law requires that qualification, and the prisoner not being able to prove the negative, it puts the proof of the affirmative upon the person himself.

Att. Gen. What does sir Bartholomew mean? Would he have the jury-men bring their evidences with them to prove their freehold?

L. C. J. Treby. No, sure, Mr. Attorney; but to ask the question was allowed him the last time, and we will not deny him the same just favour now.

Cook. Are you a freeholder, Sir, in London of the value of 10*l.* a-year?—*Long.* Yes, Sir.

Cook. Were you of the grand-jury when the bill was found against me?—*Long.* No, Sir.

Cook. I challenge you, Sir.

Cl. of Ar. William Carbonell.

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Carbonell. My lord, I am no freeholder.

L. C. J. Treby. What, does he say he has no freehold?—*Cl. of Ar.* Yes, my lord.

L. C. J. Treby. Then he must be set aside.

Cl. of Ar. Joshua Foster.

Foster. My lord, I am no freeholder in London neither.

Att. Gen. My lord, we desire they may be sworn, whether they have a freehold or not.

Cl. of Ar. Hold Mr. Carbonell and Mr. Foster the book. [Which was done severally.] You shall true answer make to all such questions as shall be asked you by the Court. So help you God.

Att. Gen. Ask him if he hath not a freehold in London?

Carbonell. No, I have not.

Cl. of Ar. Have you, or any body in trust for you, a freehold in London of the value of 10*l.* a-year?—*Carbonell.* No, Sir.

Cl. of Ar. Joshua Foster, have you, or any in trust for you, any estate of freehold in London of the value of 10*l.* a-year?

Foster. No, Sir.

Cl. of Ar. Joseph Billers.

Cook. I desire they may be called in the order as they are in the pannel; you have not called John Ewen, who is next.

Cl. of Ar. I do call them in order: as for Mr. Ewen, one hath made oath that he is sick, and is not able to come hither. What say you to Mr. Billers? There he stands.

Cook. Sir, are you a freeholder of 10*l.* a-year within the city of London?

Billers. Yes, Sir.

Cook. Was you of the grand-jury, Sir, when the bill was found against me?

Billers. No, Sir.

Cook. I challenge you.

Cl. of Ar. John Child.

Cook. Sir, are you a freeholder within the city of London?—*Child.* Yes, Sir.

Cook. Of 10*l.* a-year?—*Child.* Yes, Sir.

Cook. Were you of the grand-jury when the bill was found against me?—*Child.* No, Sir.

Cook. I challenge you.

Cl. of Arr. Edward Leeds.

Cook. Sir, are you a freeholder within the city of London of 10*l.* a year?

Leeds. Yes, Sir.

Cook. Were you of the grand jury that found the bill against me?—*Leeds.* No, Sir.

Cook. I challenge you.

L. C. J. Treby. What question was that he asked him?

Cl. of Arr. Whether he were one of the grand jury that found the bill.

L. C. J. Treby. A very proper question: for an indicter ought not to be a trier*.

* This exception was allowed by Jefferies C. J. in Titus Oates's Case in this Collection (vol. 10, p. 1081. See too Hawk. Pl. Cr. and Colledge's Case as referred to in the Note in that page). In that Case two indictments having been found against Oates, when he challenged one for having been of the grand jury

Cl. of Ar. Thomas Clark.

Cook. Sir, are you a freeholder within the city of London of 10*l.* a year?

Clark. Yes, Sir.

Cook. Were you of the grand jury that found the bill against me?—*Clark.* No, Sir.

Cook. I challenge you.

Cl. of Ar. Nathan Green.

Cook. Are you a freeholder, Sir, within the city of London of the value of 10*l.* a year?

Green. Yes, Sir.

Cook. Were you of the grand jury that found the bill against me?—*Green.* No, Sir.

Cook. I challenge you.

Cl. of Ar. Henry Sherbroke.

Cook. I have nothing to say against him.

Cl. of Ar. Then hold Mr. Sherbroke the book. [Which was done.] Look upon the prisoner. You shall well and truly try, and true deliverance make between our sovereign lord the king and the prisoner at the bar, (whom you shall have in charge) according to your evidence. So help you God.

[Then Mr. Sherbroke was put into the place appointed for the jury.]

Cl. of Ar. Henry Dry.

Cook. Sir, are you a freeholder in the city of London of the value of 10*l.* a year?

Dry. Yes, Sir.

Cook. Were you of the grand jury that found the bill against me?—*Dry.* No, Sir.

Cook. Sir, I challenge you.

Cl. of Ar. Joseph Morewood.

Cook. Sir, have you a freehold in London of the value of 10*l.* a year?

Morewood. Yes, Sir.

Cook. Were you of the grand jury that found the bill against me?

Morewood. No, Sir.

Cook. Sir, I challenge you.

Cl. of Ar. Richard Greenway.

Cook. Are you a freeholder of 10*l.* a year in London?—*Greenway.* Yes, Sir.

Cook. Were you of the grand jury that found the bill against me?

that found the bill, the attorney-general answered "I believe he was upon one of the Indictments, but I think it was not this." To which the Chief Justice replied, "But if he were in either of them he cannot be so impartial." Upon the Trial of Fitzharris (see it in this Collection, vol. 8, p. 530.) Major Wildman objected to serve on the jury, on the ground that he had in parliament voted the impeachment of Fitzharris for the same crime for which he was then to be tried; but whether this would have been a sufficient exception to his serving was not decided. It seems that he was set aside for want of freehold in his own right. In 12 Mod. 305, it is said, that in the Case of the King against Kirk and Caga, it was granted that some of the grand jury who found the bill might be of the petty jury. See, too, the Case of Hendley and others in this Collection, A. D. 1719.

Greenway. No, Sir.

Cook. Sir, I challenge you.

Cl. of Ar. John Sherbrook.

Cook. Sir, are you a freeholder of the city of London of 10*l.* a year?—*Sherbrook.* Yes, Sir.

Cook. Were you of the grand jury that found the bill against me?

Sherbrook. No, Sir.

Cook. Sir, I challenge you.

Cl. of Ar. Thomas Emmes.

Cook. Are you a freeholder, Sir, within the city of London of 10*l.* a year?

Emmes. Yes, Sir.

Cook. Were you of the grand jury that found the bill against me?—*Emmes.* No, Sir.

Cook. I challenge you.

Cl. of Ar. Samuel Jackson.

Cook. Sir, are you a freeholder within the city of London of 10*l.* a year?

Jackson. Yes, Sir.

Cook. Were you of the grand jury that found the bill against me?—*Jackson.* No, Sir.

Cook. Sir, I challenge you.

Cl. of Ar. Henry Hunter.

Cook. Are you a freeholder, Sir, in London, of the value of 10*l.* a year?—*Hunter.* Yes, Sir.

Cook. Were you of the grand jury that found the bill against me?—*Hunter.* No, Sir.

Cook. I challenge you.

Cl. of Ar. John Deacle.

Cook. Sir, are you a freeholder within the city of London of the value of 10*l.* a year?

Deacle. Yes, Sir.

Cook. Were you of the grand jury that found the bill against me?—*Deacle.* No, Sir.

Cook. I challenge you.

Cl. of Ar. John Cullum.

Cook. I accept of him. [He was sworn.]

Cl. of Ar. Thomas Shaw.

Cook. I accept of him. [He was sworn.]

Cl. of Ar. George Juyce.

Cook. Sir, are you a freeholder within the city of London of 10*l.* a year?

Juyce. Yes, Sir.

Cook. Were you of the grand jury that found the bill against me?—*Juyce.* No, Sir.

Cook. I challenge you.

Cl. of Ar. Richard Young.

Cook. I have nothing to say against him.

[He was sworn.]

Cl. of Ar. John Hedges.

Cook. Sir, are you a freeholder within the city of London of 10*l.* a year?

Hedges. Yes, Sir.

Cook. Were you of the grand jury that found the bill against me?—*Hedges.* No, Sir.

Cook. I challenge you.

Cl. of Ar. John James.

Cook. Sir, Are you a freeholder within the city of London of 10*l.* a year?

James. Yes, Sir.

Cook. Were you of the grand-jury that found the bill against me?—*James.* No, Sir.

Cook. I challenge you.

Cl. of Ar. Thomas Poole.

Cook. Sir, Are you a freeholder within the city of London of 10*l.* a year?

Poole. Yes, Sir.

Cook. Were you of the grand-jury that found the bill against me?—*Poole.* No, Sir.

Cook. I challenge you.

Cl. of Ar. Peter Parker.

Cook. Sir, Are you a freeholder in the city of London of 10*l.* a year?—*Parker.* Yes, Sir.

Cook. Were you of the grand-jury that found the bill against me?—*Parker.* No, Sir.

Cook. I challenge you.

Cl. of Ar. William Wilkinson.

Wilkinson. My lord, I am no freeholder in London. [To which he was sworn.]

Cl. of Ar. Henry Mitchel.

Cook. Hold, Sir, here Thomas Man in my pannel is next.

Cl. of Ar. There is oath made that he is sick in bed. What say you to Mr. Mitchel?

Cook. Sir, Have you a freehold of 10*l.* a year in the city of London?

Mitchel. No, Sir. [To which he was sworn.]

Cl. of Ar. Richard Ryder.

Cook. Sir, Have you a freehold of 10*l.* a year in the city of London?

Ryder. Yes, I have, Sir; but I live in a parish that never served upon any juries, nor ever did in the memory of any man.

Cl. of Ar. But have you a freehold of 10*l.* a year?—*Ryder.* Yes, Sir.

Cook. Were you of the grand-jury that found the bill against me?—*Ryder.* No, Sir.

Cook. Sir, I challenge you.

Cl. of Ar. Richard Temple.

Temple. My lord, I am no freeholder. [To which he was sworn.]

Cl. of Ar. Peter Walker.

Cook. Sir, Are you a freeholder of the city of London of 10*l.* a year?—*Walker.* Yes, Sir.

Cook. Were you of the grand-jury that found the bill against me?—*Walker.* No, Sir.

Cook. I challenge you.

Cl. of Ar. Thomas Pistol.

Pistol. I am no freeholder. [To which he was sworn.]

Cl. of Ar. John Hunt.

Hunt. My lord, my name is mistaken; my name is William Hunt.

L. C. J. Treby. Then you must go on to another.

Cl. of Ar. John Hardret.

Hardret. I am no freeholder of 10*l.* a year. [To which he was sworn.]

Cl. of Ar. John Hammond.

Cook. Are you a freeholder, Sir, of 10*l.* a year in London?—*Hammond.* Yes, Sir.

Cook. Were you of the grand-jury that found the bill against me?—*Hammond.* No, Sir.

Cook. I challenge you.

Cl. of Ar. John Cooper.

Cook. I accept of him. [He was sworn.]

Cl. of Ar. Josselin Roberts.

Cook. Sir, Are you a freeholder within the city of London of 10*l.* a year?

Roberts. Yes, Sir.

Cook. Were you of the grand-jury that found the bill against me?—*Roberts.* No, Sir.

Cook. I challenge you.

Cl. of Ar. Jonathan Micklethwait.

Cook. I have nothing to say against him.
[He was sworn.]

Cl. of Ar. Richard Chiswell.

Cook. Sir, Are you a freeholder within the city of London of 10*l.* a year?

Chiswell. Yes, Sir.

Cook. Were you of the grand-jury that found the bill against me?—*Chiswell.* No, Sir.

Cook. I challenge you.

Cl. of Ar. Joseph Thompson.

Cook. Sir, Are you a freeholder of the city of London of 10*l.* a year?—*Thompson.* Yes, Sir.

Cook. Were you of the grand-jury that found the bill against me?

Thompson. I was returned upon the grand-jury, but did not serve.

Cook. I challenge you.

Cl. of Ar. Edward Brewster.

Cook. Sir, Are you a freeholder of the city of London of 10*l.* a year?—*Brewster.* Yes, Sir.

Cook. Were you of the grand-jury that found the bill against me?—*Brewster.* No, Sir.

Cook. I challenge you.

Cl. of Ar. George Gooday.

Gooday. My lord, I am no freeholder. [To which he was sworn.]

Cl. of Ar. Abraham Hickman.

Cook. Sir, Are you a freeholder of the city of London of 10*l.* a year?—*Hickman.* Yes, Sir.

Cook. Were you of the grand-jury that found the bill against me?—*Hickman.* No, Sir.

Cook. I challenge you.

Cl. of Ar. George Grove.

Cook. Sir, Are you a freeholder of the city of London of 10*l.* a year?—*Grove.* Yes, Sir.

Cook. Were you of the grand-jury that found the bill against me?—*Grove.* No, Sir.

Cook. I challenge you.

Cl. of Ar. Nathanael Wyersden.

Cook. Sir, Are you a freeholder of the city of London of 10*l.* a year?

Wyersden. Yes, Sir.

Cook. Were you of the grand-jury that found the bill against me?—*Wyersden.* No, Sir.

Cook. I challenge you. My lord, I desire to know how many I have excepted against.

Cl. of Ar. One-and-thirty.

Mr. Burleigh. Right, right.

Cl. of Ar. Samuel Blewitt.

Cook. Are you a freeholder of the city of London of 10*l.* a year?—*Blewitt.* Yes, Sir.

Cook. Were you of the grand-jury that found the bill against me?—*Blewitt.* No, Sir.

Cook. I challenge you.

Cl. of Ar. John Wolfe.

Cook. I accept of him. [He was sworn.]

Cl. of Ar. William Smith.

Cook. Sir, are you a freeholder of the city of London of 10*l.* a year?—*Smith.* Yes, Sir.

Cook. Were you of the grand-jury that found the Bill against me?—*Smith.* No, Sir.

Cook. I challenge you.

Cl. of Ar. John Bickley.

Bickley. My lord, I don't look upon myself as a freeholder.

L. C. J. Treby. Why so, Sir?

Bickley. I have a lease for 51 years, my lord, of my house, and there is a very little piece of ground adjoining to it that was very convenient for me to lay to my lease; there is no way to it but through my house; it is a thing that never was lett for any thing, and it is not worth the building.

L. C. J. Treby. What estate have you in it? Do you pay a ground-rent for it?

Bickley. My lord, I bought that little piece of ground for the conveniency of my lease.

L. C. J. Treby. But did you purchase it for a term of years, or to you, and to your heirs?

Bickley. Nay, I bought it for ever, my lord.

L. C. J. Treby. Then you have a freehold in it. What is the value of it?

Bickley. Truly very little, my lord.

L. C. J. Treby. I do not know any body can judge of the value of it but yourself. Is it worth 10*l.* a year?

Bickley. My lord, I cannot value it at 10*l.* a year, it never cost me 40*l.*

L. C. J. Treby. Then for estate you are well enough, but for value you are a little under.

Cl. of Ar. Thomas Collins.

Cook. I accept of him. [He was sworn.]

Cl. of Ar. John Watson.

Cook. I do not challenge him. [He was sworn.]

Cl. of Ar. Benjamin Hooper.

Cook. I accept of him. [He was sworn.]

Cl. of Ar. John Wells.

Cook. Sir, are you a freeholder of the city of London of 10*l.* a year?—*Wells.* Yes, Sir.

Cook. Were you of the grand-jury that found the bill against me? *Wells.* No, Sir.

Cook. I challenge you.

Cl. of Ar. John Hibbart.

Cook. Sir, are you a freeholder of the city of London of 10*l.* a year?—*Hibbart.* Yes, Sir.

Cook. Were you of the grand-jury that found the Bill against me?—*Hibbart.* No, Sir.

Cook. I challenge you.

Cl. of Ar. Mr. Cook, you have challenged your full number. Call Daniel Wray. [He was sworn.]

Cl. of Ar. John Pettit. [He was sworn.]
Crier, Countez.

Henry Sherbrook.

Crier. One, &c.

Cl. of Ar. John Pettit.

Crier. Twelve good men and true, stand together, and hear your evidence.

The names of the twelve are as follows: Henry Sherbrook, John Cullum, Thomas Shaw, Richard Young, John Cooper, Jonathan Micklethwait, John Wolf, Thomas Collins, John Watson, Benjamin Hooper, Daniel Wray, and John Pettit.

Cl. of Ar. Crier, make proclamation.

Crier. O Yes, If any one can inform my lord the king's justices, the king's serjeant, the king's attorney general, or this inquest now to be taken of the high-treason whereof Peter Cook, the prisoner at the bar, stands indicted, let them come forth and they shall be heard, for the prisoner now stands at the bar upon his

deliverance; and all others that are bound by recognizance to give evidence against the prisoner at the bar, let them come forth, and give their evidence, or they forfeit their recognizance.

L. C. J. Treby. You must make room for those twelve gentlemen that are sworn, that they may be at ease; and for those that are not sworn, their attendance may be spared.

Cl. of Ar. Peter Cook. Hold up thy hand. [Which he did.] Gentlemen, you that are sworn, look upon the prisoner, and hearken to his cause. He stands indicted in London, by the name of Peter Cook, late of London, gentleman; for that whereas an open and notoriously public and most sharp and cruel war, for a great while hath been, and it is by land and by sea carried on and prosecuted, by Lewis the French king, against the most serene, most illustrious and most excellent prince, our sovereign lord William the Third, by the grace of God, of England, Scotland, France, and Ireland, king, defender of the faith, &c. All which time, the said Lewis the French king, and his subjects, were, and yet are foes and enemies of our said lord the king that now is, William the Third, and his subjects; he the said Peter Cook, a subject of the said lord the king that now is, of this his kingdom of England, well knowing the premises, not having the fear of God in his heart, nor weighing the duty of his allegiance, but being moved and seduced by the instigation of the devil, as a false traitor against the said most serene, most mild, and most excellent prince, our sovereign lord William the Third, now king of England, his supreme, true, rightful, lawful, and undoubted lord, the cordial love, and true and due obedience, fidelity, and allegiance, which every subject of the said lord the king that now is towards him our said lord the king should bear, and of right is bound to bear, withdrawing; and utterly to extinguish, intending, and contriving, and with all his strength purposing, and designing the government of this kingdom of England, under him our said lord the king that now is of right duly, happily, and very well established, altogether to subvert, change, and alter, and his faithful subjects, and the freemen of this kingdom of England, into intolerable and miserable servitude to the aforesaid French king to subdue and enthrall; the first day of July, in the seventh year of the reign of our said lord the king that now is, and divers days and times, as well before as after, at London, in the parish of St. Peter, Cornhill, in the ward of Lime-street, falsely, maliciously, devilishly, and traitorously did compass, imagine, and contrive, purpose and intend, our said sovereign lord the king that now is, then his supreme, true, rightful, and lawful lord, of and from the regal state, title, honour, power, crown, empire, and government of this kingdom of England to depose, cast down, and utterly deprive, and the same our lord the king to death and final destruction to bring, and the aforesaid Lewis the French king, by armies,

soldiers, legions, and his subjects, this kingdom of England to invade, fight with, conquer and subdue, to move, incite, procure and assist, and a miserable slaughter among the faithful subjects of our said lord king William, throughout this whole kingdom of England, to make and cause. And further, that the said Peter Cook, during the war aforesaid, to wit, the aforesaid first day of July, in the seventh year abovesaid, and divers other days and times before and after, at London aforesaid, in the parish and ward aforesaid, to the said foes and enemies of the same our lord the king, did adhere and was assisting: And his aforesaid most wicked and devilish treasons, and traitorous compassings, contrivances, intentions, and purposes aforesaid, to fulfil, perfect, and bring to effect, and in prosecution, performance, and execution of that traitorous adhering, he the said Peter Cook, as such a false traitor, during the war aforesaid, to wit, the same first day of July, in the year abovesaid, at London aforesaid, in the parish and ward aforesaid, and divers other days and times, as well before as after, there and elsewhere in London aforesaid, falsely, maliciously, advisedly, secretly, and traitorously, and by force and arms, with one Robert Charnock, sir John Freind, and sir William Parkyns, knights, (which said Robert Charnock, sir John Freind, and sir William Parkyns, were lately severally duly convicted and attainted of high treason, in contriving and conspiring the death of our said lord the king that now is) and with divers other false traitors to the jurors unknown, did meet, propose, treat, consult, consent, and agree to procure from the aforesaid Lewis the French king, of his subjects, forces and soldiers, then, and yet, foes and enemies of our said sovereign lord William, now king of England, &c. great numbers of soldiers and armed men, this kingdom of England to invade and fight with, and to levy, procure, and prepare great numbers of armed men, and troops, and legions against our said lord the king that now is, to rise up and be formed, and with those foes and enemies, at and upon such their invasion and entry within this kingdom of England, to join and unite, rebellion and war against our said lord the king that now is, within this kingdom of England, to make, levy, and carry on; the same our lord the king so, as aforesaid, to depose, and him to kill and murder: And further, with the said false traitors, the same first day of July, in the year abovesaid, at London aforesaid, in the parish and ward aforesaid, traitorously did consult, consent, and agree to send the aforesaid Robert Charnock as a messenger from him the said Peter Cook, and the same other traitors, as far as, and into the kingdom of France, in parts beyond the seas, unto James the Second, late king of England, to propose to him, and to request him to obtain from the aforesaid French king, the aforesaid soldiers and armed men for the invasion aforesaid to be made, and intelligence and notice of such their traitorous intentions and adherings to the said late king James.

the Second, and the said other foes and enemies, and their adherents, to give and shew, and them to inform of other things, particulars and circumstances thereunto referring, for the assistance, animating, comforting, and aid of the said foes and enemies of the said lord the king that now is, in the war aforesaid: and to stir up and procure those foes and enemies the readilier, and more boldly this kingdom of England to invade; the treasons, and traitorous contrivances, compassings, imaginings, and purposes of the said Peter Cook aforesaid to perfect and fulfil; also the same first day of July, in the seventh year abovesaid, at London aforesaid, in the parish and ward aforesaid, he the said Peter Cook, divers horses, and very many arms, guns, muskets, pistols, rapiers, and swords, and other weapons, ammunition, and warlike matters, and military instruments, falsely, maliciously, secretly, and traitorously, did obtain, buy, gather together, and procure; and to be bought, gathered together, obtained and procured, did cause, and in his custody had and detained to that intent, to use the same in the said invasion, war, and rebellion against our said lord the king that now is, him our said lord the king, of and from the regal state, crown and government of this kingdom of England to depose, cast down, and deprive, and him to kill and murder; and the designs, intentions, and all the purposes of him the said Peter Cook aforesaid to fulfil, perfect, and fully to bring to effect, against the duty of his allegiance, and against the peace of our said sovereign lord that now is, his crown and dignity, as also against the form of the statute in such case made and provided.

Upon this Indictment he has been arraigned, and thereunto has pleaded Not Guilty, and for his trial hath put himself upon God and his country, which country you are; your charge is to inquire whether he be guilty of the high treason whereof he stands indicted, or not guilty; if you find him guilty, you are to enquire what goods or chattels, lands or tenements, he had at the time of the high treason committed, or at any time since; if you find him not guilty, you are to enquire whether he fled for it; if you find that he fled for it, you are to enquire of his goods and chattels as if you had found him guilty; if you find him not guilty, nor that he did fly for it, you are to say so, and no more; and hear your evidence.

Mr. Mompesson. May it please your lordship, and you gentlemen that are sworn, this is an indictment for high treason against Peter Cook, the prisoner at the bar, and the indictment sets forth, that whereas there has been an open and cruel war for a long time, and still is between his majesty king William and the French king; the prisoner at the bar not weighing the duty of his allegiance, the first of July in the 7th year of the king's reign, did compass and intend to depose and deprive the king of the title, honour, and dignity of the imperial crown of this realm, and likewise to put the king to death, and did adhere to the

king's enemies; and to fulfil these treasons, he did consult with Charnock, and several other traitors who were mentioned there, and some of whom have been found guilty of treason, and executed for it, to send over to the late king James, to persuade the French king to send over soldiers and arms to invade this kingdom, and to raise an insurrection and rebellion in it, and to deprive and put the king to death; and to complete these treasons, it further sets forth, that the prisoner at the bar did provide several arms and horses, and this is laid to be against the duty of his allegiance, against the king's peace, crown and dignity, and against the form of the statute in that case made and provided; to this he has pleaded not guilty, and for trial put himself upon the country; and, gentlemen, if we prove these facts laid in the indictment, it is your duty to find him guilty.

Att. Gen. May it please your lordship, and you gentlemen of the jury, the prisoner at the bar stands indicted for high treason.

Cook. My Lord Chief Justice, if your lordship pleases, before the witnesses are examined against me, I intreat you that they may not be both in court together, that one may not hear what the other swears, though I suppose it is the same thing; for they have been together both now and the last day.

L. C. J. Treby. Mr. Cook, I must tell you, it is not necessary to be granted for asking; for we are not to discourage, or cast any suspicion upon the witnesses, when there is nothing made out against them; but it is a favour that the court may grant, and does grant sometimes, and now does it to you; though it be not of necessity.* They shall be examined apart, but at present this is not the time of examination: for the king's counsel are now to open the evidence before they examine the witnesses; but when the time comes for the witnesses to be

* It is noticed by Mr. Peake, *Compendium of the Law of Evidence*, ch. 3, s. 6, in a Note, that it appears that the present practice of ordering witnesses out of court during the progress of a cause, so as to prevent them from hearing the testimony of others, is very ancient; and he cites from Fortescue *de Laudibus Legum Angliæ*, c. 26, the following passage: "Et si necessitas exegerit dividantur testes hujusmodi donec ipsi deposuerint quicquid velint ita quod dictum unius non docebit aut concitabit eorum alium ad consimiliter testificandum."

See, also, 1 Siderfin, 131.

In the Case of captain Thomas Vaughap, in this same year 1696, in this Collection, it is said, that a prisoner cannot insist as on a right on the removal out of court of the witnesses for the crown during the examination of each other.

Mr. Peake (ch. 3, s. 6), omits not to notice the advantages of examining witnesses in the absence of each other: which, indeed, is well illustrated by the ancient narrative in the Apocrypha, of Susannah and the Elders.

called and examined, the court will, in favour to you, take care that your request be complied with.

Att. Gen. May it please your lordship, the prisoner stands indicted for high treason, in compassing and imagining the death and destruction of his majesty, and likewise in adhering to his majesty's enemies; these are the treasons specified in the indictment: the overt acts that are laid to prove these treasons are, that he, with several other traitors named in the indictment, did meet and consult and agree to send over Charnock into France, to invite the French king to make an invasion upon the kingdom, and did provide arms for that purpose.

Gentlemen, the nature of the evidence that you will have produced to prove the prisoner guilty of these treasons lies thus: It will appear to you, that there has been for some time a conspiracy carried on by several traitors, and wicked persons, to subvert the established government of this kingdom, and destroy the constitution of England, by a foreign invasion of the French. You will hear that this conspiracy was laid wide, and consisted of several parts; one part was that of assassinating his majesty's royal person, and that was to be done first, as a preparation and encouragement to the French to invade the kingdom: the other part was the inviting the French king to invade us, and the prisoner at the bar is accused of being concerned in that part that relates to the invasion of this kingdom by a French power; and though it may be the other part, that of assassinating the king, be the blackest part of the conspiracy, yet if the prisoner at the bar has been engaged in the inviting a foreign power to invade the kingdom, my lords the judges will tell you, in point of law, that is as much an overt-act of the compassing the destruction of the king and the people of England, and the subversion of our ancient good constitution, as if he had been concerned immediately in the other part, the assassination.

But now, gentlemen, that the prisoner was engaged in inviting the French to invade us, you will hear proved by several witnesses, that there having been a design last year, just before his majesty went to Flanders, to expose his own person for our protection, and the protection of the liberties of Europe, there was a conspiracy to murder him before he went to Flanders, which, it seems, they were not ripe for then; but immediately after he was gone to Flanders, you will hear there were formal meetings of several gentlemen and persons of quality, among whom the prisoner at the bar was one: there was a meeting in May, last year, after the king was gone to Flanders; and this was at the Old King's-Head in Leadenhall-street; and there were present my lord of Aylesbury, my lord Montgomery, sir William Parkyns, sir John Freind, Mr. Charnock, (all which three last have suffered the punishment of the law for their treason already) and there were also Mr. Cook, the prisoner at the bar,

Mr. Porter and Mr. Goodman; these men did meet together, to consider of the best ways and means of encouraging and inviting the French king with an armed force to invade this kingdom; they considered that that was a proper opportunity, and did treat of several arguments that might persuade to it: First, That the king was gone to Flanders, and so was not in person here to defend us; and that the troops, to make good such defence, were in a great measure drawn thither, to assist the allies against the French power; they did think likewise that at that time there was a great discontent and dissatisfaction in the nation, though I think in that they were greatly mistaken; and I believe and hope they will always find themselves so, to think that the people of England are so little sensible of that which is the means of their preservation, as to hearken to any discontents to encourage a French power to come into England to destroy our religion and liberties; that indeed they did apprehend, though they were mistaken, and I believe they always will, when they go upon that ground.

Gentlemen, These persons thinking this a proper opportunity, did agree to send a messenger into France upon this message, To go to the late king James, and persuade him to desire and prevail with the French king to assist him with ten thousand men, 8,000 foot, 1,000 horse, and 1,000 dragoons; and to encourage him, they promised their assistance here, as soon as he came over; and undertook, that between them they could furnish, and would raise 2,000 horse to meet him at his landing, and join upon such an invasion.

Gentlemen, At this meeting this was agreed upon by all that were there, whereof the prisoner was one; and they did agree to send Mr. Charnock; (who has since been executed, and a principal encourager of the design, and actor in it) he was the messenger that was appointed to go upon this errand, and Mr. Charnock was resolved to go; but desired another meeting of these gentlemen, to know if they continued in their former resolution, that he might have all the assurance that was reasonable to give the French king encouragement to make the invasion: accordingly another meeting was had of most of the same persons that were at the meeting before; particularly the prisoner at the bar was at that second meeting, which was in Covent-Garden at one Mrs. Mountjoy's, who keeps a tavern next door to sir John Fenwick's lodgings; there they met upon the same design, and upon consultation had, and the question asked, they did agree to continue in the former resolution; and upon that immediately Mr. Charnock went into France, to solicit forces from thence to invade us; but it happened, as it seems, that the French king's forces were otherwise employed, so that he could not spare so many at that time; and this return was brought by Charnock to the gentlemen that employed him; that he had spoke with the late king, who gave

him that answer, That the French king could not spare so many men at that time, but he thanked them for their kindness.

Gentlemen, this will be the nature of our evidence, to shew, that the prisoner at the bar was concerned in that part of the conspiracy which relates to the French invasion; and if he be guilty of that, in point of law, he is as much guilty of the conspiracy to depose and murder the king, as if he had been concerned in the other part of assassinating his royal person; and I believe nobody can think, that those that were to act in the assassination, would have attempted to engage in such a desperate design, if it had not been for the encouragement of the French invasion that was to second them afterwards, if they succeeded; so that nobody can extenuate the crime of the invasion, because as to the horridness of the attempt, it is less black than the other; they are both crimes of a very high nature, and equally high-treason; and if we prove the prisoner guilty of this part, we hope you will find him guilty.

Sol. Gen. My lord, we will call our witnesses and prove the matter, as it has been opened. Call captain Porter and Mr. Goodman.

Serj. Darnall. Now, my lord, we must desire that that may be done which our client desired before, and which your lordship was favourably pleased to promise, that the witnesses may be examined apart.

L. C. J. Treby. Let it be so: who do you begin with?

Sol. Gen. We begin with captain Porter, my lord.

L. C. J. Treby. Then let Mr. Goodman withdraw.

Mr. Baker. Let Mr. Goodman go up stairs, and we will call him presently.

Sol. Gen. Swear captain Porter: [which was done.] Captain Porter, Do you know Mr. Cook, the prisoner at the bar?

Capt. Porter. Yes, my lord.

Sol. Gen. Do you remember a meeting of some gentlemen at the King's-Head-tavern in Leaden-hall-street?—*Porter.* Yes, I do, Sir.

Sol. Gen. Then pray, give an account of the company that were there, the time when, and what passed?

Porter. My lord, the last year we had two meetings; the first was in May, the other was the latter end of May, or the beginning of June; the first was at the King's-Head in Leadenhall-street; there were my lord of Aylesbury, my lord Montgomery, sir John Fenwick, sir John Freind, sir William Parkyns, Mr. Charnock, Mr. Cook, and myself; Mr. Goodman came in after dinner; at this meeting it was consulted which was the best way and the quickest to restore king James, and hasten his return into England; several discourses and proposals there were; at last it was agreed to send Mr. Charnock to the late king, to borrow of the French king 10,000 men, 8,000 foot, 1,000 horse, and 1,000 dra-

goons, to be sent over into England to assist the king's restoration. Says Mr. Charnock thereupon, This the king can do without your sending, and I would not go upon a foolish errand. What will you do to assist in this matter? The company desired him to promise king James, that if he would send word when he landed and where, they would be sure to meet him at his landing with a body of 2,000 horse.

Att. Gen. Was the prisoner at the bar in the company, and present at this resolution?

Porter. Yes, he was.

Att. Gen. Did all the company agree to it?

Porter. Yes, they did.

Att. Gen. What signs were there of their agreement? Did they stand up severally and declare their agreement, or how?

Porter. My lord of Aylesbury and sir John Fenwick did rise up, and desired captain Charnock, that he would go upon this errand: and when the question was asked severally of all there present by Mr. Charnock, whether he might assure the king of what they had told him? every one said, Yes, you may; and Mr. Cook kneeled indeed, upon a chair, and said, Yes, you may.

Att. Gen. Did he give his consent to it?

Porter. Yes, he answered in those very words.

Sol. Gen. Do you remember any meeting of any company at Mrs. Mountjoy's?

Porter. Yes, that was a second meeting.

Sol. Gen. Pray tell my lord and the jury how you came to meet there then, what company were there, and what passed?

Porter. Mr. Charnock desired another meeting, to see if the gentlemen kept to their former resolution; and we met at Mrs. Mountjoy's eight or ten days after, and there were most of the company that was at the first meeting, and there all that were present did assure Mr. Charnock that they kept to their first resolution, and would abide to what was agreed upon at the former meeting.

Att. Gen. Who were present at the second meeting?

Porter. The prisoner at the bar was there at that second meeting.

Att. Gen. What was that second meeting for, do you say?

Porter. It was to give Mr. Charnock assurance, that we were agreed to stand by the resolution taken at the first meeting.

Att. Gen. What did Mr. Charnock do afterwards?

Porter. I went away from them; there was sir William Parkyns, sir John Freind and captain Charnock went to the Queen's-Head-tavern in Fleet-street, and captain Charnock told me he would go in two or three days, and I believe did so.

Att. Gen. When did you see him afterwards?

Porter. When I was a prisoner upon the account of the riot in Drury-Lane; about two or three days after I came to Newgate he came to see me, and said he had been in

France; and that king James thanked us for our kind offer, but the French king could not spare so many men that year; and he told me he had been with my lord of Aylesbury, and the rest of the gentlemen that had employed him to go over, and had delivered them the several messages that he was ordered to from the king.

L. C. J. Treby. Captain Porter, who were present at the second meeting, do you say?

Porter. My lord of Aylesbury, sir John Freind, sir William Parkyns, captain Charnock, Mr. Cook, and myself; I cannot tell whether my lord Montgomery or Mr. Goodman were at that second meeting, or no.

Att. Gen. Captain Porter, I would ask you another question: you were concerned in the assassination with those other persons that engaged in it; Pray, what safety did you propose to yourselves after the assassination was over?

Porter. My lord, I asked sir George Barclay what we should do after the fact was committed; says he, You need fear nothing, I will go away that night, I have a ship ready, and the king will be landed in five or six days afterwards; if you will but keep yourselves close for so many days, all will do well.

Sol. Gen. If the prisoner or the counsel will ask him any questions, my lord, they may do it.

Sir B. Shower. Pray, Sir, can you recollect what time of day this was that this debate and resolution were had at the Old King's-Head in Leadenhall-street?

Porter. Truly, sir Bartholomew, I cannot tell.

Sir B. Shower. Pray, by what means do you recollect that this was in the month of May?

Porter. Because capt. Charnock was absent at the Dog-tavern riot, which was the 10th of June.

Sir B. Shower. Was it not in April?

Porter. No, Sir, to the best of my remembrance it was in May.

Sir B. Shower. What makes you think it was in May rather than April?

Porter. I have told you, Sir, because both meetings were before the Dog-tavern riot, the 10th of June, and Mr. Charnock was not there at that time; but he told me afterwards he had been in France, and there were eight or ten days difference between the two meetings.

Att. Gen. My lord, if they have done with him, I would ask him one question, to settle this matter in point of time. Capt. Porter, Was the king gone to Flanders when you had these meetings?

Porter. The king was gone, Sir, before the first meeting.

Att. Gen. The king did not go till several days in May; was Mr. Goodman there?

Porter. He was at the first meeting, but I cannot tell whether he was at the second or no.

Serj. Darnall. Pray, what time was Mr. Goodman there at the first meeting?

Porter. He came up after dinner at the first meeting.

Mr. Baker. Then call down Mr. Goodman. [Who came in and was sworn.]

Sol. Gen. Mr. Goodman, Pray will you give my lord and the jury an account what you know of an intended invasion upon this kingdom; what were the circumstances of it, and who were concerned in it.

Goodman. My lord, about the middle of May last, or thereabouts, captain Porter sent to me, and told me there was a meeting of some gentlemen of our acquaintance at the King's-head in Leadenhall-street; and he desired me that I would be there, because it was about business: I told him I did not know whether I could be there at dinner; but however I would not fail of coming thither after dinner; and accordingly I came. When I came into the house, I sent up my name to captain Porter, and he came down and brought me up stairs, and there I saw my lord Montgomery, my lord of Aylesbury, sir John Fenwick, sir William Parkyns, sir John Freind, Mr. Charnock, and that gentleman at the bar, Mr. Cook: when we were there, the discourse was, that we did think king James's coming was retarded, and we would do any thing to facilitate his restoration.

Cook. My lord chief justice.

L. C. J. Treby. What say you, Mr. Cook?

Cook. My lord, if your lordship pleases, I desire the jury may not be talked to by any body; and I understand there are some talking with the jury.

L. C. J. Treby. Fy upon it! we will lay any body by the heels that do so; they must neither be disturbed, nor instructed by any body.

Cook. My lord, I am informed there was somebody talking to them, and telling them this was the same case with sir John Freind.

L. C. J. Treby. Do you but shew us the man, and we will find another place for him; we will send him to the gaol, I will assure you.

Mr. Burleigh. This gentleman, my lord, did hear such a discourse to the jury (pointing to a gentleman there) who stood up.

My lord, I cannot positively swear to the man, but I did hear some discourse that it was the same evidence as in the former trial.

L. C. J. Treby. If you can shew us who it was, we will take care to punish him: I suppose he stands corrected; and if we knew who he was, he should stand committed.

Att. Gen. Pray, Mr. Goodman, begin again, and tell what passed at that meeting, because the jury were interrupted from hearing by people's buzzing about them.

Goodman. My lord, when captain Porter brought me up into the room, I told you what gentlemen I found there; after we were set down, there was a consultation, that considering the French king's wars retarded the affair of sending back king James, and the means of restoring him to the crown, it was fit we should find out some way or method to facilitate his restoration, and it was thought convenient to

have a messenger to send over to king James with proposals for that purpose ; to this effect, as near as I remember, That if king James could prevail with the French king to furnish 10,000 men, whereof 8,000 to be foot, 1,000 horse, and 1,000 dragoons, we would endeavour to meet him at the head of as many horse as we could raise, to sustain those forces at their landing : this was debated in order to come to a resolution ; and much difficulty there was how many the number should be ; the man pitched upon to be sent, was Mr. Charnock ; and after some debate, how many thousand horse could be raised : says Mr. Charnock, do not let me go over upon a foolish errand, but let me know what I have to say exactly : thereupon it was concluded by all, that 2,000 horse should be the number we could promise, and the king might depend upon them ; and if we brought more, so much the better ; and sir John Freind said, I believe he has so many friends here, that if he came himself, he might be welcome ; but that we did not think fit to trust to ; and nobody would advise any such thing. When the resolution of the thing and the number was thus fixed, Mr. Charnock asked, whether it were with all our consents ? and that he might assure the king, that this was our resolution thereupon ? We all rose up, and said to him, Yes, you may, yes, you may, every one particularly ; and I remember one thing particularly concerning the prisoner Mr. Cook, that he kneeled upon the chair when he said, Yes, you may ; and his elbows were upon the table : this is all that I know of that meeting. There was to be another meeting, as captain Porter told me ; but I had business in the city ; but whatsoever he promised on my behalf, as to the quota of men, I would be sure to make it good ; and I was not at the second meeting.

Att. Gen. Did you see Mr. Charnock afterwards ?

Goodman. Yes, I did, when he came back ; and he told me the thing was not accepted, for the French king could not spare men, and that he had been with the several gentlemen to carry them the compliments that he had in charge from king James, who returned them thanks for their good affection ; and, among the rest, he did me the honour to return me thanks too.

Sir B. Shower. Pray, Mr. Goodman, let me ask you a question : when was it that you saw Mr. Charnock after this ?

Goodman. It was in Arundel-street, at his lodgings.

Sir B. Shower. But I ask you, Sir, when it was ? was it before or after the 10th of June ?

Goodman. It was after the 10th of June, Sir.

Sir B. Shower. How long after, pray ?

Goodman. I believe it was a month after the 10th of June.

Sir B. Shower. Did you see him here in England before Mr. Porter was discharged from the riot, and came out of Newgate ?

Goodman. I believe I did see him before captain Porter was discharged, long.

Serj. Darnall. Who were the persons that were present at that meeting ?

Goodman. My lord Montgomery, my lord of Aylesbury, sir John Fenwick, sir John Freind, sir William Parkyns, Mr. Charnock, captain Porter, and the prisoner at the bar, Mr. Cook.

Serj. Darnall. Were you at dinner with them, Sir ?

Goodman. No, I came in after dinner.

Serj. Darnall. Pray, what house was it, do you say, this meeting was at ?

Goodman. It was at the King's-head in Leadenhall-street.

Sir B. Shower. Can you tell what day of the week it was ?

Goodman. No, nor the day of the month.

Sir B. Shower. Was you ever in the company of these gentlemen at any other time ?

Goodwin. No, this was the only time that I heard of this consultation : I was not at the second meeting.

Cook. If your lordship pleases, may I ask Mr. Goodman any questions ?

L. C. J. Treby. Yes, by all means ask him what you will.

Cook. Mr. Goodman, you are upon your oath : but did you ever hear me speak ten words in your life ? Was you ever in my company in any house, before or since ?

Goodman. Yes, Sir ; I was in your company at the Cock in Bow-street, where you came in accidentally.

Cook. Did you ever hear me talk of the government, or any thing of that nature ?

Goodman. What the discourse was of, I cannot particularly say, but I am certain you was there : and as to the consultation that I now speak of, I remember very well you gave your consent in that manner as I have told the court.

Att. Gen. My lord, we have done at the present.

L. C. J. Treby. Then, brother Darnall, what say you for the prisoner ?

Serj. Darnall. May it please your lordship, and you gentlemen of the jury : I am of counsel, in this case, for the prisoner at the bar, Mr. Cook, who stands indicted of a very great offence, no less, gentlemen, than high-treason ; and if he be guilty, his punishment will be as great ; but because the punishment and the offence are both very great, the law requires exact positive proof, and that by two credible witnesses. There have been two indeed that have been produced to you ; and if you believe both of them, after what we shall offer to you against them, and if what they swear be true, the prisoner is guilty ; but if we satisfy you that either of them is not to be credited, so that you do not believe both of them, he must be acquitted.

There is no doubt, Gentlemen, but there has been a villainous horrid plot ; there is no question of it ; and it was, as it has been opened, basely to assassinate one of the bravest men living ; and to make the happiest people in the world, if they know when they are so, the

most miserable people upon earth, by bringing them under French tyranny and slavery. Many of the traitors have been brought to just punishment for this treason; nay, they have owned the fact at their deaths, so that there is no question of the truth of it; and therefore, gentlemen, every honest man will endeavour to bring such as are plainly guilty of such an abominable conspiracy, to just punishment; but yet they will be as careful not to let an innocent man suffer; that, gentlemen, every honest man will take care of, and especially such as are upon their oaths: it concerns a jury highly to be satisfied that he is not innocent, whom they bring in guilty; for it is better that twenty guilty men should escape, than one innocent man suffer.

But, Gentlemen, if my brief be true, we shall give you such an account of one of these witnesses; first, as to the man himself; that he is not a man to be credited as a witness; and then besides that, as to the evidence he gives in this case, (I say, if my brief be true) it is false, and we shall prove it so; and when you have heard our evidence, if you are satisfied that one of these witnesses is not to be credited, or that what he swears is not true, you are to acquit the prisoner.

Gentlemen, here has been one Mr. Goodman produced as a witness, one that never was produced before at the trial of any of those that have suffered, so that the truth of their guilt does not at all depend upon his evidence, nor does it give any credit to it. This is this gentleman's first entry upon this stage; and yet (if my brief be true) this is not the first bloody or cruel part that he has acted; for we have a record of conviction against him, whereby it will appear to you, that he was indicted (for endeavouring to poison two great dukes) for giving 40 guineas to an Italian empiric, one Amydei, and promising 200*l.* more when it was effected, to poison the late duke of Grafton, and the present duke of Northumberland; and we shall shew you, that he was convicted of it, and fined a thousand pound for the offence; which, considering the meanness of his circumstances at that time, was as much as twenty thousand pounds; for he could as well have paid twenty as one then; and it appears too, that Mr. Goodman (nay, it will not be denied by him himself) was in this horrid plot; and he that would be concerned to poison two dukes in a family, to which he had so many obligations—

Goodman. My lord, I desire leave to speak to this matter that the serjeant mentions.

Serj. Darnall. Pray, Sir, let me go on; you may talk anon; I have seen the copy of the record of conviction, and have it ready to produce.

Att. Gen. Mr. Goodman, be quiet, and stay till by and bye; you will be defended, no doubt on it; but in the mean time let them go on, and do not interrupt them.

Serj. Darnall. I say, my lord, he that would be concerned in so vile an act, as a contrivance to take away the lives of two great dukes,

(who were, in effect, his young masters) that he should go to poison them in a family to which he had been so much obliged; and then, he that would be concerned in so horrid a plot as this was, to destroy his country, and take away the life of the king; sure it will be no difficult thing to think that this man will not stick little at the prisoner's life at the bar, especially when he has so great a temptation to it, as to save his own life by it.

But perhaps some of you may doubt whether it is to save his own life or no: but I believe there are none of you would give any credit to him, if you thought so: therefore, to satisfy you of that fact, we shall produce you evidence of his own opinion of that matter, beside the general known circumstances he lay under: as, that he was long in prison before he charged the prisoner with any thing, and the prisoner was at liberty, went every day abroad for a week after Mr. Charnock's trial, and never absconded one minute, but lived publicly, openly, and visibly to all his friends, and all strangers: but besides, gentlemen, that Mr. Goodman knew he must die, and justly and deservedly for this horrid plot and treason himself; and had no other way left to save his life, but to come in thus as an evidence and accuser, which we think will shake his credit with you.

I say, besides all this, (if my brief be true) we shall prove that he has said himself, That either he must hang Peter Cook, or he must be hanged himself. Thus, gentlemen, he swears to save his own life, by taking away another's.

This, Gentlemen, is as to the man himself, that he is not to be credited. But now further, as to the evidence that he has given: he tells you that he came into the tavern in Leadenhall-street, and that there he found such company; he owns he came in after dinner; and that the other gentleman, Mr. Porter, owns too; he says there were present at this meeting, my lord Montgomery, my lord of Aylesbury, Mr. Cook, and several other gentlemen; but (if my brief be true) we shall prove by three witnesses, that he was not there till they were gone; and that will make an end of all the pretence of his evidence.

Att. Gen. Nay, then we shall never have done.

Serj. Darnall. I'll assure you, Sir, I have the names of three witnesses in my brief, to prove that my lord of Aylesbury, my lord Montgomery, and Mr. Cook, were gone before he came in, though if any, or either of them were gone, it destroys his testimony; and if we prove this to you, I would be loth to be one of the jury that should take away the prisoner's life upon this evidence; no, if he were the vilest man alive, and much less the life of the prisoner at the bar; for we shall prove (if my brief be true) he is a man of morals, a man of virtue, one that has a great love for his country; and this we shall prove by evidence undeniable, persons of quality in their country, such as serve their country in parlia-

ment, as their representatives; we shall shew it by such evidence, that there will be no room to doubt of it: he is a man without any stain or blot upon him, till this accusation; he is the eldest son of his father, and heir to a great estate; his father is a great officer, and a great getter under this government; and can it be imagined or believed, that such a man would be guilty of the worst of treasons, to destroy the religion he professes, to overturn the state, to ruin his own estate, himself and his posterity, which must be the consequence of it? Nay, if two good witnesses could be produced to testify it, and if we had not had so much to take off the credit of Goodman, I could hardly believe it of any man that was in his right senses; he must have been a madman if he had done it, one that stood so well with the present government, and of a family never tainted with disloyalty.

Certainly, gentlemen, when we make out this to you against Mr. Goodman, the prisoner can be in no danger of his life from Mr. Goodman's evidence, though he is an unfortunate man to come under such an accusation; but I cannot believe that any jury, upon such a man's evidence, will brand an honest family with the foulest, vilest, blackest treason that ever was hatched; no, gentlemen, you are men of ability and understanding, and that is it we rely upon; we doubt not but that you will consider the evidence, and consider your oaths, and not let the prisoner's blood lie at your doors; therefore we shall go on and call our witnesses to make out what I have opened.

Sir B. Shower. My lord, we desire to call our witnesses, and I shall reserve myself to make some observations after we have given our evidence: Mr. Serjeant has opened as much as we can prove, and we will now produce our evidence; First, we will shew the conviction of Goodman: Mr. Burleigh, where is the conviction?—Mr. Burleigh. Here it is, Sir.

Sir B. Shower. Where had you it, Sir?

Mr. Burleigh. Out of the Treasury at Westminster.

Sir B. Shower. Is it a true copy, did you examine it there?

Mr. Burleigh. Yes, it is a true copy, I did examine it with the record.

Sir B. Shower. Then read it, Mr. Tanner.

Cl. of Ar. [Reads]—'Michaelmas Term: Tricesimo secundo Caroli Secundi.'

L. C. J. Treby. Read the record in English to the jury.

Cl. of Ar. [Reads.] 'Be it remembered, that sir Robert Sawyer, knight, Attorney General of our lord the king that now is, who for the same our lord the king in this part sueth, came here in the court of our said lord the king, before the king himself at Westminster, on Thursday next after three weeks of St. Michael, the same term; and for the same our lord the king, brought here into the court of our said lord the king, before the said king, then and there, a certain information against Cardell Goodman, late of the parish of

'St. Martin in the Fields, in the county of Middlesex, gentleman, which information follows in these words, *scilicet, Middlesex scilicet*, Be it remembered that sir Robert Sawyer, knight, Attorney General of our said lord the king that now is, who for the same our lord the king, in this behalf sueth, in his own proper person came here into the court of our said lord the king, before the king himself at Westminster, on Thursday next after three weeks of St. Michael that same term, and for the same our lord the king gives the court here to understand and be informed, That Cardell Goodman, late of the parish of St. Martin in the Fields, in the county of Middlesex, gentleman, being a person of a wicked mind, and of an ungodly and devilish disposition and conversation, and contriving, practising, and falsely, maliciously and devilishly intending death, and poisoning and final destruction unto the right noble Henry duke of Grafton, and George duke of Northumberland, and that the aforesaid Cardell Goodman, his most wicked, most impious, and devilish intentions, contrivances and practices aforesaid, to fulfil, perfect, and bring to effect, the 30th day of September, in the six-and-thirtieth year of the reign of our lord Charles the Second, now king of England, &c. and divers other days and times, as well before as after, at the parish of St. Martin in the Fields, in the county of Middlesex, with force and arms, &c. falsely, unlawfully, unjustly, wickedly, and devilishly, by unlawful ways and means, did solicit, persuade, and endeavour to procure one Alexander Amydei to prepare and procure two flasks of Florence wine, to be mixed with deadly poison, for the poisoning of the aforesaid right noble Henry duke of Grafton, and George duke of Northumberland; and his most wicked, most impious, and devilish contrivances, practices and intentions aforesaid, to fulfil, perfect, and the more to bring to effect, the aforesaid Cardell Goodman, the day and year abovesaid, at the parish aforesaid, in the county aforesaid, falsely, unlawfully, unjustly, maliciously and devilishly, did promise and agree to give unto the aforesaid Alexander Amydei forty pieces of guinea gold, of the value of forty pounds, of lawful money of England, if he the said Alexander Amydei would prepare, procure and provide two flasks of Florence wine, to be mixed with deadly poison, for the poisoning of the aforesaid right noble Henry duke of Grafton, and George duke of Northumberland; and if the aforesaid poison with the wine aforesaid to be mixed, should effect the death of the aforesaid Henry duke of Grafton, and George duke of Northumberland; that then he the said Cardell Goodman would give unto the said Alexander Amydei the sum of 100*l.* and that beyond sea he would maintain the said Alexander, all the days of him the said Alexander, to the evil and most pernicious example of all others in the like case offending, and against the peace of our said

'lord the king that now his, his crown and dignity, &c.'—Then here is process prayed by the Attorney General against Mr. Goodman, who comes, and by his Attorney pleads not guilty, and here is issue joined.

Sir B. Shower. Well, see for the verdict.

Cl. of Ar. There was a trial at Nisi Prius, and the jury find that the said Cardell Goodman is guilty of the premises in the Information specified, as by the information is supposed against him.

Sir B. Shower. Now read the Judgment.

Cl. of Ar. 'Thereupon it is considered, that the said Cardell Goodman do pay to the king the sum of 1,000*l.* for his fine, imposed upon him for the occasion aforesaid, and that the aforesaid Cardell Goodman be committed to the Marshalsea of this court, in execution for his fine aforesaid, that he be safely kept there, till he pay his fine aforesaid; and before that the said Cardell Goodman is delivered out of the prison aforesaid, he shall give security to behave himself well, during his life, and also shall give security for the peace to be kept towards the said lord the king, and all his people, and particularly towards the right noble Henry duke of Grafton, and George duke of Northumberland.'

Serj. Darnall. So, you hear the record of the information, conviction and judgment, for a very horrid abominable crime.

Att. Gen. But I desire they may now go on, and read the whole of the record.

Cl. of Ar. [Reads.] 'And afterwards, to wit, on Friday next after eight days of St. Hilary, in the 36th and 37th years of the reign of our said lord the king that now is, before our said lord the king at Westminster came the aforesaid sir Robert Sawyer, knight, Attorney-General of our said lord the king that now is, and acknowledged that the said Cardell Goodman has satisfied to our said lord the king that now is, of the judgment aforesaid against him, in form aforesaid given, therefore the said Cardell Goodman is thereof acquitted; And so forth.'

Serj. Darnall. Call Mr. Charles Edwards, William Cock, Christopher Crawford, Mary Crawford, and Mr. Huntley.

[Edwards appeared upon a Habeas Corpus, directed to the keeper of Newgate, where he was a prisoner.]

Mr. Baker. Where is the warrant of his commitment? What is he committed for?

Tokefield. He is committed for suspicion of treason, and treasonable practices.

Mr. Baker. Is he not committed for high-treason?—Tokefield. No, Sir, he is not.

Serj. Darnall. What discourse had you with Mr. Goodman concerning the prisoner at the bar? What did you hear him say?

Mr. Baker. He is not sworn yet; it seems this gentleman was Dundee's chaplain in Scotland.

Att. Gen. If he be not sworn, he can give no evidence.

Serj. Darnall. My lord, we desire he may be sworn.

L. C. J. Treby. Swear him. [Which was done.]

Serj. Darnall. Pray, Sir, will you tell the court and the jury, what you know of any discourse of Mr. Goodman's concerning the prisoner at the bar.

Edwards. My lord, I desire to know, being ignorant of the law, whether I am brought here by the common course of justice or not?

Serj. Darnall. Sir, we have subpoenaed you for the prisoner at the bar, to give evidence of the truth of your knowledge here upon oath.

L. C. J. Treby. Would you have us tell you how you came here? We suppose you came by due process of law, as a witness.

Edwards. Then, my lord, I desire to speak but one word; that it is a strange thing to me to consider, how words should be carried away that were privately spoken; as if it were to expose me to the reproaches of all my friends; it is a thing that I did never expect to hear of again: however, seeing I am called here, and obliged upon my oath to declare what I know, I by God's grace will, to the uttermost of my power, tell what has passed in this matter.

L. C. J. Treby. Do not make any apology for telling the truth: you are obliged by your oath to do it, and the court expects it from you.

Edwards. Among other discourses that passed betwixt Mr. Goodman and me, I asked him when Mr. Cook was to be arraigned, and when he was to be tried: Says he, he is to be arraigned upon Monday, and he is to be tried upon Thursday. I asked him, whether it was for the Assassination-Plot, and he told me No. For what then? said I: as being concerned in sending Mr. Charnock into France? Who are the evidences against him? said I. Said he, captain Porter and myself. Said I, I believe two witnesses will be found good, or by way of demonstration in law; and I pity the poor gentleman's case. Says he, He swore against me. How comes it then, said I, that he is not come off, and has not a pardon, and would divulge nobody else?

L. C. J. Treby. Who had not a pardon do you mean?

Edwards. Mr. Cook. I asked, how he had not a pardon? Says he, He would give an account of nobody else but me, and that was the reason he had no pardon. Said I to him, Who are the evidences against him? Says he, captain Porter and myself. And after this, says he, He or I must perish; or, He and I must suffer; I believe the word was suffer. But, says he, it is a foolish thing to be hanged. All that is said of a man that is hanged, is, That he hanged handsomely, or he died bravely. That's all the discourse that I can remember.

Serj. Darnall. He said it was a foolish thing to be hanged; and Mr. Goodman, it seems, had no mind to be hanged; and I believe so too: but he must not hang my client, to save his own life.

Edwards. Now, by the same oath that I have sworn, I knew nothing of being brought hither, till my words were carried away privately from me, and has been consulted of, and returned to me back again; and I was far from suborning or carrying away a discourse privately, to make any advantage of it.

Serj. Darnall. Now we will call Crawford, and Huntley, and Cock.

Att. Gen. I desire that gentleman that was last examined may not go away.

[*Crawford, Huntley and Cock* were sworn.]

Sir B. Shower. Set up Mr. Crawford, (which was done). Pray, Sir, will you recollect yourself? Do you remember when my lord of Aylesbury and captain Porter dined at the King's-Head?

Crawf. Yes: it was about a twelvemonth ago.

Serj. Darnall. What company was there?

Crawf. My lord of Aylesbury, sir John Freind, sir John Fenwick, sir William Parkyns, captain Porter, and two or three more, I did not know their names.

Sir B. Shower. How many were there that dined there?—*Crawf.* I think about eight in all.

Sir B. Shower. Was the room shut while they were there, or did the servants and drawers go up and down commonly?

Crawf. Yes, they did go up and down commonly.

Sir B. Shower. After dinner, did any body come to them while they were there?

Crawf. No, not during my lord of Aylesbury's stay, and my lord Montgomery went away with him.

Sir B. Shower. About what time did my lord of Aylesbury go away?

Crawf. I think it was about four o'clock.

Sir B. Shower. How can you tell it?

Crawf. I did attend upon them the most part of the time.

Sir B. Shower. Did you see him go away?

Crawf. Yes, I did.

Sir B. Shower. Was that gentleman, Mr. Goodman, there when they went away?

Crawf. I did not see him there, to my remembrance: nobody came in there before they went away, saving their own servants.

Serj. Darnall. Do you know Mr. Cook, the prisoner at the bar? Was he one of the gentlemen that were at your house?

Crawf. Yes; I did not well remember or recollect, till I saw him on Saturday last.

Att. Gen. Was he one that went away?

Crawf. I do not remember, truly, Sir.

Att. Gen. Pray, how long was it after dinner that they went away?

Crawf. I think it was not an hour.

Att. Gen. Was you there all the time, from the time of the dinner?

Crawf. No; not all the while; I was not in the room, but going to and fro.

Serj. Darnall. You say Mr. Goodman did not come up till after they were gone?

Crawf. No, I did not see him.

Att. Gen. Did you see him at all?

Crawf. No, I did not see him at all.

Att. Gen. Just now it was said, he did not come till they were gone; and now it seems he did not see him at all.

Crawf. I do not know that he was there at all.

L. C. J. Treby. But, brother Darnall, you opened it, that Mr. Goodman came after my lord of Aylesbury was gone, and now you will prove it that he came not at all.

Sir B. Shower. My lord, we do not pretend to falsify his evidence for any thing more than is material for the prisoner: we say Mr. Goodman was not in the room where they dined till those persons went away; if in any particular we disprove him, it is sufficient for us: if we can shew that he was not there till three of those that he has named were gone away, that answers our end. We are not concerned if he came at four, five, or six o'clock, and discoursed with Charnock till twelve o'clock at night.

Att. Gen. Pray reserve your remarks; but only observe now what he says, that Mr. Goodman came not at all thither; and that is more than you pretended to open.

Mr. Conyers. How many were there that were there at dinner?—*Crawf.* About eight.

Mr. Conyers. How many do you name that you know?

Crawf. My lord of Aylesbury, sir John Freind, sir John Fenwick, sir William Parkyns, and captain Porter; there were several others, two or three more, but I did not know their names.

Mr. Conyers. Did you see Mr. Goodman come in at any part of the day afterwards?

Crawf. I do not know that Mr. Goodman.

Mr. Cowper. Mr. Crawford, you say, that for an hour after dinner you were sometimes in the room, and sometimes out; when you were out of the room, were you always in the passage up to the room?

Crawf. No, I was not.

Mr. Cowper. Could any man come in or out without your seeing?

Crawf. I should have known him above stairs when I came in again.

Mr. Cowper. Why, you say, there are two or three above that you did not know.

Crawf. I knew them by sight, if not their names.

Mr. Cowper. Were you always in sight then?

Crawf. No, Sir, I tell you I was up and down.

Sir B. Shower. Was there any body came in before my lord of Aylesbury went out? that is, any body besides those that dined there?—*Crawf.* No.

Sir B. Shower. My lord, we are not contending now about a man's coming up without his knowledge; but whether any such man as Mr. Goodman came up and staid there during the consultation; and we insist upon it, there was nobody there till my lord of Aylesbury,

my lord Montgomery, and Mr. Cook were gone, but those that dined there: now I would ask a question again of him, Was there any body but who dined there, till my lord of Aylesbury went away?

Crawf. No, there was not.

Att. Gen. Why do you say so? How do you know that?

Crawf. I did not see any body.

Sol. Gen. Did you attend upon other rooms, as well as that, at the same time?

Crawf. Yes, I did.

Sol. Gen. Then how is it possible that he can swear that Mr. Goodman was not there?

Sir B. Shower. Do you remember when my lord of Aylesbury and they went away?

Crawf. It was about four o'clock.

Sir B. Shower. Were you there in the room when they went away?

Crawf. I went out with my lord to the coach.

Sir B. Shower. Did you see him come down stairs, or did you go up stairs then?

Crawf. I went up stairs when the coach was called.

Sir B. Shower. Was then any body there but such as dined there?

Crawf. I did not see any body there but those that dined there.

Mr. Cowper. But, my lord, he does not know all that dined there, neither.

L. C. J. Treby. Mr. Crawford, you say my lord of Aylesbury and others went away about four o'clock: pray how long did the rest of the company stay there?

Crawf. I cannot remember. They staid there pretty late: it is a pretty while ago.

L. C. J. Treby. About what hour did they part?

Crawf. I cannot remember what time the rest went away: our house is fuller at night than at noon; and I waited upon other companies. It was pretty late before they went away, that I am sure.

L. C. J. Treby. But he cannot remember whether it were five or six, or twelve, that they went away; only he can remember the hour of four, that my lord of Aylesbury and they went away.

Just. Rokeby. Was it light, or was it dark when they went away?—*Crawf.* It was dark.

L. C. J. Treby. Did you attend the company after my lord of Aylesbury was gone?

Crawf. I went up and down into that company as I did into others.

L. C. J. Treby. Was you there several times after my lord of Aylesbury was gone?

Crawf. Yes, I was there once or twice after my lord of Aylesbury was gone, I am sure.

L. C. J. Treby. And did you never see Mr. Goodman there?

Crawf. No; I never saw Mr. Goodman in my life before I saw him on Saturday last.

Sir B. Shower. Which is Mr. Huntley?

Huntley. Here I am, Sir.

Sir B. Shower. Pray recollect yourself, and tell my lord and the jury what you remember

of any company that were with Mr. Porter, at the King's-head, and who dined there.

Huntley. My lord of Aylesbury, my lord Montgomery, sir John Fenwick, sir William Parkyns, sir John Freind, Mr. Porter and Mr. Charnock.

Sir B. Shower. That was the company, you say, that dined there: Did Mr. Goodman dine there?

Huntley. No, Mr. Goodman did not dine there.

Sir B. Shower. Pray, Sir, recollect yourself: when did any of this company part, or go away?

Huntley. My lord of Aylesbury and my lord Montgomery went away about four o'clock.

Sir B. Shower. Sir, how do you know that?

Huntley. I went down stairs after them; I was above stairs when they parted from the rest of the company.

Serj. Darnall. Pray mind, Sir: was Mr. Goodman there at that time before they went away?—*Huntley.* No, he was not.

Sir B. Shower. Are you sure of that, upon the oath you have taken?

Huntley. Yes, I take it upon my oath he was not there.

Sir B. Shower. Did you attend them at dinner?

Huntley. Yes, I did attend them at dinner.

Sir B. Shower. Did you attend them all the while they were there?

Huntley. I was called frequently, and was in and out of the room very much after dinner.

Sir B. Shower. Do you think, if a fresh man had come in after dinner, you should not have known him?

Huntley. Yes, I should have known him.

Att. Gen. Pray, friend, let me ask you one question: was Mr. Goodman there all that day?

Huntley. That I do not know; I did not see him at all.

Sol. Gen. Did you attend upon any other rooms that day?

Huntley. No; I attended only upon that company.

Sol. Gen. Were you in the room all the time?

Huntley. No; I went up and down.

Sol. Gen. What time did the last of the company go away?

Huntley. It was about darkish; it was pretty late, to the best of my remembrance.

Att. Gen. Pray, did any body come to those gentlemen after dinner?—*Huntley.* No, Sir.

Att. Gen. Did you ever see Goodman before now?

Huntley. Never in my life, to my knowledge.

Just. Rokeby. Did all the company, but my earl of Aylesbury, and my lord Montgomery, stay until it was duskish?

Huntley. That I do not know.

Just. Rokeby. Did you know all the company that was that day at dinner?

Huntley. I knew all but one.

Just. Rokeby. And who was that?

Huntley. That was Mr. Charnock.

Just. Rokeby. And yet you cannot tell whether there was any body else that you did not know, how then can you tell that Goodman was not there?

Sir B. Shower. He did not know him at that time, but he might remember him afterwards.

Mr. Conyers. Did not the same company use to meet at other times, at your house?

Huntley. Not to my remembrance.

Mr. Conyers. How then came you, if they never had used to meet there, to know all these people's names?

Huntley. I have seen sir John Freind there, and sir William Parkyns.

Mr. Conyers. Was sir John Freind there, or no?—*Huntley.* Yes, he was.

Mr. Conyers. My lord, he was the only man that was not named before: you did not name sir John Freind before, as I heard: but pray, did you ever see Mr. Charnock there but at that time?—*Huntley.* No, I did not.

Mr. Conyers. How came you to know it was Mr. Charnock?

Huntley. I knew very few of them before that time; and I asked their servants the names of all those persons that were there.

Mr. Conyers. Did you know Mr. Porter, pray?

Huntley. Not before that time: I did see Mr. Porter, and I knew him again when I saw him: his black told me his name that day.

Sir B. Shower. You, Huntley, I would ask you one question more: was the door shut, or no?—*Huntley.* No, it was not.

Sir B. Shower. Did the servants go up and down as they used to do?—*Huntley.* Yes, Sir.

Att. Gen. Sir Bartholomew would make it that there was no consultation at all.

Sir B. Shower. They were mad folks if they would consult at that rate with the door open. Pray call Mr. William Cock. [Who was sworn.]

Att. Gen. Sir John Freind has owned it, that's dead.

Sir B. Shower. Sir John Freind's confession is nothing to the prisoner.

Att. Gen. Mr. Serjeant Darnall did open, that the confession of those that died was an undeniable proof of the conspiracy: but go on with your evidence.

Serj. Darnall. Pray, Mr. Cock, will you recollect yourself about the time when captain Porter and some other gentlemen dined at your house.—*Cock.* Yes, very well.

Serj. Darnall. Pray, Sir, can you tell who dined there at that time?

Cock. There were my lord of Aylesbury, my lord Montgomery, sir William Parkyns, sir John Fenwick, sir John Freind, Mr. Charnock, captain Porter and Mr. Cook.

Just. Rokeby. Was that all the company?

Cock. Yes, it was.

Just. Rokeby. One of them said there were eight.

L. C. J. Treby. And he has named eight, brother.

Serj. Darnall. Can you remember when

any of the company went away, and who went away first?

Cock. My lord of Aylesbury and my lord Montgomery went away in a hackney-coach; and their servants were frequently in the room, and waited afterwards in another room, after that they had waited at table at dinner; and though the door was shut, as it used to be when any company is there, yet nobody was forbid to come there at all.

Att. Gen. Do you remember when Mr. Goodman came there?

Cock. I never saw Mr. Goodman in my life before to-day.

Serj. Darnall. Did any body come to this company before my lord of Aylesbury went away that did not dine there?

Cock. I did not see any body there at all: and my lord of Aylesbury was about buying a hogshead of white-wine, but we could not agree about the price: and when my lord of Aylesbury went away, I went down with my lord, and waited upon him to the coach; and I told my lord, I hoped he would buy the wine still. But he answered, he could not tell whether he should or no.

Serj. Darnall. Who else went with my lord of Aylesbury?

Cock. My lord Montgomery. I do not remember any body else.

Just. Rokeby. Did all the rest of the company go away at once?

Cock. Truly, my lord, I cannot say they did.

Just. Rokeby. By what time did the rest go away?

Cock. I believe it might be eight or nine o'clock.

Serj. Darnall. You saw my lord of Aylesbury when he parted: was Mr. Goodman there then?—*Cock.* I did not see him.

Baron Powis. Did Mr. Cook stay till the last?

Cock. That I cannot tell truly.

Baron Powis. I find they all swear to four o'clock of my lord Aylesbury's going, and go no further.

Att. Gen. Pray, Sir, let me ask you a question or two: did you ever see Mr. Goodman before now?

Cock. No, I do not remember I did.

Att. Gen. When you went into the room after dinner, did you look about the room to see whether there were any new company?

Cock. I did look about the room several times, and so did my servants, to see if there were any thing wanting.

Att. Gen. Can you take it upon your oath, that he was not there whilst my lord of Aylesbury staid?

Cock. I do: and can take it upon my oath, he was not.

Att. Gen. Then, if you can, pray distinguish the time when he came in.

Cock. I do not remember that ever I saw him in my life before to day.

Att. Gen. Why are you not as positive that he was not there at all, as that he was not there before my lord of Aylesbury went away?

Cock. He might come in, and I not see him.

Att. Gen. Might he not as well come in before they went away, as after, to come in and you not see him?

Cock. No, I do not think he could.

Att. Gen. Why do you think so?

Cock. Because the servants were all about, and they did not go to dinner till 2 o'clock: and I believe those gentlemen that I named, came in a quarter of an hour's time to dinner.

Att. Gen. We do not say he came there before dinner: but could he not come in after dinner, before my lord of Aylesbury and my lord Montgomery went away, without your seeing him?—*Cock.* Yes, Sir.

Sir B. Shower. Then, hark ye, Sir, I would ask you one question: did you see him, upon your oath, or not?—*Cock.* No, I did not.

Sir B. Shower. Might not Mr. Goodman come in to them without your seeing him?

Cock. It is possible; but I do not think it was so.

Just. Rokeby. How then can you be positive that he was not there till my lord of Aylesbury went?

Sol. Gen. You say you may be positive he was not there before my lord of Aylesbury went: can you be as positive now, that he was not there before Mr. Cook went?

Cock. I do not know when Mr. Cook went.

Sol. Gen. How can you be then positive he was not there before my lord of Aylesbury went?

Cock. There were no more than what dined there when my lord of Aylesbury went away.

Mr. Conyers. Pray, Sir, let me ask you a question: Were you in the room at any time after dinner?—*Cock.* Yes.

Mr. Conyers. Pray, Sir, how many times after dinner, were you there?

Cock. I believe half a dozen times.

Sol. Gen. And yet you do confess that Mr. Goodman might come in after dinner before my lord of Aylesbury went, and you not see him?

Sir B. Shower. Ay, but he could not stay there without his seeing him, if he was so often in the room: you do not take Mr. Cock's evidence right.

Att. Gen. You named eight persons that dined at your house: did you know them all personally before that day?

Cock. Yes, my lord, the most of them at least.

Att. Gen. Did they use to meet at your house?

Cock. Commonly sir John Freind did once a week. Mr. Charnock I knew when I was drawer, and so I did sir William Parkyns: The rest I knew by hearing their names.

Att. Gen. Did you know them before that day, Sir, I ask you?

Cock. I had seen captain Porter several times before that day; but I cannot say at my own house.

Sir B. Shower. Do you remember the treaty about the hogshead of white wine?

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Cock. Yes, Sir, very well.

Sir B. Shower. Were you by when my lord of Aylesbury went away, and spoke with him about it?

Cock. Yes, I was; and told him, I hoped he would buy the wine still.

Sir B. Shower. Can you be positive that any body was there before my lord of Aylesbury went away, that could stay there any time, and did not dine there?

Cock. I believe not, Sir; for I came in half a dozen times after dinner, and I believe if I had heard Mr. Goodman's name, or seen him there, I should have remembered it; but I did not see any body but those that dined there.

Mr. Cowper. Where was you, when my lord of Aylesbury went away? Where did you meet him going away?

Cock. Upon the stairs: seeing my lord of Aylesbury, and my lord Montgomery coming down, I met them.

Mr. Cowper. Where did you meet them? At the middle, or the top of the stairs?

Cock. My lord of Aylesbury was at the top of the stairs.

Mr. Cowper. Did you meet him just coming out of the room?

Cock. Yes, Sir, I saw the coach that was called for my lord; and so I went up stairs, and met my lord at the top of the stairs coming down.

Sol. Gen. Now, how can you be positive who was in the room when he came out of the room?

Cock. I went up in the room after my lord of Aylesbury went away.

Sol. Gen. How long after my lord of Aylesbury went away?

Cock. It was presently after.

Sol. Gen. How long before my lord of Aylesbury went away had you been in the room?

Cock. I had been there just before.

Serj. Darnall. Call Thomas Peachy.

[Who appeared, and was sworn.]

Sir B. Shower. My lord, we shall prove that after the plot broke out, and after Mr. Porter had made his discovery, there was no disturbance of Mr. Cook till a good while after Charnock's trial; and Mr. Cook was so far from being sensible, or conscious of any guilt, that he never absconded, but continued for three weeks in his father's house, where he was taken by a messenger. Pray, Mr. Peachy, will you tell my lord and the jury, where Mr. Cook was taken, and when, and by whom?

Peachy. He was taken at his father's house by a messenger, about 7 o'clock in the morning.

Sir B. Shower. What day of the week was it he was taken?

Peachy. Upon a Sunday morning, in his own room, in his father's house, at 7 o'clock in the morning.

Sir B. Shower. Did people come to him as they used to do?

Peachy. Yes; and he went frequently

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abroad as he used to do, and did never abscond from his father's house.

Serj. *Darnall*. Pray swear Mr. Treganna.

[Which was done.]

Sir *B. Shower*. Mr. Treganna, pray do you remember how long after the plot broke out did you see Mr. Cook?

Treganna. After Mr. Charnock's trial, a week, he was at my chamber; after the plot broke out, he was concerned in a trial at Winchester assizes, upon an issue out of Chancery, Mr. Nicholls was the clerk in court, and went down to manage it at the assizes; and Mr. Cook came to me a day or two after Winchester assizes was over, and asked me if I had any news from the assizes? This was long after the plot broke out: and I remember particularly, that I saw him twice after the plot was discovered, at my chamber.

Sir *B. Shower*. Swear Mr. Nicholls. [Which was done.] Sir, pray will you tell my lord and the jury, what you know of Mr. Cook's appearing abroad after the plot was discovered?

Nicholls. I was sent down to the trial: I was present, and did attend at two trials indeed, and I suppose baron Powis may remember that I attended at two trials at Winchester assizes.

Baron *Powis*. Possibly you might, Sir: I cannot tell all the attendance at the assizes.

Nicholls. And after my return from Winchester assizes, Mr. Cook was with me several days, both at my office and chamber, and at his father's office: and I remember particularly, that he threatened me that I was in trouble when I was at Winchester, and therefore I remember it very well.

Sir *B. Shower*. Mr. Nicholls, you know Mr. Cook very well; pray what are his morals?

Nicholls. Upon occasion of the cause in chancery that went to trial, I have had the knowledge of Mr. Cook five or six years; I always believed him to be as temperate a man as ever I met with: I think in five years time I was not above once with him in a tavern.

Sir *B. Shower*. Did you ever hear him swear?

Nicholls. No, never; nor vent a curse: I believe he drank as little as any man, and was as godly a man. I never heard him speak a foul word.

Sir *B. Shower*. How do you know that, Sir, that he was so godly a man?

Nicholls. Upon occasion of this cause, I was several times at sir Miles Cook's, and at Mr. Cook's lodgings there, and we were to go about business, and after he was dressed, he has made me stay while he went into his closet and said his prayers. And he told me further, that he never went out of his father's doors without saying his prayers; and I was forced to stay at the door while he performed his devotions, as he told me, and I believe he did.

Serj. *Darnall*. Now, my lord, we will call some other witnesses to prove his good affection to his country; how he continually desired success to the fleet, and to the army.

Sir *B. Shower*. So that really he had an aversion to it. Swear Mr. Hamond.

[Which was done.]

Serj. *Darnall*. Pray, Sir, will you give an account what you know of the prisoner, concerning his judgment, and concerning his morals?

Hamond. I have been for some time acquainted with Mr. Cook the prisoner at the bar, and to the best of my observation, I always took him to be a conscientious man, and I have heard him declare great detestation of a French force: and three or four days before he was taken into custody, I asked him what he heard of intelligence? He said he heard what was in the public prints, and heard no more, and knew no more; and he had a great abhorrence of the conspiracy, and thought it a very monstrous thing. I never heard him speak a disrespectful word of the king's person or government in my life. And I say again, I have heard him several times declare, in common conversation, that he had an aversion to French power, and he had a dread of it.

Serj. *Darnall*. What have you heard him say about our fleet, or army*?

Hamond. My lord, I have heard him very much wish prosperity and success to our fleet.

Just. *Rokeby*. What fleet, pray, Sir?

Hamond. To our fleet, king William's fleet against the French. Things to this purpose he frequently said.

Serj. *Darnall*. Then swear Mrs. Hunt. [Which was done; but she was not examined.]

Sir *B. Shower*. My lord, we leave it here. But I must beg the favour, that if they give any new evidence, and there be occasion, we may have liberty to answer it. And I have an observation or two to make when the evidence is over.

Att. Gen. My lord, if they have done with their evidence, I beg leave to observe, that there is something arises upon that evidence that will give us occasion to call a witness or two more. My lord, the first witness which they called was Edwards, and he is in custody upon suspicion of high-treason in Newgate, and he gives an account of some discourse that he had with Mr. Goodman; and for that, it will be necessary for us to call Mr. Porter again and Mr. De la Rue, to shew that this Edwards, the witness, as he is committed for suspicion of high-treason, so he was in the conspiracy for the assassination; he was one in the list that was brought back by Cranburne from Mr. Charnock to captain Porter, as one of Charnock's men, and he is in custody for it. Then as to the other matter, they have called three witnesses to prove, that Mr. Goodman was not in this place at this time. The counsel indeed opened it, that he was not at the tavern till after my lord of Aylesbury and my lord Montgomery were gone away; but their evi-

* See in this volume, p. 1, sir John Freind's Case, and the other cases referred to in the Note there.

dence goes further, That he was not there at all: and the master of the house says, he was not there to his knowledge at any time. So that if their evidence prove any thing, they prove that he was not there at all; they do not remember that they saw him there: so that the question will be, whether Mr. Goodman was there at that time? And it will be necessary to call Mr. Goodman again, and Mr. Porter, to confront these witnesses, who will tell you when he came in: and particularly as to my lord of Aylesbury, that he went with him to the stairs-head, and my lord would not let him go further, but he went back again when my lord of Aylesbury went down stairs. We will begin with the witnesses, as to this Edwards. Swear Mr. De la Rue.

[Which was done.]

Mr. Conyers. Mr. De la Rue, Pray do you know Mr. Edwards that was here?

De la Rue. He goes by several names; I know him by the name of Douglas: and last Monday I came into the Press-yard, and saluted him by the name of Douglas, and he said he had taken his own name again, by which he was known at St. Germain's, and that was Edwards or Richards, as I remember, or some such name.

Mr. Conyers. When was he at St. Germain's?

De la Rue. About three or four years ago.

Mr. Conyers. Pray look upon him, see if you know him.

De la Rue. I know him very well, there he stands, that is the person in the black wig; he was reputed at St. Germain's to be my late lord Dundee's chaplain.

Att. Gen. What name did he go by at St. Germain's?

De la Rue. I cannot very well tell: but he said he had taken his own name again; and I think he said it was Edwards or Richards.

Mr. Conyers. Did he go formerly by the name of Douglas?

De la Rue. Yes, here in England: Mr. Porter knew him to go by that name.

Att. Gen. What else do you know of him?

De la Rue. The list that Mr. Cranburne carried from Mr. Porter to Mr. Charnock, and which he brought back again from Mr. Charnock to Mr. Porter, had in it, among the other names, the name of Douglas, which I understood to be that gentleman.

Att. Gen. Did he go by that name at that time?—De la Rue. Yes, he did.

L. C. J. Treby. Pray repeat that again, Sir, that we may understand it, and see whether it be evidence.

De la Rue. Why, Sir, the list that Mr. Cranburne brought from Mr. Charnock to Mr. Porter, at the foot of the list which Mr. Porter had sent to him, there were other names written, as I believe, in Mr. Charnock's hand; and among those names there was the name of Douglas, which I understood to be this Mr. Edwards, as he calls himself. And moreover, when Mr. Porter went out of town, going to Doctors Commons I called at Mr. Charnock's,

and he had a great deal of company with him, four or five troopers, and among the rest this Edwards or Douglas was there sitting by him. Here is a gentleman that I see upon the bench, I think he is a Scotchman, that knew him at St. Germain's as well as I. I think his name is Macdonnel.

Just. Rokeby. What countryman did you take this Edwards to be?

De la Rue. A Scotchman, and chaplain to my lord Dundee that was killed in Scotland.

Serj. Darnall. Did you see this gentleman in France, Sir?

Macdonnel. I never was in France in my life.

Att. Gen. You cannot ask him the question: you know it tends to make him either accuse or excuse himself of a crime. Pray, call Mr. Porter again. But in the mean time, till he comes, we will examine Mr. Goodman, because he is here. Mr. Goodman, you were by, and heard what these drawers said concerning your being at the Old-King's-Head in Leadenhall-street that day. Pray, give an account when you came in, whether you saw my lord of Aylesbury, and what passed between you at my lord of Aylesbury's going away?

Goodman. Mr. Porter brought me up; and when I came in they were all sitting; and after salutation I sat down: and when they had consulted some time, they came to a resolution, as I have told you already. The fellows are so far in the right of it, that my lord of Aylesbury and my lord Montgomery went away first; for I took my leave of them at the head of the stairs. Says my lord of Aylesbury to me, Pray avoid ceremony, we will go away privately as we came, in a hackney-coach. And as to the master of the house, who says, he does not know me, I have dined several times there; four or five times with sir John Freind; and one particular day above all the rest, I remember I was not well, and I went down stairs to the bar, and said, I pray, can you get me a little brandy? He said, Yes; he would help me to some of the best in England. And he brought me up some which I liked very well; and thinking he had a quantity of it, I asked him what I should give him a gallon for a parcel. But he said, he had but a little: and I am sure he has seen me there five or six times.

Att. Gen. Then set up that master of the house, Cock, again, (which was done). Come, Sir, you hear what Mr. Goodman has sworn, and mind it; you are upon your oath. You said just now, that you never saw Mr. Goodman before.

Cock. No, upon my word, Sir, I do not know that ever I saw him before.

Att. Gen. Do you remember nothing of his being with sir John Freind at your house?

Cock. No, upon my word, Sir.

Att. Gen. Nay, you are upon your oath. Nor do you know nothing of your giving of him brandy?

Cock. No, upon my oath, I do not remember any such thing.

Att. Gen. That is a very safe way of swearing, I profess.

Mr. Conyers. He remembers the particular time when he was sick, and you offered to sell him some brandy.

Att. Gen. No, he asked him what he should give him for it a gallon. But, Mr. Cock, did you ever see Goodman in your house since my lord of Aylesbury and they were there?

Cock. No, upon my word, Sir, I did not: and I never had but two gallons of brandy in my life at a time: and I never had any cask, or any thing of that nature, to sell any out of.

Att. Gen. Who used to be with sir John Freind at your house?

Cock. There used to be Mr. Richardson, and justice Cash, and colonel Cash.

Goodman. Mr. Richardson was there that day: I could almost have remembered the particular day, but I cannot be positive; only we were in the same room where the consultation was, at the further part of the room.

Just. Rokeby. You friend, the master of the house, you hear what Mr. Goodman says: he says he was with sir John Freind at your house, and being not well, he asked for some brandy, and you told him, you would give him some of the best in England. And he propounded to you then to sell him some of it; but it seems there was no bargain made. Do you remember any such thing of one that was with sir John Freind, that spoke of buying of brandy when he was sick?

Cock. No, upon my word, I do not.

Att. Gen. Then set up Mr. Porter, (who stood up). Pray, Mr. Porter, look upon that man in the black peruke; what name did he use to go by?

Porter. He used to go by the name of Edwards.

Att. Gen. Had he any other name?

Porter. Yes, Douglas.

Att. Gen. He has so many names, that we do not know which is his true name. Mr. Porter, pray what else do you know of him touching his being concerned in the conspiracy?

Porter. I know not any thing of my own knowledge; but his name was put down in the List that Mr. Charnock sent me of his men, and Mr. De la Rue read his name there.

Sol. Gen. Mr. Porter, you were a witness upon the trials of sir John Freind, and sir Wm. Parkyns; did you give evidence that Mr. Goodman was in the room at the same time when the consultation was?—*Porter.* Yes, Sir.

Att. Gen. Well, you hear that these people have sworn, that Mr. Goodman did not come till my lord of Aylesbury went away; nay, indeed, that he was not there at all.

Porter. My lord, upon my oath he was there before my lord Aylesbury went away, and Mr. Goodman bowed, and took leave of my lord as he went out of doors.

Att. Gen. What time did my lord of Aylesbury go away?

Porter. It was about an hour and a half,

or two hours after dinner, and he was in the room when my lord went away, for he took his leave of him at the door.

Mr. Cowper. Do you remember the manner of Mr. Goodman's coming in?

Porter. Mr. Goodman sent up his name to me, and I told the company, and promised for him, that he was a very honest man, and much in king James's interest; and then with their consent I went down and brought him up.

Just. Powell. How long time do you think there was between Mr. Goodman's coming in, and my lord of Aylesbury's going away?

Porter. I cannot tell that, I do not remember exactly how long it was.

Just. Powell. Was it a quarter of an hour, or half an hour?

Porter. A great deal longer, for we had discoursed of the whole business after Mr. Goodman came into the room.

Mr. Conyers. How long were they there after Mr. Goodman came in?

Porter. It was very near two hours after he came in, before they went away; they did not go away till six o'clock, and he came in at four, as near as I can remember.

Att. Gen. Then, my lord, we have done.

Sir B. Shower. Then I beg the favour of a word or two, my lord. May it please your lordship, and you gentlemen of the jury, I am of counsel in this case for the prisoner at the bar, and I must beg your lordship's patience, and your favour, gentlemen, to make a few observations upon the evidence that has been given; for we humbly insist upon it in point of law, that here is not sufficient evidence before you to convict the prisoner. You are, gentlemen, to have respect and regard to your consciences and the oaths which you have now taken, to give a verdict, and make true deliverance between the king and the prisoner; you are not to go according to your own private opinions, nor according to public fame, nor according to common report, nor according to the verdicts in other cases, nor according to the confessions or dying speeches of criminals who have been executed, whether made by themselves, or by others for them, but you are to go by the testimony of credible witnesses, and if you have not the evidence of two credible witnesses before you, my lords the judges will inform you how the law stands. That by the statute of Edward the 6th, and the new statute for trials of treasons, there must be two witnesses to prove the prisoner guilty of the overt act of the treason that is laid in the indictment; and whether there have been two credible witnesses produced before you, is the question that you are to consider upon your oath and conscience; that is, whether you are satisfied here be two such as the law requires. The question is not merely whether Mr. Cook be guilty, but whether in your consciences he be legally proved guilty; whether there be evidence to satisfy your consciences, according to the laws of the land, that he is guilty; and we insist there is not; and therefore I beg

leave to recapitulate what has been sworn against him, that we may see how far it reaches, and wherein it is defective.

Gentlemen, Mr. Porter he swears, that about the beginning or middle of May, he cannot tell which, there was this meeting at the Old King's Head Tavern in Leadenhall street; in which, I would observe to you, that he confines himself to a certain month; the reason is very plain, and therefore I asked him whether it was not in April; for if he had said it had been then, there had been no danger to the prisoner, because of the act of indemnity, therefore he was careful to fix it in May; and he would not lay it in June, for the tenth of June is a famous day; and then, or soon after, Newgate had him; he was confined there for a riot on that day, and so they have restrained it to a month, and the only month that he is capable of swearing to, as to any act done the last year till they came in January to the assassination plot, which the prisoner is not accused to have had any concern in; but it should seem he cannot tell what day of the week, or of the month, but about the beginning or the middle of May eight persons dined at this place, and then after dinner Mr. Goodman came in, and they discoursed about this matter.

First, gentlemen, we insist upon it, that it is very improbable that English Protestants of pious conversation and good morals should agree, as he says, to send such a message to the late king, to invite over a French Popish force; we may easily see the horrid and mischievous consequences that would have followed, such as must affect every Englishman with a concern, so that it is improbable a man of virtue and piety could engage in such an enterprise; and if it be improbable, you will never believe it, unless the conviction or proof be irresistible: and if you have any other reasons to distrust this man's truth, then we hope you will go upon the side of probability; and not let popular prejudice, common fame, or any thing else but legal and undeniable evidence have the ascendant over you. If you are not satisfied that Mr. Cook did assent (as from the character of the man it is not probable he should) to send Charnock into France, to persuade king Lewis and king James to send ten thousand men to invade our country, then he is not guilty.

In the next place, gentlemen, he is not guilty we say in the eye of the law, if they have not two witnesses; and for that we say you have but one that is to be believed; and if you have but one that is to be believed, that in law is but one, and consequently my client is not guilty; so the king's counsel agree, that if there be but one witness, he cannot be convicted, the law is plain in the case. Now to make it out that here is but one witness at most, we have offered you several objections, and made them out by evidence, against the testimony of Mr. Goodman; that he is not a person fit to be believed; and if he be out of the case, then does Mr. Porter stand alone, and all will amount but to

one witness, suppose it should be granted that his testimony were true.

First, we have read a record of conviction against him, of a crime, one of the greatest next unto treason, that is known in our or any other law. That he hired a man to poison two dukes, branches of a noble family, to which he had such great obligations, as all mankind do know, and he himself cannot but acknowledge; and if there were not that aggravation in it, of his obligations to that family, yet to lie in wait to murder and poison, is such an offence as any age can seldom shew the like. And the objection is not so very easily answered as they would have it; nor can it be so soon passed over as they think, by saying he is a witness of a confederacy with which the prisoner is accused, a crime greater than the thing objected. It is true, none can bear testimony in such a business but he that is a party: But, we say, if these persons who come and set up themselves for witnesses, were not *probi Homines*, and did not appear to be persons of indifferent credit between man and man, and did not stand impartial in the eye of the world in other respects before, then they are not to be believed, as to what they charge themselves and others to be guilty of. Now, if Mr. Goodman stand convicted of such an offence as this that is alleged against him, though he is pardoned by the act of parliament, or satisfaction acknowledged upon the record, though it be even the very next term, yet that does not purge him from the infamy and disgrace, or from the imputation of being concerned in so villainous a design. It is impossible that he should be a good witness that would be engaged in such a matter, especially when we have those various witnesses, and such a concurring testimony, that what he has sworn is absolutely false.

Gentlemen, if there were nothing but his own testimony in the case, there would be no question at all in it: And as to capt. Porter's testimony about his being there, we have produced three witnesses, who, if they be of credit, then Mr. Goodman is not to be believed, but is falsified throughout; for it is not the question, whether Mr. Cook went away before the consultation and the resolution; for if my lord of Aylesbury or my lord Montgomery went away, Mr. Goodman is falsified in that, and consequently you ought not to believe him in the rest; for he actually swears, that my lord of Aylesbury, my lord Montgomery, and those other gentlemen, were all present, and at the consult, and did consent and agree to the Resolution, by using these words; Yes, you may; Yes, you may. Now, we say, there are three witnesses that swear, That my lord of Aylesbury was gone before he came there. I do not care whether he came there or not; that is not material: For if there were nobody there when my lord of Aylesbury was there but those that were at dinner, then Mr. Goodman was not there at any such consultation, as they would insinuate was at that time, in that place, and that company.

My lord, we have proved to you Mr. Cook's abhorrence and declaration, which we think, ought to go a great way in satisfaction of his innocence, at least to induce you to the favourable side; for, gentlemen, you are not brought hither to convict a man only, but to try and examine him and it is your duty to acquit, as well as convict, according as the evidence stands: It is your duty to go according to your consciences, and to declare whether he be guilty or not guilty, upon the evidence you have before you: You are to examine the truth of the fact in all its circumstances, and upon your own consciences to declare whether he is guilty or not guilty; now we propose it to you, and submit it to your consciences, that here are three witnesses that speak upon their oaths, against whom there is no objection that ever they were guilty of lying in wait to poison any body, nor in any plot for an assassination, nor any conspiracy for inviting an invasion from France, nor any other objection against them but they stand upright in the face of the world, and they three swear, That he was not there at that time. The answer, that we expect, is, That he might be there, and they not see him: and because it was possible he might be there, and they not see him, therefore it is no evidence that it is so: that's no objection; for you will take it as the nature of the thing will afford, be no better evidence than this; that they and the matter itself allow. Now there can went in and out continually; the drawers, and the master of the house five or six times himself, were in the room, and they say, there was no such person there. Why then it is very improbable, if not impossible, that any such man should be there. The one swears, he came down from my lord of Aylesbury just before he went away; and another says, he followed him out of the room; and the master says, that he met my lord of Aylesbury at the stairs head. All which falsifies Mr. Goodman in that particular, that he was with my lord of Aylesbury at the stairs-head, when he went away. These are incompatible; and if we falsify him in any one thing, he is not to be believed in any other.

Then, gentlemen, we offer to your consideration an answer to another objection: They say these witnesses seem to swear, that he was not there at all. We are not concerned whether he was there afterwards, or not: If you are satisfied, that he was not there, as our witnesses swear, while my lord of Aylesbury was there, that's enough. But then they make an objection, How comes the master of the house to remember my lord of Aylesbury's going away, more than any body else? Gentlemen, you know the nature of the thing shews, not only that it was more probable the master of the house should make his observations near the time of dinner, rather than afterwards at night, when there is more hurry: But it is more probable he should take notice of it from the quality of the person, from the

discourse he had with him about the white-wine, which was a good medium to refresh a vintner's memory, it being a matter in his own trade, and that might make him call it to mind.

Therefore, gentlemen, we think these three witnesses stand free and clear in their credit; and being so, are inconsistent with Mr. Goodman's testimony; and we hope in favour of life, the credit inclines on their side, especially when the question is, whether a man shall be executed for treason who never fled for it, who was never charged with any treason or treasonable practices before; nay not so much as with any particular crime or immorality: And whether three witnesses shall be believed against whom there is no objection, rather than two, against one of which there are such objections.

My lord, we are not now debating or attacking the evidence of the plot, or arraigning the former judgments against the conspirators that have suffered; but, gentlemen, we are putting you upon a serious enquiry, (as God and your own consciences shall incline you) whether our client be guilty or not guilty upon this evidence; that is, whether Mr. Goodman swears true, or not. We hope that we have given you sufficient satisfaction, that upon Mr. Goodman's part the evidence is insufficient; and we hope you will accordingly find our client not guilty.

Att. Gen. If Mr. Cook have any thing to say himself, I desire he may say it now, before we begin.

Sir B. Shower. No, pray go on, Sir.

L. C. J. Treby. Mr. Cook, would you say any thing yourself, before the king's counsel sum up?

Cook. The little I have to say, my lord, I will speak now, or by and bye which you please.

L. C. J. Treby. You must do it now, because after they have summed up, there is nothing more to be said by you.

Cook. My lord, I thank God, I have lived a life, I hope, as good as any man, and have often received the blessed sacrament; I have done it constantly, and shall do it speedily, by the grace of God, as soon as I can have a minister come to administer it to me. I did offer it to my own father, when he came to me, and told me, If I would confess this thing I should not come to trial: I told my father, I would not for ten thousand worlds take away the blood of an innocent man to save mine. I thank God, I am in a very good way to die; I have, for at least this last year, frequently received the blessed sacrament; and how I have lived, every body in the court that knows me can tell, my life and conversation has been as regular as any man's, and I am as ready to die to-morrow, if occasion was for it, (I thank God) as any one; I will receive the blessed Sacrament upon it; and it is not for life that I would do any thing that is wrong or unjust: I do love my nation, and I love the quiet of the nation; I never was for disturbing the government that now is; and I ever was against foreign forces or an invasion, for I never thought of one, or

heard of it, but with abhorrence and detestation: and I do assure faithfully, I should be sorry to disparage Mr. Porter's evidence, because I would have every body that was concerned in that horrid and barbarous crime to suffer; in God's name, let them all suffer. I thank God, I never knew any thing of it, nor of a French invasion: and I would say more of it, but that I would not hurt Mr. Porter's evidence, whose discovery of that bloody business has done so much service. As for Mr. Goodman, as I hope to receive the blessed sacrament, and may I perish, when I do it, if I speak an untruth; I would not for any thing, no, not for the good of my country, have innocent blood spilt; I would lay down my life to serve my country, but I would not have my blood be lightly lost; and how little a man soever I am, my blood will lie as heavy upon the nation as any the weightiest man's can do. I do not doubt your lordship's justice, nor the jury's; but I pray, my lord, observe, though it is usual not to own things at the bar, yet do not make this denial as of course, but out of truth; and I do assure you, in the presence of the whole court, if I should suffer for this, I must at my last moments either confess or deny something: and, I say, I do assure, in the presence of the whole court, and I will take the blessed sacrament upon it, that I must, at my death, deny this whole matter, and that ever I did see Mr. Goodman at all there; I do not think I saw him: I do not remember I saw Mr. Goodman at all, except once in Germain-street, when the coach broke, and that must be but in passing by neither, and he would have hurt or killed the coachman, and we kept him from it; and I walked with him half the length of Germain-street, before I knew who Mr. Goodman was. If ever a one of those gentlemen, that are men of credit and honour, can say I was any ways so inclined, or that they ever saw me, or knew me, that I ever bought a pistol or a blunderbuss, or the like, may God sink and strike me dead; and the blessed sacrament which I intend to receive be my curse and damnation, if I knew of king James's coming, till after the whole town rang of it: I had no hand in the invasion; and, besides my abhorrence of introducing foreign force, I desire your lordship and the jury to consider the circumstances of my case, that I had but a very small allowance from my father, and therefore it is not probable I should take upon me to join with my lord of Aylesbury, and my lord Montgomery, and those other gentlemen to send Mr. Charnock into France to invite over a foreign force: and I call God to witness I had no hand in it. I beg your lordship's pardon for all this trouble; I would not hurt Mr. Porter's evidence, for the reasons that I have told you; but this is for my life, and I do not so much value that as I do truth and sincerity; and I shall receive the blessed sacrament, if I die, that I never did do so. Indeed I never did take the oaths, nor did I ever refuse them, because they were never

offered me; but I would take the oaths now if they were offered me. My lord, I beg your pardon for this trouble.

L. C. J. *Treby*. Have you done, Sir? Have you said all you would say?

Cook. Yes, my lord.

L. C. J. *Treby*. Then, you gentlemen of the king's counsel, will you conclude?

Sol. Gen. May it please your lordship, and you gentlemen of the jury, I am of counsel in this case for the king, and I could have been very glad this gentleman's defence that he has made had been stronger than in truth it has been: and I should have been very glad too, that his counsel had been able to have made it better for him; but that he and they may be satisfied, as much is done as the case will bear; they have had all the liberty in the world to make his defence they could desire, nay, more than in strictness could be allowed them.

Gentlemen, our evidence is very positive against the prisoner at the bar, and for the highest crime that the king's subjects can be guilty of, by the confession of the gentleman himself and of his counsel. We have, I say, two positive witnesses against him; they say they are not legal ones: I must own, if we have not two witnesses, we have never an one; for whatsoever falsifies Mr. Goodman's testimony, falsifies whatsoever Mr. Porter has sworn. Now, the evidence that Mr. Porter has given against him is this: he says, there was to be a meeting at the King's-head-tavern in Leaden-hall-street, and there they consulted of the methods to bring back king James hither; and it was thought the best way to send to king James to invite the French king to send 1,000 horse, 1,000 dragoons, and 8,000 foot, to land here in this kingdom, where they would meet him with 2,000 horse. They pitched upon a very proper messenger, Mr. Charnock, a person that has been attainted, and has suffered for high-treason; he was to be sent into France upon this errand; Mr. Cook, the prisoner at the bar, was one of the persons that were there at that time, and he was consenting to this message; and Mr. Porter gives you a particular token relating to the prisoner, for he remembers the prisoner did kneel upon the chair, and leaned his elbows upon the table when he consented.

Mr. Porter goes further, and tells you, That Mr. Charnock would have another meeting, to know and see whether all the company were of the same mind they had been: and, that afterwards they met at Mrs. Mountjoy's house, and there the prisoner at the bar was present, and consenting to the same thing: thereupon Mr. Charnock went into France, and came back again, and said, the French king could not spare so much force. Mr. Goodman gives the same evidence that Mr. Porter had given: It's true, he was not at Mrs. Mountjoy's tavern, but he tells you withal, he spoke with Mr. Charnock when he came back from France, and Charnock returned him the same answer he did to Mr. Porter, that the French king

could not spare so many forces. This is the evidence in short, gentlemen, that is given against the prisoner; and if this evidence be true, then he is guilty of the crime for which he is indicted.

Against these witnesses they have produced, first, a record of conviction against Mr. Goodman, and that was for hiring one Amydei to poison the duke of Grafton and the duke of Northumberland: they have produced the record whereby it appears, he was convicted, and fined 1,000*l.* and was to find security for his good behaviour during life; and he was to lie in prison till the fine paid, and security given: but it happens, in that very record it appears there was satisfaction acknowledged upon that, even the very next term; and that gives a great deal of suspicion to believe, that the evidence that was given was not much credited; for, though the counsel for the prisoner has said, that it was the payment of the 1,000*l.* that was the satisfaction; no, it is not so, it is a satisfaction of the whole judgment, for finding security as well as the fine. They say he was not able to pay the fine, and there is nothing appears of the other parts of the judgment being complied with, but the whole judgment is set aside.

But all this does not make a man no legal witness; if they thought this conviction tended to set aside his evidence, they would have produced it at another part of the trial, than where they did: that is, when Mr. Goodman was first called to be sworn as a witness, then they should have produced this record, and said he had been no witness: but they knew well enough that that was no exception against the legality of his evidence, but tends only to his credit, and nothing else. Now, though it be a black crime to endeavour to poison another, yet that does not totally destroy any man's credit; if it did then the other gentleman, Mr. Porter, has confessed himself guilty of a greater crime than that for which Mr. Goodman is convicted by this record; for he owns himself one that was in that design of assassinating the king. And Mr. Goodman owns himself too guilty of a greater crime than what is objected to him, which is that of high-treason; and, I hope, if he may be believed, when he owns himself guilty of high-treason, which is a greater crime than poisoning a private subject; or guilty of such a design as the assassination of the king, which Mr. Porter has charged himself with, and notwithstanding which, they have not offered that as an exception against Mr. Porter's evidence, (for they very well know his evidence has been received, and credited:) Mr. Goodman may be credited, though guilty of the crime objected to him: and the constant practice in all trials of this kind hath been, that it does not take away the witness's evidence, however it affects his credit, which in this case is supported by the concurrent testimony of Mr. Porter. And so then, I say, we have two legal witnesses (notwithstanding all the exceptions) to prove Mr. Cook guilty of the crime for which he is indicted.

Then they go on further, and produce other witnesses: First, they produce one Edwards, a person that is committed for high-treason himself, and under suspicion of his being to be one of those that was to have a hand in the assassination; but his evidence goes no further, than that Mr. Goodman told him he was to be a witness against Mr. Cook, and either he the witness, or Mr. Cook must suffer: and that it was a foolish thing to be hanged. My lord, there is nothing at all in this matter that takes away Mr. Goodman's evidence: It is very plain Mr. Goodman had forfeited his life, and must do something to save it, and I think he could not do a better service to entitle himself to the king's mercy, than to discover those that were equally guilty with himself. It was his duty to have done it, if he had not been in danger; and if he hath done no more than what was his duty, I hope that is no objection against his testimony.

They have produced likewise a drawer of the King's-Head tavern, one Crawford, and he says he attended in this room while this company was there. But then he goes a little further than the counsel, or the prisoner would have had him; for they called him to prove that Mr. Goodman was not there when my lord of Aylesbury, my lord Montgomery, and Mr. Cook were there. But when the drawer comes, he knows nothing of Mr. Goodman's being there at all: he says, Mr. Cook was there, but not Mr. Goodman; and yet he does acknowledge, that Mr. Goodman might be there, and he not see him come up. He acknowledges he attended upon other company as well as well as this; so that it is plain in the nature of the thing, and his own confession, that Goodman might be there. This cannot take off the positive evidence of Mr. Goodman, and Mr. Porter, who both swear, that Goodman was there.

But then they produce another drawer, and that is one Huntly; and he gives the same account; only indeed he says, he was there all the while they were at dinner: but that is nothing, because it is acknowledged both by Mr. Porter and Mr. Goodman, That he was not there at dinner-time, but he might be there after dinner, and yet Huntly could not see him at dinner: he tells you likewise, he passed up and down in the room afterwards, and did not see Mr. Goodman there; but yet he might be there, and he not see him.

Then they produce the master of the house, and he gives much the same evidence in effect which his servants do, that he did not see Mr. Goodman there all the while; but he says something that is a little incredible; he can be positive that Mr. Goodman was not there while my lord of Aylesbury was there, but he cannot be positive he was not there afterwards. He tells you, he met my lord of Aylesbury and my lord Montgomery upon the middle of the stairs coming down, and he is sure Mr. Goodman was not in the room at that time. Now, is that possible that he can be sure of that, when

he owns (and cannot but own) that Mr. Goodman might go into the room, and he not see him: so that he has made a strain in his evidence that it is very little to be credited, which was not designed so much for the advantage of Mr. Cook as for the advantage of somebody else: and, in itself, it is almost an impossible thing that it should be true, by what he offers as the reason of his evidence.

But then, Gentlemen, you are to consider, that all these three witnesses, if they swear true, do falsify not only Mr. Goodman, who swears that he was there; but they likewise falsify the evidence of Mr. Porter; and for that reason I asked Mr. Porter the question, Whether he did not give the same evidence against sir John Freind? And if what he swears now be not true, neither was it true when sir John Freind was tried, for he was the only witness at that time against sir John Freind, for this meeting; and therefore these men's testimony tends to overthrow both witnesses as well as one: and I must tell you, that if Mr. Goodman be not a legal witness, because he has sworn a thing that is not true, then Mr. Porter is not a good witness, who has sworn the same thing, viz. That Mr. Goodman was there; and then you ought to acquit the prisoner, because there is no witness against him at law; for there is the same evidence against Mr. Porter, that there is against Mr. Goodman as to this matter.

Then, Gentlemen, as for the character of Mr. Cook, they say he is a good English Protestant, I hope he is so; but it is plain, that religion does not vary the case: it is within the reach of every man's memory that is here, that the same things have fallen upon other gentlemen that have had the same character, particularly sir John Freind, and sir William Parkyns, who both said the same things, in the same place, that they were true Protestants of the Church of England. But that is no manner of evidence that will be weight against positive oaths.

Now, Gentlemen, it is fit likewise you should reflect upon another thing: what is it that should engage Mr. Porter, and Mr. Goodman, or invite either of those two gentlemen to give a false evidence against the prisoner at the bar? It does not appear that there was any injury done by him to them, to provoke them to it; so that it could be for nothing but for the sake of truth.

It has been further said on the behalf of Mr. Cook, that he abhorred the French, and any invasion upon his country, and the like: it is a matter that is easily said; and it has been said by others that have been in the same place where he now stands, that they hated all plots, and they might punish them if ever they caught them. But these are only sayings, and nothing else. If there can be any constructions made of the evidence given by these two witnesses, that does not directly prove the indictment, then the prisoner ought to be acquitted: but if there can be no other construction made, but only, that there was a plain design to send Charnock into France to king James, to per-

suade him to prevail with the French king, to come and invade us with a foreign force: and if our witnesses are legal witnesses, (as, I doubt not, my lords the judges will tell you they are; if there be no exception to the credit of Goodman, but only that he was in such a design of poisoning the two dukes, which is really no objection of discredit to his testimony); then, with submission, I think there is no room left for you, gentlemen of the jury, to doubt, but that the prisoner is as guilty of this crime laid to his charge, as any others that have been tried and condemned for the same: and so, gentlemen, I leave it to you.

L. C. J. *Treby*. Mr. Conyers, and Mr. Cowper, will you say any thing to this matter?

Mr. *Conyers* and Mr. *Cowper*. No, my lord, we submit it entirely to your lordship's direction; we have done on all sides, we think.

L. C. J. *Treby*. Gentlemen of the Jury, the prisoner at the bar, Mr. Cook, stands indicted here for high treason; there are laid in the indictment two sorts of treason; the one is compassing and imagining the death of the king, the other is adhering to the king's enemies. The evidence to prove these treasons seems to be joint; for, as to that of compassing and imagining the king's death, as well as to the other, the overt acts are meeting and consulting about the treason, and then agreeing and resolving to invite and procure an invasion from France, and to meet that invasion with an insurrection here. And the evidence is applied entirely to prove these acts:

Gentlemen, that these are proper overt-acts of compassing the king's death, I need not inform you, the law is very well known; and the prisoner's own counsel do acknowledge, that these are sufficient overt-acts of compassing and imagining the king's death: so that all which they defend him by is, the improbability of the testimony given against him.

Now, gentlemen, you are to consider and weigh well the evidence that has been given. By law, it is true, as they observe, there must be two witnesses. Here is no defect of number; that is acknowledged too; here are two witnesses; but the question is, whether here be two witnesses that deserve credit, and upon whose testimony you can find that the prisoner is guilty? The witnesses, gentlemen, are Mr. Porter and Mr. Goodman.

First, for the matter of their testimony, it is positive from them both; that you'll do well to observe. Mr. Porter tells you, That in May last, (which is now just a twelvemonth) there was a meeting of eight persons, that is, my lord of Aylesbury, my lord Montgomery, sir John Fenwick, sir William Parkyns, sir John Freind, Mr. Charnock, Mr. Cook the prisoner at the bar, and the witness himself, Mr. Porter; and this was at the King's-Head tavern in Leadenhall-street, and there these eight dined, and this was in order to consult about an invasion, together with an insurrection intended to be made for the restoring of the late king. After dinner comes in Mr. Goodman, he says;

and then they pursued this consultation, and came to a resolution to send Mr. Charnock into France, and the message was agreed upon which he should carry; and he was to go to the late king, and solicit him to obtain 10,000 soldiers from the French king, whereof 8,000 should be foot, 1,000 horse, and 1,000 dragoons. These were to make up the 10,000 men to invade this kingdom. And they resolved also, when this force should land, they should meet and assist this invasion with a joint force, that should consist of 2,000 horse. And to acquaint and assure him of this, was the message. But, he says, that Mr. Charnock was very cautious in it, and would not presently go upon this errand, but he would have further assurance that they were in earnest, and would make good what they did send him to propose, therefore he would have a second meeting; and a second meeting was had, and that was at Mrs. Mountjoy's tavern, and there they did renew the same resolution; and there were present my lord of Aylesbury, sir William Parkyns, sir John Fenwick, sir John Freind, Mr. Charnock, the prisoner at the bar, and himself; he does not know or remember whether my lord Montgomery, or Mr. Goodman was there. He says, Mr. Charnock did accordingly go into France, and he did return and bring back king James's thanks to them, but their desire could not be complied with; and he had his share of the compliments.

Now comes Mr. Goodman, and he says, That about the same time, viz. Mid-May, Mr. Porter acquainted him, there would be a meeting of some of king James's friends, at this tavern in Leadenhall-street. He says, That he did tell Mr. Porter, he doubted he should not be there at dinner, but he would come as soon as he could after dinner; and according to appointment, he did come after dinner, and there was this consultation and resolution that Mr. Porter speaks of, and says, that Mr. Charnock afterwards told him, he had been in France with the late king, and brought back the same answer that Mr. Porter speaks of; and he had the honour of thanks from the late king too.

Gentlemen, I must observe one thing to you, which does go very much towards the confirming what these witnesses say, and that is the agreement in their testimonies, though they were examined apart at the desire of the prisoner: You will find they agree in these several circumstances, in the time, that it was this time twelve-months; in the place, that it was at this tavern; in the number of persons that were there, which was eight before Mr. Goodman came in; in the number of horse, foot, and dragoons that were to be brought from France, and in those horse that were to meet them here: and besides, in those words of discourse upon the consultation and the resolution. And there is one circumstance more in which they do agree, and which is very particular: That when they came to deliver their consent to this message that Mr. Charnock was to carry, the rest sat, and Mr. Cook the pri-

soner did kneel upon the chair, and leaned upon the table. And this both of them do agree in. And after all the many questions asked in their separate examination, I do not find they disagree in any part of their evidence. So that, gentlemen, there can remain no question now, but whether these two witnesses are men of credit? or, whether there has been opposed to them any such evidence as will make you believe, that (if not both) at least one of them has forsworn himself? They do produce nothing against Mr. Porter, whatsoever may have been produced at former trials against his credit: Perhaps what has been before has satisfied the objectors, and there is nothing appears against his credit; but he is not only a competent, but a very clear, good, credible, and undoubted witness.

But against Mr. Goodman they offer several things, which they say amount to a violent presumption that he is not to be looked upon as a credible witness: And first, they produce a record of a conviction upon an information against him, for attempting to poison two noble dukes: This he was convicted of, and fined 1,000*l.* and ordered to find sureties for his good behaviour during his life. But to this it is answered, that it appears in the same record; that satisfaction was acknowledged of the 1,000*l.* and all the rest of the judgment the very next term, and he was forthwith discharged, and that without paying the money, which (it was observed) the prisoner's counsel said Mr. Goodman was not able to pay at that time, no more than he could 20,000*l.* and thereupon the king's counsel say, that the government was convinced that he was wronged by a causeless prosecution, and the evidence against him was found not to be credible. And besides, Mr. Goodman stands pardoned by several acts of pardons, as well as other subjects.

Then they produce one Edwards, who is a prisoner here, and committed for suspicion of high-treason, and for treasonable practices: he is, no doubt of it, a witness for all that: for that is but an accusation upon him, and does not take away his credit. He tells you of a discourse that he had with Mr. Goodman, and that Goodman asked him when the prisoner was to be tried; and he told him he would be tried such a day; and when it was asked what it was for, it was answered, Not for the assassination, but for sending Mr. Charnock into France. He asked then who were the witnesses against him? Mr. Goodman said, Mr. Porter and himself. And further said, that he understood that Mr. Cook had sworn against him (though he would give an account of nobody else) and had no pardon, and either he must hang, or himself. And then he talked lightly of the business of hanging, and said it was a foolish thing to be hanged, for all that people would say, was, that such an one hanged handsomely, or died bravely. This indeed is a sort of discourse as if Mr. Goodman did apprehend himself in danger from Mr. Cook's evidence; and yet I cannot see that it

does at all falsify the evidence of Mr. Goodman: he may be a true witness, and yet he might say he was to give evidence against Mr. Cook, and it was in Mr. Cook's power to give evidence against him, and that truly; and if both were in the guilt, they were in danger of one another. But for a further answer, the king's counsel have produced Mr. De la Rue, who says, that he knew Mr. Edwards, and that he was a Scotchman, and reputed chaplain to the viscount of Dundee; that he went formerly by the name of Douglas, and by that name he was set down and described in the list that Mr. Charnock sent to captain Porter; and to that name he answered in the Press-Yard lately. Now it is certain, that Mr. Charnock's putting of his name in that list, is no evidence of his being guilty in Mr. Charnock's treason. But his going by two names doth justly lay him under some suspicion. But the evidence that the prisoner seems to rely upon most, is what evidence has been produced against Mr. Goodman in that point of fact, by the master and the two drawers; the first of the drawers name was Crawford, and he does tell you, that about twelve months ago there was this company at dinner there: my lord of Aylesbury, my lord Montgomery, sir John Freind, sir John Fenwick, sir William Parkyns, captain Porter, Mr. Charnock, and the prisoner, though he did not then know his name, or the name of one or two more of them. I observe, by the way, that his testimony so far does verify theirs, that there were eight of them there, but he says he did not see Mr. Goodman there, nor any but those that dined there. And my lord of Aylesbury went away, as he thinks about four o'clock. He cannot say that the prisoner was there, or was gone at that time before Mr. Goodman came in; for he did not see Mr. Goodman there at all, he was not in the room all the time, but he was to and fro attending till my lord of Aylesbury and my lord Montgomery went away in a coach that was called, and when they were gone, the rest of the company staid there a good while; being urged to tell how long, at last he said it was dark; and that agrees with Mr. Porter, who says, it was about nine o'clock when they went away. He says he was there once or twice after my lord of Aylesbury went away, but he never saw Mr. Goodman that he remembers at all, till last Saturday, in all his life. As to this, the king's counsel say, that it is only a negative evidence, and in which a man cannot be absolutely positive, but can only speak according to his observation and memory, which might not be perfect, and Mr. Goodman might be there in the mean time of his going in and out: that is possible; and so it must be left to you to consider of it.

Then there is Huntley the other drawer, and he says my lord of Aylesbury went away about that time, and that he did not see Mr. Goodman there at all, nor ever in his life till now; neither does he remember that any body came to them after dinner, and if any fresh

man had then come in, he thinks he should (going often in to them) have known him; and says, that he attended this company only: and he had seen sir John Freind and sir William Parkyns there before.

Then Mr. Cock, the master of the house, was produced, and he names all the eight persons that did dine there; and so far he confirms the king's evidence: he thinks that my lord of Aylesbury and my lord Montgomery went away privately (as it seems they had come) in a hackney-coach, and that it was about four o'clock; and he says, he did not see Mr. Goodman there, and he does not know that he ever saw him till now: but when he was cross-examined by the king's counsel, he does acknowledge that he might possibly come in after dinner, and before my lord of Aylesbury went away, and he not see him, because he was not there all the time; he says, sir John Freind used to dine at his house, and came to his house once a-week; and he had seen some of the rest, but they did not frequent his house as sir John Freind did: he says, the company dined about two o'clock, and the last of them staid till about eight or nine, and that the door was shut as is usual when company is in a room, but nobody was forbid to come there.

But to establish the credit of the evidence on the king's part, they did produce Mr. Goodman and Mr. Porter again: Mr. Goodman does acknowledge so far to be true, that my lord of Aylesbury went away first; but says, that himself was not wholly a stranger to this house, for he had dined there four or five times with sir John Freind; and particularly one time, he being sick, and asking for some brandy, the master of the house said he would help him to some of the best in England, and Mr. Goodman would have bought some of him. But the master seems not to own that, and says, he does not remember any thing of it.

But then comes Mr. Porter again, and he says positively, that Mr. Goodman was there, and that he did speak with the company, and complimented my lord of Aylesbury when he went away, and went part of the way towards the stairs with him; and he does well remember it by this token, that when Mr. Porter was told Mr. Goodman was below, he mentioned him in the company as a trusty man, that was fit for the conversation, and then Mr. Porter went and fetched him up; and Mr. Goodman was there near two hours, and they discoursed all this matter in that time, in the presence of the prisoner and the rest; and he says it was about six o'clock before my lord of Aylesbury and my lord Montgomery went away, and then there was opportunity enough for this discourse and consult that they speak of.

The prisoner has offered another sort of evidence: first, the confidence of his own innocence, that he was abroad three weeks after this conspiracy was discovered; and they have produced Mr. Treganna, Mr. Peachy, and Mr. Nicholls, who prove that he never ab-

scolded, but was abroad, and appeared openly (for three weeks after) till such time as he was taken. This the king's counsel say is no proof that he is not guilty, and their evidence untrue. They say he might have a confidence, and the rather because he is not charged with the assassination; for at that time these witnesses speak of, nothing was discovered and public but the assassination; for it was before sir John Freind's trial; and then was the great discovery of the secret of the invasion.

Then he shews farther as to his conversation, that he is a man of a very sober life, never was known to swear, that he drinks but little, and is a godly man, and often says his prayers. As to that, the king's counsel on the other side tell you, that has been pretended to by other people too; and the question is not about religion, but this fact that you are now to try. Whether he be so religious, or no, as he pretends, or whether he be sincere in his devotion, that is not so much the matter now; but the question is, Whether he has offended in this kind as he stands accused? They produce a gentleman, one Mr. Hamond, and he says that he is a very conscientious man, and particularly is a great lover of his country; and he has often heard him declare a detestation of an invasion by a French force, and wish success to the fleet; but that which he remembers chiefly, was about the time of the discovery of this Plot. The king's counsel answer to this, that a man may use such kind of expressions, perhaps, to cover his guilt; and in the reply to sir Bartholomew Shower's observations, it was taken notice of by Mr. Solicitor, (what we all cannot but remember) that the like evidence was given as to sir John Freind, that he did detest an invasion, and was present at the common-prayer when king William was prayed for, and declared against Plots; and that if they caught him in the corn they might put him in the pound. These things a man might say, and it is the lightest evidence that can be given, being discourses out of men's own mouths, who will never proclaim their own guilt; and therefore it is the weakest defence that can be offered. But, gentlemen, you are to consider the other evidence that has been produced by the prisoner, given by several witnesses, and who are upon their oaths now as well as the king's witnesses. And his counsel say their witnesses, but particularly the three upon whom they chiefly rely, have no objection made out against them; and no man's testimony ought to be presumed to be false. And it must be taken notice of, that they can speak only according to their belief, grounded on their observation and memory, that they did not, so far as they observed, or remember, see Mr. Goodman there, as it was most probable they should if he had been. But it is possible they might overlook, or forget; the rather for that they were not of the company, but in and out, up and down; and Mr. Goodman was not there at

dinner, when their attendance was fixed and constant.

It ought to be considered also, that here are several circumstances, some of which seem very pregnant. It is agreed on all hands, that the prisoner dined there with those other seven persons, concerning four of whom we must conclude nothing; but concerning three of them we in this court may take notice, they are attainted of high-treason, and so it is evident that the prisoner was for a long time a companion of three traitors, and had a conversation with them. I do not find that he had any occasion to be there; nor any of the rest of the company. Concerning my lord of Aylesbury, indeed, it is said he proposed to treat about a hogshead of white wine. But that seems to be casual, and not the end of his coming, and dining with this company there. But be that how it will, that relates to his lordship alone. But for the others I do not find they do pretend any occasion of meeting there; and therefore it leaves it the more suspicious: and it is the more so, because it was managed so privately and cautiously. They were not attended according to their qualities. The lords went away together in a hackney-coach that was called, as they had come thither in another. The rest thought fit to stay there till it was dark: and as soon as it was so, went away. There was some extraordinary cause for all this. It did import the prisoner to shew that it was for some good cause and purpose.

And further, it is observable that this house was a place which, as the master says, none of this company did use to resort to except sir John Freind: which makes it probable (this being a house that sir John Freind frequented, and none of the others) that he bespoke this place, and brought the rest thither: and if it were so, that makes it more probable that there was such a treason there to be hatched, as is evidenced by the king's witnesses; for you may remember, and it appears by the record in this court, that sir John Freind was indicted and attainted (not for the assassination, but) for the treason for which the prisoner is now a-trying, an invasion that was to be supported with an insurrection. Now if sir John Freind was chiefly acquainted with this house, and brought this company together, it is very probable it was about this business which sir John Freind was so concerned in. And that he is attainted for it, appears upon the record before us; which should be read: but that the prisoner's counsel admit it, and are so far satisfied in it, that they won't arraign the verdict; nay they did acknowledge that there was a plot; and there was no doubt of it, there was such a plot.

Now then, Gentlemen, here it is certainly proved by these two witnesses, (and not gainsaid by the prisoner's own witnesses) that there was such a meeting, and that the prisoner was there; and they both have positively sworn that this treason was committed there. You have heard what has been objected to their

credit; they have delivered their testimony upon their oaths, and so, gentlemen, you are upon your oaths; if you are satisfied and can take it upon your consciences, that these two witnesses are, or any one of them is, (if such distinction can possibly be made in this case) then you are to acquit the prisoner; but if you are satisfied, and think they have sworn true, you are to find him guilty.

Just. *Rokeby*. Nay, if one be forsworn, both are; for the evidence is intirely in all parts the same; and if Mr. Goodman be perjured, Mr. Porter is so too.

Sir *B. Shower*. Forsworn and perjured are hard words; we only say mistaken.

Just. *Rokeby*. Well, that objection goes to one as well as the other.

L. C. J. *Treby*. It must be so, since they speak of the same joint matter, viz. their being together in company. If Mr. Porter says true, when he swears that Mr. Goodman was there with him and the rest, Mr. Goodman must say true when he swears that he was there with Mr. Porter and the rest. There was one thing that I forgot: sir *B. Shower* observed, that it might be an invention of captain Porter, because he fixeth it in point of time to the month of May, that he does not say it was in April; for that then it would be within the pardon, which extends to April 29, last year; nor would he lay it in June, for then he was in Newgate, and others of them were dispersed by reason of a riot committed in Drury-lane: and this sir *B. Shower* alledges, was a piece of skill and contrivance: but, really, this is a piece of ingenuity in himself: for, besides that the king's witnesses affirm positively that it was in May, and remember it by a certain token, viz. That it was within a very few days after the king went beyond sea, one or two of the prisoner's witnesses (*Crawford* I am sure) did say that this meeting was this time twelve-month, and you know we are now near mid-May.

Serj. *Darnall*. If you believe our drawers for part, you must believe them for all.

Att. Gen. No, not so: my lord speaks only where they concur with our evidence. It were strange to expect we should disbelieve or doubt what the witnesses on both sides affirm to be true: but I do not think it would be to the advantage of the prisoner, if what his counsel proposeth were agreed to, viz. That the drawers (and their master too) should be believed for all they say, provided equally the king's witnesses should, in like manner, be believed for what they say. For the main thing controverted, is, Whether Mr. Goodman were at this meeting? These witnesses for the prisoner say, they did not see him there; at least they do not remember it. Mr. Porter, and Mr. Goodman himself says, he was there. Now, these things agreed, and admitted, would make a very consistent clear evidence, that Mr. Goodman was there, though the master and drawers did not observe, or do not remember his being there.

[Then an officer was sworn to keep the Jury, who withdrew to consider of their Verdict, and about three quarters of an hour after returned into court.]

Cl. of Ar. Gentlemen, answer to your names. Henry Sherbrook,

Mr. Sherbrook. Here, And so of the rest, &c.

Cl. of Ar. Are you all agreed of your verdict?—Jury. Yes.

Cl. of Ar. Who shall say for you?

Jury. Our Foreman.

Cl. of Ar. Set Peter Cook to the bar. [Which was done.] Peter Cook, hold up thy hand. [Which he did.] Look upon the prisoner; how say you, is he guilty of the high-treason whereof he stands indicted, or not guilty?—Foreman. Guilty.

Cl. of Ar. What goods or chattels, lands or tenements had he at the time of the treason committed, or at any time since?

Foreman. None to our knowledge.

Cl. of Ar. Then hearken to your verdict as the court has recorded it: you say that Peter Cook is guilty of the high-treason whereof he stands indicted, but that he had no goods or chattels, lands or tenements at the time of the high-treason committed, or at any time since to your knowledge; and so you say all?

Jury. Yes.

Cl. of Ar. Gentlemen, the court dismisses you, and thanks you for your service. [Then the court adjourned till 5 o'clock in the evening.]

POST MERIDIEM.

About 6 o'clock, the Court being by proclamation resumed, the prisoner convicted was brought to the bar in order to judgment.

Cl. of Ar. Peter Cook, hold up thy hand. [Which he did.] Thou stand'st convicted of high-treason, for compassing and imagining the death of his majesty king William the 3rd, and for adhering to the king's enemies: what can'st thou say for thyself, why the court should not give thee judgment to die according to the law?

Cook. My lord mayor, my eyes are very bad, therefore I desire your lordship would be pleased to take this paper, and that it may be read.

Cl. of Ar. Have you any thing to say in arrest of judgment?

Cook. I desire my Paper may be read.

[It was handed up to the court, and then delivered down to Mr. Attorney General, and the king's counsel, but not openly read.]

Recorder. [Sir Salathiel Lovell.] Mr. Cook, the court have read your paper you sent up, and have communicated it to the king's counsel; if you have any thing to move in an arrest of judgment, this is your time, and we will hear you; but as for any representation of your case to any others, that must be considered of afterwards; you are now called to your judgment.

Cook. I did not know that I might offer any thing afterwards; but if your lordships think fit to communicate that to my lord justices, I submit it to you.

Recorder. Mr. Cook, there is nothing appears upon this paper that is matter of law, and so not serviceable to you now, and therefore what you desire in it the court will consider of afterwards.

Cook. I do not understand the law, my lord, but I have heard the court ought to be of counsel for the prisoner, and I desire I may not suffer by my ignorance.

Recorder. I declare it, for my part, I know nothing that you can have any advantage of in arrest of judgment; if I did, you should not lose the benefit of it, and you have had your counsel assigned, who have pleaded for you without restraint; and if there had been any matter of law that would have availed you in the arrest of judgment, no doubt they would have laid hold of that advantage for you.

Cook. I cannot tell, my lord, what is matter of law.

Att. Gen. Your lordship observes, they took all the objections that they could to the indictment, but there was none that they could fix.

Cl. of Ar. Then, crier, make proclamation. [Which was done on both sides of the court.]

Crier. O yes. All manner of persons are commanded to keep silence while judgment is in giving, upon pain of imprisonment.

Cook. My lord, may I have my paper again?

Recorder. If you think it may be any service to you to leave it with the court, you may do so; or if you desire it, you shall have it again.

Cook. I desire your lordship to keep it.

Recorder. I will receive it, and it shall not be buried, I assure you.

Cook. I do not hear what the court says.

Recorder. You say you did not hear what was said to you: if you desire to have your paper again, you shall have it; but if you desire to have it communicated above, the court will consider it, and take care of that too.

Cook. I desire your lordship would do it.

Then the Recorder proceeded to give judgment.

Recorder. Mr. Cook, I think it useful to the public, and also at this time to you, to observe, That the reign of the late king James was, throughout, one entire design and project formed, in conjunction with the French king, totally to subvert our religion, laws, and liberties; which grew so apparent to the subjects of these nations, in so many instances of fatal consequence, managed in such a method, and advanced so far, that the people of these kingdoms, of all qualities, ranks and degrees, did find it absolutely necessary for the preservation of themselves and the neighbouring nations now in alliance with us, to pray in aid of the then prince of Orange, as a person not

only nearly allied to this crown, but also intirely in the interest of these kingdoms, and those neighbouring princes and countries that lay exposed to the violence and ambitious insults of France. And the love which that noble prince did bear, not only to us but to our neighbours also, disposed him to embrace that invitation; upon whose arrival here, that predecessor, from motives that were invisible, declined the kingdom and the government, and left the people to themselves; whereupon his present majesty was necessarily and rightfully placed upon that throne he so well deserved: And this is now that king, for whose preservation all good people have associated, and spare neither lives nor treasure to support and to continue in the government; and this is that king whom you have traitorously conspired, not only to dethrone, but also to destroy; and this is that people that you would have to swim in blood, and lose their religion, liberty, and property. These matters need a history to relate at large; I only touch them shortly, to move good men to rejoice in their deliverance, and to move you seriously to reflect upon the heinousness of your crime.

Mr. Cook, you are an Englishman, and must needs know, that in this place we frequently condemn to death clippers, coiners, thieves, and robbers, and other such like criminals, and that justly and necessarily too, for the preservation of the innocent, and for the common good. Of what condemnation must you, and such as you, be worthy then, who have so horridly endeavoured and designed the fatal ruin and destruction of your own native country, and to render your fellow-subjects a miserable prey, and at the best to become slaves and vassals to a foreign prince?

Let me also mind you, that nothing is more sure, than that after this, you must receive a judgment in another world; and if that pass against you too, that sentence will be most terrible, and your sufferings without end: And therefore I do advise you to employ the few days you have yet to live in preparation for your future happiness, which cannot be duly done without a full confession of this, as well as other crimes you have been guilty of: I therefore charge it to you as your duty, and leave it with you at your utmost peril, that you honestly and faithfully discover all you know of this inhuman and traitorous conspiracy, and all the persons that you do know to be guilty of it: This will be the greatest service you can do in this world, and will be the best preparatory step that you can take towards a better. And, Sir, there now remains no more for me to say, but to pronounce that Sentence on you which the law directs: and that is this:

‘ That you, Peter Cook, be taken hence to
‘ the place from whence you came, and thence
‘ be drawn upon a hurdle to the place of execution, where you are to be hanged by the
‘ neck, and cut down before you be dead; that
‘ your bowels be taken out, and your privy-

'members cut from your body, and both burnt
'in your sight; that your head be cut off, and
'your body divided into four quarters, which
'head and quarters are to be at the king's dis-
'posal; and God Almighty have mercy upon
'your soul.'

Cook. I beg, if your lordship please, that I may have my relations and friends come to see me, and some divines, the better to prepare me for another world.

Recorder. Mr. Cook, if you will give the names of those that you would have come to you to the officer, care shall be taken in it; and you will not be denied any reasonable helps that may be had for your preparation for eternity.

Att. Gen. It is not fit he should be denied any reasonable help; but in the mean time there is reason for the government to be cautious, upon the account of what has notoriously past in the case of some others.

Recorder. If he give in the names, it will be considered of, and care taken that nothing be done but what is reasonable and safe.

Then the Prisoner was taken from the bar, and the Court proceeded to what was remaining of the business of the sessions.

He was afterwards pardoned, upon condition of transporting himself, and never returning any more to England.

The following Article (undated) is published in Dalrymple's Memoirs, Appendix to part 2, book 7.

Extract of the Examinations and Confessions of Peter Cook, son to sir Miles Cook. He was condemned for the Assassination Plot, but afterwards pardoned.

"He gives an account of his having been in France, several years ago; that he went on my lady Philips her business, but being there, was introduced to king James, and carried over the compliments of several persons to the king; particularly from archbishop Sandcroft, lord Ailesbury, lord Montgomery, sir John Fenwick, lord Clarendon, lord Litchfield, lord Huntingdon, lord Weymouth, sir Edward Seymour, and others; he brought back messages to some of them, and was bid to see the marquis of Halifax, as being a man of honour, who received him very civilly; he brought over instructions from king James for the borrowing 6,000*l.* they were directed to lord Ailesbury, lord Litchfield, and lord Brudenell, but they all excused it.

"Mrs. Iron sent him advice of the La Hogue business, which he communicated to lord Halifax, whereupon he found him uneasy at his staying longer with him, and told him he knew what he had to do.

"He says at that time, there was a meeting at a tavern in Holborn, where were the lord Brudenell, sir Theophilus Ogelthorpe, sir Francis Windham, major George Mathews, Mr. Bruce, colonel Fountaine, one Holmes, and several others: they advised with one another what they should do upon that invasion; it was resolved those who had horses should rendezvous towards Cane wood, and those who had none should get near the Tower, to join with sir John Freind's party. There was a regiment lined with yellow, which they were told they might depend upon."

390. The Trial of ALEXANDER KNIGHTLEY, at the King's-Bench, for High-Treason: 8 WILLIAM III. A. D. 1696.

THURSDAY, April 30, 1696.

THIS day the Keeper of Newgate brought to the bar of the court of King's-bench Alexander Knightley, by virtue of a writ of Habeas Corpus, issuing out of that court for that purpose, to be arraigned upon an indictment of high treason found against him at the sessions of Oyer and Terminer, holden for the county of Middlesex; which indictment by writ of Certiorari was removed into the King's-bench. The return of the Habeas Corpus was delivered, and then the prisoner was arraigned thus.

Cl. of Ar. Alexander Knightley, hold up thy hand. (Which he did). Thou standest indicted by the name of Alexander Knightley, late of the parish of St. Paul Covent-Garden, in the county of Middlesex, gent. for that you not having the fear of God in your heart, nor weighing the duty of your allegiance, but being

moved and seduced by the instigation of the devil, as a false traitor against the most serene, most illustrious, and most excellent prince, our sovereign lord William the third, by the grace of God of England, Scotland, France and Ireland king, defender of the faith, &c. your supreme, true, rightful, lawful and undoubted sovereign lord, the cordial love and true and due obedience, fidelity and allegiance, which every subject of our said lord the king, that now is, towards him our said lord the king should bear, and of right ought to bear, withdrawing, and utterly to extinguish, intending and contriving, and with all your force purposing and designing the government of this kingdom of England, under him our said lord the king that now is, of right, duly, happily, and very well established, altogether to subvert, change, and alter, as also the same our lord the king to death and final destruction to put

and bring, and his faithful subjects, and the freemen of this kingdom of England, into intolerable and most miserable slavery to Lewis the French king to subdue and inthral; the tenth day of February, in the seventh year of the reign of our said sovereign lord the king that now is, and divers other days and times as well before as after, at the parish of St. Paul Covent Garden aforesaid, in the county aforesaid, falsely, maliciously, devilishly, and traitorously you did compass, imagine, and contrive, purpose, design, and intend our said sovereign lord the king that now is to slay, kill, and murder, and a miserable slaughter among the faithful subjects of our said lord the king, throughout this whole kingdom of England, to make and cause; and your said most wicked, most impious, and devilish treasons, and traitorous compassings, contrivances and purposes aforesaid to fulfil, perfect, and bring to effect, you the said Alexander Knightley afterwards, to wit, the same tenth day of February, in the year abovesaid, at the parish aforesaid, in the county aforesaid, and divers other days and times, as well before as after, there and elsewhere in the same county, falsely, maliciously, advisedly, secretly, traitorously, and with force and arms, with very many other traitors to the jurors unknown, did meet, propose, treat, consult, consent, and agree him our said lord the king that now is, by lying in wait and deceit, to assassinate, kill, and murder; and that execrable, horrid, and detestable assassination and killing the sooner to execute and perpetrate, afterwards, to wit, the same day and year, and divers other days and times, at the parish aforesaid, in the county aforesaid, traitorously you did treat, propose, and consult with those traitors, of the ways, manner, and means, and the time and place where, when, how, and in what manner, our said sovereign lord the king, so by lying in wait, might be slain and killed; and that you did consent, agree, and assent with the same traitors, that forty men on horseback, or thereabouts, of whom you the said Alexander Knightley were to be one, with guns, muskets, and pistols, charged with gunpowder and leaden bullets, and with swords, rapiers, and other arms armed, should lie in wait and be in ambush, the same our lord the king in his coach being when he should go abroad to attack; and that a certain and competent number of those men so armed, upon the guards of our said lord the king, him then attending, and being with him should set upon, and should fight with them and subdue them, whilst others of the same men so armed, him our said lord the king should assassinate, kill, slay, and murder; and you the said Alexander Knightley, your treasons and all your traitorous intentions, designs, and contrivances aforesaid to execute, perform, fulfil, and bring to effect, afterwards to wit, the aforesaid tenth day of February, in the seventh year abovesaid, at the parish aforesaid, in the county aforesaid, divers horses, and, very many arms, guns,

muskets, rapiers and swords, and other weapons, ammunition, and warlike things, and military instruments, falsely, maliciously, secretly, and traitorously you did obtain, buy, gather together, and procure, and to be bought, obtained, gathered together, and procured, did cause, with that intent to use, employ, and bestow them in and about the detestable, horrid, and execrable assassination, killing, and murder of our said lord the king that now is, as aforesaid; and the same premisses the more safely and surely to execute, do, and perform, you the said Alexander Knightley, with one Edward King, late for high treason, in contriving and conspiring the death of our said lord the king that now is, duly convicted and attainted, by the consent and assent of divers of the traitors and conspirators aforesaid, in the said tenth day of February, in the seventh year abovesaid, traitorously did go and come to the place proposed, where such intended assassination, killing, and murder of our said lord the king, by lying in wait, should be done, performed, and committed, to view, search, and observe the conveniency and fitness of the same place for such lying in wait, assassination, and killing there to be made, performed, and committed; and that place so being seen and observed, afterwards, to wit, the said day and year, your observations thereof to some of the said traitors and conspirators you did relate, and impart, to wit, at the parish aforesaid, in the county aforesaid, against the duty of your allegiance, and against the peace of our said sovereign lord the king that now is, his crown and dignity, and against the form of the statute in this case made and provided. How sayest thou, Alexander Knightley, art thou guilty of the high-treason whereof thou standest indicted, or Not Guilty?

Knightley. Not guilty.

Cl. of Ar. Culprit, How will you be tried?

Knightley. By God and my country.

Cl. of Ar. God send you a good deliverance!

Knightley. With submission to your lordship, I did not expect, in this weak condition that I am in, to be brought at this time to the bar; that having taken me off extremely from the application that I should have otherwise made of myself to my defence; but seeing there is no mercy to be had here, I will endeavour to have patience, and undergo my fate as well as I can.

L. C. J. (Holt.) Mr. Knightley, you have no reason to find fault; for when I was acquainted you were ill, and desired a physician, I ordered one to be sent to you; and yesterday in the afternoon you sent word you were so sick, that you could not be brought hither to day; but your doctor was with me last night; and upon discourse with him, I did apprehend you were not so ill, but that, especially considering the weather, you might very safely be brought to the bar to day.

Knightley. The gentlemen that brought me the copy of the indictment found me very ill,

and I have been ill ever since this day seven night.

L. C. J. Well, now let us see what time we shall appoint for the trial.

Att. Gen. (Sir Thomas Trevor.) When your lordship pleases to appoint.

L. C. J. I think you cannot try it till Wednesday fortnight.

Mr. Clark. That day is free, my lord.

L. C. J. It being upon a *Certiorari*, the *Venire facias* must be returnable upon a common day; and there must be 15 days between the teste and the return.

Att. Gen. May it not be Tuesday, then, that the jury appear?

L. C. J. You cannot have it before Wednesday, for that is the return day.

Mr. Clark. Tuesday fortnight is appointed for the trial between Pride and the earl of Bath.

Att. Gen. Then it must be upon Wednesday. for there must be fifteen days between the teste and the return.

L. C. J. Well, take back your prisoner, and bring him here again on Wednesday fortnight; you shall have a rule for it. (Then the prisoner was carried back.)

WEDNESDAY, May 20, 1696.

This day being appointed for the trial of the prisoner, he was brought to Westminster Hall, and the jury were called over as soon as the court appeared in the hall, and the defaulters recorded; and about eleven of the clock the prisoner was brought to the bar.

Cl. of the Crown. Alexander Knightley, hold up thy hand. (Which he did.) Those good men that thou shalt hear called, and personally appear, are to pass between our sovereign lord the king and thee, upon the trial of thy life and death: If therefore thou wouldst challenge them, or any of them, thy time is to speak unto them as they come to the book to be sworn, before they be sworn.

L. C. J. (*Holt.*) *Mr. Knightley*, I perceive you have a desire to speak something; let us hear what you have to say.

Knightley. I humbly beg your lordship's leave, that I may speak before the jury be called. What I have to say, I beg I may have your leave to read, because I have a bad memory.

(*Reads.*) My lord, I hope to save the jury and the witnesses against me a great deal of trouble, and design to take up very little of your lordship's time: but in the first place, I think myself obliged to thank your lordship for your great indulgence, in granting me so much time between my arraignment and trial; the greatest part of which I have employed to appear before the great tribunal of heaven.

I speak in the face of the world here, that I am convinced I cannot hope to be happy hereafter, without a just abhorrence of, and a sincere repentance for that crime for which I here stand indicted.

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And since confession is an essential part of repentance, I do acknowledge I was to have been concerned in some part of the barbarous assassination, and was unhappily surprised into a consent to act in it, though in my heart I did abominate the fact as much as any man living; but under some honourable and fair pretences I was drawn in at first, and then of a sudden became so far engaged, that by a mistaken notion of honour, I thought I could not retreat without the infamy of cowardice.

My lord, I humbly crave your lordship's permission to acquaint you, how that some time since I was brought before some of the lords of his majesty's most honourable privy council, where I do assure your lordship, I did freely own and fully discover my being concerned in that horrid design: and I here openly confess the same, with that sorrow and repentance as becomes a man of honour and conscience.

My lord, there is one circumstance particular in my case, I most humbly beg leave to insist upon, and urge to your lordship in my behalf; which is, that it was upon my confession (as I conceive) that *Mr. Harris*, now a principal evidence against me, was first discovered; so that my own confession has been a great means to take away my life.

I expect after a few words now in this solemn court to receive from your lordship the Sentence due upon the conviction, from my own mouth, of a crime for which I cannot in modesty hope, so much above my deserts, the king's most gracious pardon; yet the greatness of my offence does not rob me of all thoughts of mercy, whilst I throw myself absolutely and entirely at his majesty's feet for it; and I humbly beg of your lordship as a privy-counsellor, that you would represent my unfortunate case to their excellencies the lords justices of England, as an object of his majesty's favour.

And now, my lord, I shall not detain your lordship and the court any longer, but my next words convict and lay me under the just sentence of death: so to my indictment I beg leave to plead Guilty, and throw myself entirely upon the king's mercy, and do desire my former plea to my indictment may be withdrawn.

Cl. of the Cr. Thou hast been indicted and arraigned of high-treason in compassing and imagining the death and destruction of the king; how sayest thou, Alexander Knightley, art thou guilty of the high-treason whereof thou standest indicted, or not guilty?

Knightley. Guilty, my lord.

Cl. of the Cr. Art thou content to withdraw thy plea Not Guilty?—*Knightley.* Yes, Sir.

Cl. of the Cr. Do you plead to the indictment Guilty or Not Guilty?

Knightley. I am Guilty.

Att. Gen. Then, my lord, we desire, since he relinquishes his plea of not guilty, that you will record his confession; and since he has confessed the indictment, we have nothing more to do but wait the judgment of the court.

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L. C. J. We shall not give judgment now.

Att. Gen. If the prisoner have any thing to say for himself, your lordships, I suppose, will hear him to it.

L. C. J. But I say, we cannot by the course of the court give judgment now; for after a person is convicted here, whether by confession or verdict, he ought to have four days from the time of such confession or verdict, to move in arrest of judgment, if there be so many days of the term remaining; if not, then the longest time that can be had in the term is allowed. In *Stayley's Case* * it was otherwise practised, judgment was given the same day; that was in the time of the Popish-Plot, and is a case not to be imitated, because not justified by any precedent before that time or since; but it has been always observed to have four juridical days for moving in arrest of judgment, if so many remain of the term.

Monday, May 25, 1696.

This being the last day of the Term, the prisoner was brought from Newgate to the King's Bench bar.

Att. Gen. If your lordship please, I desire the judgment of the court to be pronounced upon Mr. Knightley upon his conviction.

Cl. of the Cr. Alexander Knightley, hold up thy hand, (which he did). Thou hast been indicted and arraigned for high-treason in compassing and imagining the death of the king, and adhering to the king's enemies; what can'st thou say for thyself, why judgment should not be given against thee to die according to the law?

Knightley. I have nothing more to say, my lord, than what I have said.

Cl. of the Cr. Crier, make proclamation for silence. (Which was done on both sides the court.)

Crier. Oyez: Our sovereign lord the king straitly charges and commands all manner of persons to keep silence while judgment is in giving, upon pain of imprisonment.

L. C. J. Mr. Knightley, you are by your own confession convicted of high-treason in designing the murder of the king, and the subversion of the whole state of England, in promoting an invasion from the French, its most ancient and inveterate enemies.

It hath appeared before your arraignment, not only by the evidence that hath been given at former trials, but even by the signs of the times and the manner of some men's actings, that there hath been for some years last past a train of plots and conspiracies against this government; and when the various means which the conspirators did project among themselves for its ruin proved ineffectual, it was at last resolved among some of the conspirators to assassinate the king, as the most certain way of accomplishing their end.

In which design you were deeply engaged,

and was an active instrument in the carrying it on, being sent to view the ground on both sides the water, and with others that were sent with you reported your opinion, which was the most convenient place to attack the king and his guards.

And though you did, the last time you were at the bar, urge by way of extenuation of your crime, that you being engaged in the interest of the late king, and thereby supported, you was surprised into this barbarous design, which being proposed to you, you thought yourself obliged in honour to engage in it; which is so far from an extenuation, that it is an high aggravation: for men of honourable principles, though most zealously disposed to the advancement of any particular interest, yet always detest the use of base and vile means. Therefore when the assassination of the king was proposed, you had an opportunity to have retreated with honour, and might have refused to be further concerned: but you rather pursued this wicked enterprise with great zeal.

And though you are by your profession a Roman Catholic, and may for that reason think that your crime is mitigated, because you acted in the behalf of a prince of your own religion, which you hoped thereby to introduce: notwithstanding all which, your offence is highly aggravated in respect of the ingratitude and folly with which it is attended. For there is no English Papist that is master of any property, but he is interested in the preservation of this government, to which the whole party of them hath been, and still are continually obliged for its moderation and justice; for instead of being exposed to the severity of those laws to which they are obnoxious, they have had the same indulgence in the enjoyment of their religion, and the same protection, and as much benefit in the distribution of the common justice of the realm, as any other of the king's subjects; therefore none of them could ever expect to mend their condition under a French domination. But the contrary is foreseen by all considering men; for the English Papist, as well as Protestant, would have been reduced to a most dismal state, if you had obtained your end.

For it is against all the rules of reason, and the experience of all ages, to imagine, that the French king would spare English Papists more than Protestants; for it is not zeal to religion, or affection to the interest of the late king, that hath excited him to invade England, but it is his pride and ambition to conquer the three kingdoms, and to reduce this to be a province to France: indeed the pretence of restoring the late king, and introducing the Popish religion, may serve to delude some warm and unwary zealots to engage in his assistance, who do not consider, that if they should be successful, they would be as certainly destroyed as others, but with more disadvantage to themselves. For after they shall have survived the liberty of their country, have embred their own hands in their countrymen's blood, they

* See vol. 6, p. 1501, of this Collection.

will be at the mercy of their conqueror, who can never think it his interest to trust them, but will despise them for being such villainous traitors to their own country. Nay, rather, these Englishmen, who by their courage and resolution shall endeavour to defend their country, though they should be unfortunately vanquished, will meet with a much better reception, for they will have given assurances that they may be confided in, when the others have by such a wicked treason given a demonstration to the contrary.

There being then nothing to be said that can palliate such a crime as that of which you are convicted; but you having taken a different course the last time you were at the bar from what you took at first, you have relinquished your plea of not guilty, and have confessed the indictment; I wish out of charity to your person, it was as sincere as (I think it) it was prudent in you; for after several convictions of others that were your accomplices, you could not be a stranger to the evidence upon which they were grounded: you must therefore in all probability have expected to have undergone the same fate. If your confession be a real effect of your repentance, you will reap the advantage of it in the next world; but what consequence it will have in this, I cannot say; "For the heart of the king is in the hand

of the Almighty, which, as the rivers of water, he turneth whithersoever he will." Live therefore for the time to come in expectation of a speedy death, and prepare yourself to appear before another judgment-seat; to the making of which important preparation I shall dismiss you, first discharging the court of the duty now incumbent upon it, in giving that judgment which the law hath appointed. And the court doth award,

'That you be conveyed from hence to Newgate, the prison from whence you came, and from thence you are to be drawn upon a hurdle to Tyburn; where you are to be hanged by the neck, and while you are alive to be cut down, your privy-members are to be cut off, and your bowels to be cut out of your body, and burnt in your view; your head is to be cut off, and your body is to be divided into four parts, and your head and your quarters are to be disposed where his majesty shall appoint. And I pray God to have mercy upon your soul.'

Knightley. My lord, I am truly sorry for what I have done, and I humbly thank your lordship and the rest of the judges for your favour to me.

Then the prisoner was carried back to Newgate, and afterwards was graciously pardoned.

391. The Proceedings against the Three Nonjuring Clergymen, Mr. COLLIER, Mr. COOK, and Mr. SNATT, for publicly absolving Sir William Parkyns and Sir John Freind at Tyburn: 8 WILLIAM III. A. D. 1696.*

THE publicly absolving sir William Perkins and sir John Friend at the place of execution made a great noise at that time. Burnet says, "A very unusual instance of the boldness of the jacobites appeared upon that occasion: these two had not changed their religion, but still called themselves Protestants; so three of the nonjuring clergymen waited on them to Tyburn; two of them had been oft with Friend, and one of them with Perkins; and all three, at the place of execution, joined to give them public absolution, with an imposition of hands, in the view of all the people: a strain of impudence, that was as new as it was wicked! since these persons died owning the ill designs they had been engaged in, and expressing no sort of repentance for them. So these clergymen, in this solemn absolution, made an open declaration of their allowing and justifying these persons in all they had been concerned in. Two of them were taken up, and censured for this in the King's bench, the third made his

escape." The Account published at that time, by permission of the Sheriffs, is as follows:

An Account of what passed at the Execution of Sir WILLIAM PERKINS, and Sir JOHN FRIEND, at Tyburn, on Friday, April 3, 1696.

The prisoners being drawn in a sledge from Newgate to the place of execution, were permitted to have the assistance of three nonjuring ministers of their own chusing, viz. Mr. Collier, Mr. Cook, and Mr. Snatt. Sir William Perkins came first up into the cart, and had some private discourse with one of the ministers.

Sir W. Perkins. When must I deliver my paper?—*Minister.* When all is over.

Then the Executioner went to put the rope about sir William Perkins's neck.

Sir W. Perkins. May not I pray before it be put on?

Executioner. Yes, sir, if you please.

Then sir John Friend came into the cart; and the three ministers and prisoners all kneeling down, Mr. Cook read some prayers out of the morning-prayer, and the office for visita-

* See p. 140, of the present volume. Also 5 Mod. 363. Comb. 382.

tion of the sick: and then the ministers standing up, asked them, Whether they were in charity with all the world? and if they had offended any, whether they did ask them forgiveness? And whether they did desire the absolution of the Church? Upon their answer, that they did, they all laid their hands upon their heads, and Mr. Cook pronounced the absolution, which ended in these words: "And by his authority committed to me, I absolve thee from all thy sins, in the name of the Father," &c.

Sir W. Perkins. When are we to deliver our papers?—Minister. Now, if you please.

Sheriff. Take what time you please, Sir, for your devotions, we will wait your leisure.

Then the two prisoners continued in their private prayers, sir W. Perkins making use of the prayers in the *Whole Duty of Man*, and sir John Friend read some prayer out of a written paper; and afterwards, sir W. Perkins delivered to the sheriffs a paper.

Sheriff. If you require any more time, you shall have it. You say this is your paper?

Sir W. Perkins. Yes, Sir; and I desire you to dispose of it as you think fit.

Sheriff. Have you any thing to say, by way of confession or denial, of the fact for which ye come hither to suffer?

Sir W. Perkins. What I think fit to say, is contained in that paper.

Sheriff. If you desire any more time, you may have it; you shall have your liberty.

Then sir John Friend held a paper up.

Sheriff. What do you say, sir John?

Sir J. Friend. Sir, here is a paper, I desire it may be printed; for I came here to die, and not to make a speech; but to die, and to resign myself to God; and I desire it may be printed, for all people to see it. (For both their Speeches, see p. 136 of this volume.) And I have no more to say, but to beg of God to receive my soul; I resign my soul to him.

Sheriff. The Lord have mercy upon you.

Sir J. Friend. I hope the Lord will have mercy on me.

Sheriff. Sir John, if you desire any more time, you shall have it; we will wait on you with great willingness.

Sir J. Friend. I thank you, Sir. Mr. Sheriff, I desire the cart may not be too hasty to go away, till we give a sign.

Sheriff. You shall have your own time; take your time, communicate your own sign, and the cart shall not go before.

Then the ropes were tied about them.

Sir J. Friend. I have no animosity against any man; I freely forgive all, and I hope God, for Christ's sake, will forgive me.

Then their caps were put on.

Sir J. Friend. My Saviour had a crown of thorns for me; the Lord receive my soul! the Lord have mercy on me!

Then the Executioner asked them both forgiveness; and they answered, We freely forgive you.

Sir J. Friend. Will not the things lie in my way?

Executioner. I will remove them. If you please, tell me when I may pull your caps over your eyes.—Prisoners. When you will.

Sir W. Perkins. The Lord receive my spirit! Executioner, had I best hold up my legs, or stand in the cart when it goes away?

Executioner. It is best to stand, Sir, I think.

Sir W. Perkins. But then my feet will hang in the cart.

Executioner. If you please, give me notice when you will have the cart go away.

Sir J. Friend. Stretch forth thy arms, O Lord, and receive my soul, and carry it into heaven, I beseech thee! Executioner, when we knock, go away.

And after a few ejaculations, they gave the sign, and the cart drew away.—They both of them gave money to the Executioner; and having hung above half an hour, being a considerable time after they were dead, they were cut down and quartered, according to the sentence.

For this act of theirs, Mr. Cook and Mr. Snatt were committed to Newgate, and ordered to be prosecuted by the Attorney General; but Mr. Collier kept out of the way, and was not taken. On this occasion, Mr. Collier published the following Defence of himself:

A DEFENCE OF THE ABSOLUTION GIVEN TO SIR WILLIAM PERKINS AT THE PLACE OF EXECUTION, APRIL 5, 1696.

My being present, and in some measure officiating, at the place of execution on Friday last, has been extremely misunderstood. The *Weekly Intelligence*, together with the *Remarker*, have censured this action with a great deal of liberty and heat. I thank God I am not easily disturbed with intemperate language, especially when it is given without occasion. So that if matters had gone no farther, I could have passed over the ill usage, and said nothing. I confess, having received notice that some persons of figure threatened me with imprisonment, I took a little care of myself; and as it happened, not without reason: For on Monday about twelve at night, six or eight persons rushed into my lodgings, broke open a trunk, and seized some papers of value, though perfectly inoffensive and foreign to their purpose. And since, I understand there is a Bill found against me for High Misdemeanors. And now one would think I had done something very extraordinary.

I shall therefore make a brief report of matters of fact, and leave the world to judge, whether all these censures and severities are deserved or not.

Sir William Perkins (whom I had not seen for four or five years last past) after his trial, desired me to come to him, in order to his preparation for another world. I accordingly visited him in Newgate, as I thought myself obliged by my character. I was put in the list of those who had leave to see him by public

order, and had the first two days the liberty of conversing with him in private. Afterwards I was not permitted to speak or pray with him alone, a keeper being always present. At last even this permission was recalled, insomuch that I could never see him from Wednesday morning, April the 1st, till Friday at the place of execution. Sir William, being under an expectation of death from the time of his Sentence, had given me the state of his conscience, and therefore desired the solemn Absolution of the Church might be pronounced to him by me the last day. And understanding I was refused admittance on Friday morning, he sent me word that he would gladly see me at the place of execution. I went thither, and gave him the Absolution he requested, it being impracticable for me to do it elsewhere. This office I performed word for word in form, as it stands in the Visitation of the Sick. And now where lies the great crime of all this? when a man has declared his sorrow for all the faults and miscarriages of his life, and qualified himself for the privilege of absolution, with what justice could it be denied him? Ought not dying persons to be supported in their last agonies, and pass into the other world with all the advantage the church can give them? I am surprized so regular a proceeding as this should give so much offence, and make so much noise as I perceive it has done. Some people, I understand, are displeased at the office being performed with Imposition of Hands. Now this is not only an innocent, but an ancient ceremony of absolution. It was the general practice of the primitive church in such cases, long before there were any exceptions to the Roman Communion. It is, in the opinion of several fathers and good modern expositors, referred to by the Apostle, 1 Tim. v. 22. It is likewise prescribed the Assisting Presbyters in our own Ordination Form. But I suppose I need say no more in defence of this circumstance. To proceed: others seem very much shocked at the thing itself; and think it a strange presumption to admit a person charged with so high a crime, to the benefit of absolution. With submission, this is concluding a great deal too fast. Are all people damned that are cast in a capital indictment? if so, to what purpose are they visited by divines, why are they exhorted to repentance, and have time allowed them to fit them for death? But if they may be acquitted hereafter, notwithstanding their condemnation here; if they may be recovered by recollection, by repentance, and resignation, why should the church refuse them her pardon on earth, when she believes it is passed in heaven? The power of the keys was given for this purpose, that the ministers of God might bind or loose, as the disposition of the person required. The latter I sincerely believed to be sir William's case: I judged him to have a full right to all the privileges of communion: and therefore had I denied him absolution upon his request, I had failed in my duty, and

gone against the authority both of the ancient and English church. If it is said that the nature of this gentleman's charge required his being absolved in private; to this I answer, so he had been, had I been permitted to visit him the last morning: but this liberty was refused me more than once; and I hope I shall not be blamed for impossibilities of other men's making. In short, he seemed very desirous of absolution at my hands, as being the only person acquainted with his condition. Privately it was not in my power to give it him; so that he must either receive it publicly from me, or not at all. But sir William confessed himself acquainted with the intended Assassination. Pray, did he confess it to me, and have I revealed any part of his confession? Then I had been guilty of High Misdemeanor indeed: I had broke the 113th canon, and been pronounced irregular by the church; and he that falls under irregularity, is for ever after incapable of executing the office of a priest. (Dr. Heylin's Introduction to Cyprian, Angl. p. 6.) I confess there is an exception in the canon, but that does not reach the case in hand, even upon the largest supposition. Well! But sir William owned this charge before the Committee. How could I know that? I neither saw sir William after his examination, till Friday noon, nor the Votes which mentioned it till after that time. But he confessed it in his Paper. What then? Which way does the Paper concern me? It is well known sir William Perkins was a man of sense, and bred to law and letters, and needed no help to assist him in writing a few lines. Besides, I was not permitted to come near him for more than two days before he suffered: neither was he allowed so much as pen and ink till the last morning. Then it was that he penned his Speech, as I am told by those who were present; and having read it before the Keeper, delivered a copy of it to a friend, which was not shewed to me till after the execution. Indeed, I did believe he would leave some paper behind him, both because it is customary upon such sad occasions, and because on Tuesday night, when he expected death on Wednesday, he desired pen, ink and paper, for that purpose.

And now, after all, I desire to know in what single circumstance I have misbehaved myself, or done any thing unbecoming my profession? It is very hard a man must be persecuted for performing the obligations of his office, and the duties of common friendship and humanity. As for any methods of murder, I dislike them no less than those who rail loudest; and nothing but a mercenary malice could suggest the contrary: but if the functions of the priesthood, and the assistances of religion, and the reading the public Liturgy, are grown a crime, I am not concerned at the imputation. I hope the complying clergy will take some care to check the disorders, and inform the ignorance of their people a little better. If they are unproved for these slanderous ex-

cesses, their pastors must one day expect to account for it.

As for those in power, it is possible they may have been governed by mis-reports, and sudden resentment: if so, second thoughts and the reason of the case, will put a stop to their severities, and that this may be the issue of the business I think myself obliged to wish, as well for their sakes as my own.

April 9th, 1696.

JER. COLLIER.

On this occasion the following Declaration of the Archbishops, &c. appeared:

A DECLARATION of the Sense of the Archbishops and Bishops, now in and about London, upon the Occasion of their Attendance in Parliament, concerning the irregular and scandalous Proceedings of certain Clergymen, at the Execution of sir John Freind and sir William Perkins.

We the Archbishops and Bishops now in and about London, upon occasion of our attendance in parliament, having seen a printed paper, intituled, 'A true Copy of the Papers delivered by sir John Freind and sir William Perkins to the sheriffs of London and Middlesex, at Tyburn, the place of Execution, April 3, 1696:' and being also certainly informed of the most irregular behaviour of Mr. Cook, Mr. Collier*, and Mr. Snatt, in pretending to absolve the said criminals at their execution, to the great scandal of the church, and of our holy religion, have therefore thought ourselves obliged to declare our sense of the same, as here followeth:

1. As to the Paper before mentioned, we cannot but observe, that in that part to which sir John Friend is intituled, among many other things there delivered as his private opinion, (for which we must leave him to God) there are mingled some things concerning the church of England, to the great dishonour and reproach of it. That venerable name is, by the author of that paper, appropriated to that part of our church which hath separated itself from the body; and more particularly, to a faction of them who are so furiously bent upon the restoring of the late king, that they seem not to regard by what means it is to be effected. We have a sad instance of it in this very person, who (as was deposed at his trial) was privy to the horrid design of Assassination, and yet neither discovered it, nor shewed any dislike of it, but as he was afraid it might ruin king James and his affairs; and was ready also, together with others of the same Christian principle (as the author of his paper is bold to call it) to act in conjunc-

tion with an army of French Papists, for the ruin of their country, and the extirpation of that religion which they themselves do profess.

2. As for sir William Perkins, who also professed to die in the communion of the church of England, we cannot think he meant any thing else by it, than that he adhered to the same violent faction; being assured (as we are by very good information), that both he and sir John Friend had withdrawn themselves from our public assemblies some time before their death: which makes us the less wonder to find in both their papers so light, and even favourable, a mention of that most inhuman design of assassinating his sacred majesty: and especially in that of sir William Perkins, who, though he was publicly convicted of his having engaged so many in that horrible sin, yet after all, could think to clear himself of it with this wretched excuse: 'It is true I was privy to the design upon the prince, but was not to act in it.' Blessed be God, there never was any of our church, that in any change of times could have this laid to his charge, that he was so much as privy to a design of assassination.

Lastly; For those clergymen that took upon them to absolve these criminals at the place of execution, by laying all three together their hands upon their heads, and publicly pronouncing a form of absolution; as their manner of doing this was extremely insolent, and without precedent, either in our church, or any other that we know of; so the thing itself was altogether irregular.

The rubric in our office of the Visitation of the Sick, from whence they took the words they then used, and upon which, if upon any thing in our Liturgy, they must ground this their proceeding, gave them no authority nor no pretence for the absolving these persons; nay, as they managed the affair, they acted in this absolution far otherwise than is there directed.

That rubric is concerning sick persons; and it is there required, "first, That the sick person shall be moved to make a special confession of his sins, if he feel his conscience troubled with any weighty matter: and then, after such confession, the priest shall absolve him, if he humbly and heartily desire it." But here they absolved, and that publicly, persons condemned by law for execrable crimes, without so much as once moving them at that time to make a special confession of their sins, at least for those sins for which they were condemned. And on the other side, here were persons absolved that did not humbly desire absolution, as feeling any such weighty matter to trouble their conscience; but on the contrary, in sir John Friend's Paper it is declared, that he had a great deal of satisfaction in suffering for that cause, which he firmly believed to be the cause of God, and true religion.

If these ministers knew not the state of these men's souls, before they gave them absolution,

* "This Mr. Collier was a very learned and ingenious man, and the author of the Great Historical Dictionary, in folio; of the Ecclesiastical History, in folio; of the View of the Stage; and many other pieces."—Former Edition.

as it is manifest two of them, Mr. Snatt and Mr. Cook, did not as to sir William Perkins (they having since declared that they had not spoke with sir William till they were at the place of execution), how could they, without manifest transgression of the church's order, as well as the prophane abuse of the power Christ hath left with his ministers, absolve them from all their sins?

If they were acquainted with these men's sentiments declared in their papers, then they must look upon them, either as hardened impenitents, or as martyrs.

We are so charitable to believe that they would not absolve them under the former notion, for that had been, in effect, sealing them to damnation: But if they held these men to be martyrs, then their absolving them in that manner was a justification of those grievous crimes for which these men suffered, and an open affront to the laws both of church and state.

Upon the consideration of these things, and for the doing of right to our church, which may otherwise suffer, among such as are strangers to our constitution, by the evil principles and practices both of the aforesaid criminals, and the three clergymen that assisted them, who all pretended to be members of the church of England; we do declare, That we disown and detest all such principles and practices, looking upon them as highly schismatical and seditious, dangerous both to the church and state, and contrary to the true doctrine and spirit of the christian religion. And we also take this occasion to warn and exhort all the people committed to our charge, to beware of such seducers, and to avoid them; lest (as the Apostle St. Peter speaks) 'they be led away with the error of the wicked,' and fall from their stedfast adherence to the principles of the true church of England, as it was established at the blessed reformation of religion, and as by God's especial providence it continues to this day. April 10th, 1696.

Tho. Cantuar.	Sy. Eliens.
Jo. Ebor.	Gil. Hereford.
H. London.	Jo. Norwich.
N. Duresme.	Ric. Peterb.
P. Winchester.	Ed. Gloucester.
W. Cov. and Lich.	Rob. Chichester.
Tho. Roffen.	E. Asaph.

A Farther DEFENCE of the Absolution given to Sir William Perkins, occasioned by a Paper, intituled, "A Declaration of the Archbishops and Bishops," &c.

About a fortnight since I published the foregoing Defence of the Absolution given to sir William Perkins. It is true the vindication was not drawn out into any great length, neither did I imagine it necessary. That which was said, was in my opinion sufficient to satisfy any candid and impartial reader. If the argument was any where over-contracted, it

was in that part which mentions imposition of hands. Here I confess the proofs were but generally named, and the force and improvement of them left in some measure to collection. My desire to undeceive the people, and to silence their clamours as soon as might be, the disadvantage of my retirement, and the plainness of the case, were the reasons why I was no fuller upon that head: But now I have a fresh opportunity to treat the point more at large, the late Declaration, &c. of the bishops having given me a just occasion to resume the argument. I must own the perusal of this Declaration surprized me very much. I could not imagine these reverend prelates would have published so unsupported a censure; nor engaged their character so far in this affair. I am almost amazed an innocent conduct should be thus misconstrued, and the charge run so high without proof, or provocation to defend it.

The Declaration begins with some remarks upon the Papers of sir William Perkins and sir John Friend: These exceptions I shall pass over, as being unconcerned in their defence. Indeed, my resolution upon the whole is, to engage no farther than the justification of my own conduct; as being unwilling to have any unnecessary disputes with these reverend prelates.

The pretended irregularity objected against Mr. Snatt, Mr. Cook, and myself, relates wholly to the Absolution given to those two gentlemen at the place of execution. The performance of this office, the bishops are pleased to say, "was extremely insolent and without precedent in the manner, and altogether irregular in the thing."

I shall endeavour to justify my practice against every point of the accusation, and prove the Absolution defensible, both with respect to manner and form, to persons and occasion. And, 1st with respect to the manner. And here I shall make good three things.

1st, That giving Absolution with imposition of hands was the general practice of the ancient church.

2dly, That the performance of this ceremony was allowed to priests, and sometimes to deacons, as well as bishops.

3dly, That imposition of hands is enjoined the assisting Presbyters by our own church in the office of ordination, and by parity of reason is fairly applicable to the present case.

First, That giving of Absolution with imposition of hands, was the general practice of the ancient church.

To begin with Tertullian, who lived in the beginning of the third century. This father understands that place of the apostle, "Lay hands suddenly on no man," (1 Tim. v. 22.) of the offices of penance and absolution. (L. de Pudic. cap. 18.) And (cap. 22.) he alludes to the same custom in these words, "Carnem lanaitam prosternens," as Albaspinæus observes, (Albasp. Obser. l. 2. p. 97. not. in Tertull. p. 181). Indeed the design of his book, De Pudicitia, plainly determines the author to this

sense. Here he treats professedly of those who were to be finally excluded from church communion, and denied the discipline of penance. He disputes nothing about Confirmation, or Orders; so that it is evident the imposition of hands, mentioned by him, must relate to penitential absolution.

St. Cyprian's council of Carthage is express to the same purpose. Here Nemesianus, Crescens, Secundinus, and Vicentius, bishops of Thubuni, Cirta, Carpi, and Tiberis, all of them agree, that the church's peace, and the expedients of reconciliation, were to pass through this form of imposition of hands.

The 80th canon of the fourth Council of Carthage enjoins, That during the whole time of abstinence, (I suppose either stated or occasional) the priests (Sacerdotes) should lay their hands upon the penitents.

The 11th Canon of the third council of Toledo, in the directions for the methods of penance, is positive for the frequent use of this ceremony; which made Albaspinæus conclude, That absolution-prayers and imposition of hands were repeated and customary in such cases (Albasp. Observ. l. 2. p. 86.)

To conclude this point. The learned Dr. Hammond, in his Annotations on the text above-mentioned, (1 Tim. v. 22.) refers the laying on hands to absolution. "The Apostle" says he, "exhorts Timothy that he should not make too much haste to receive those who were under censures, to absolution. For that was the thing which would most probably make him partaker, or guilty of their sins, which the censures were designed to reform in them; but would not do so, if, before they had approved their repentance and reformation, they were received to the peace of the church." This learned divine cites a great many authorities in defence of his opinion, which the reader may consult at his leisure.

Secondly, The pronouncing the absolution with imposition of hands, is no encroachment upon the episcopal authority, but plainly allowed to the order of Presbyters.

This point I shall make good from several plain testimonies of St. Cyprian, whose authority must be granted to be unexceptionable, both with respect to the antiquity and character of the person. Indeed it is to this father that we are principally obliged for the remains we have of the discipline and government of the primitive church.

Now St. Cyprian is categorical in the case, and affirms roundly, that "in lesser crimes than those of the lapsed, the penitent could not be admitted to full communion, unless the bishops and clergy had laid their hands upon him." "Nisi prius illi ab Episcopo et Clero manus fuerit imposita." (Ep. 17, p. 39. Ed. Oxon.) Now where the bishops and clergy are thus contradistinguished, the order of priests must be comprehended in the latter, in the most restrained construction. I might produce his 15th and 16th Ep. (p. 34. 37.) for the same purpose; but because these

testimonies run much in the words of the former, I shall wave the recital.

This father, in his 18th Ep. tells his priests and deacons, That "they need not expect his coming home, to reconcile the lapsed; but if any of the laity were in danger of death, a priest, and if a priest could not be had, and the necessity was extreme, a deacon was a sufficient authority to hear their confession, to lay hands upon them, and consign them to the peace of the church." The same advice, upon the same occasion, is repeated, Ep. 19. p. 41. From whence it is evident, that imposition of hands was no reserved incommunicable privilege of the bishops, but delegated as low as the deacons upon emergent necessity, and visible approaches of death. These authorities of St. Cyprian are all double charged, and prove two points at once. They prove, that imposition of hands was a general appendix to absolution, and that it was within the commission of the priest to officiate in the ceremony. To proceed:

In the 13th canon of the first council of Nice, the Viaticum is ordered to be given to those who are at the point of death. And by the Viaticum, Albaspinæus proves, that absolution with imposition of hands was meant, and not the Eucharist: and that an absolution might be given by those who were no more than priests. (Albasp. Not. in quesdam Can. p. 131.) I could amass a great many more testimonies, were it necessary; but I conceive, what has been said already, may be sufficient to vindicate my practice from the charge of encroachment and singularity.

Thirdly, Imposition of hands is enjoined the assisting Presbyters by our own church in the office of Ordination, and by parity of reason is fairly applicable to the present case.

If our church had thought the imposition of hands too much for the character of priests, she would not have prescribed them a share in it at her ordinations. But since she has allowed them this liberty in the most solemn exercises of authority, why should she deny it in inferior cases? To assist in the conveyance of an authority seems a greater mark of power, than the executing any branch of the authority conveyed. If the Presbyters are permitted to lay their hands upon the clergy, why not, *a fortiori*, upon the Laity? St. Hierom affirms plainly (Ep. ad Evagr.) that the powers of a priest comprehend those of a bishop, excepting in the point of Ordination. Our church has never condemned this father's assertion; why then may not the first absolve with imposition of hands no less than the other?

But there is no appointment of this ceremony in the Absolution Rubrick. True: neither is there any prohibition. The Rubrick is perfectly silent both as to posture and gesture, and yet some circumstances of this nature must of necessity be used.

Now since our church allows the priest imposition of hands in another case, and does not forbid it in this, is it any harm if our liberty

moves upward, and determines itself by general usage and primitive practice? Our church has always professed a regard for the patterns of antiquity: we cannot do her a greater honour, than by conforming to the solemnities of the purest ages, than by making the discipline of fathers and councils the rule of our behaviour: * especially when we are not bound up by national law and particular constitution. Thus much for the manner.

I come now to justify the thing and the occasion.

It is objected by these reverend prelates, that the three "assisting clergymen pronounced a form of absolution," &c. With submission, I hope a form is better than no form; especially when it was a form rubrically appointed; a form drawn up by the public authority of the church, confirmed by Canon, and act of parliament; a form the most pertinent and proper to the occasion of any in the Liturgy. I am sorry to see the solemn offices of religion mentioned with such seeming coldness, and abatements of expression. Were it not that I am unwilling to give these reverend prelates the trouble of a question, I would gladly understand, what form they could have fixed on more suitable to so sad an occasion? I am sure that form of absolution is the most solemn and authoritative of any in the Service-book. Now if ever the church exerts herself, ought it not to be in cases of the greatest necessity? Can her most comfortable administrations, and the highest acts of her authority, be better employed than for the relief of dying persons, who are combating the king of terrors, and stand just upon the brink of eternity? Upon the whole, I am surprized they should say the "Rubrick gave us no pretence of authority to absolve those persons." Does not the Rubrick give the priest a power to pronounce the absolution, and to judge of the condition of the penitent? This cannot be denied. And why then had we no pretence of authority? "Because the Rubrick relates to the sick." To this I answer; had the church left us a stated office for persons condemned, and we had refused to make use of it, there had been some force in the objection; but as the matter stands, I humbly conceive there is none at all. The church, without question, would have condemned persons taken care of, as well as others, and their spiritual necessities supplied. And if so, is it not more respect to the church to officiate in forms of her own setting forth, than in private and unauthorized compositions? And if the function was to be performed in the public devotions, I desire to know what part of them could have been more proper than the Office of

Visitation of the Sick? If we consider the design of the church, and especially the Rubrick before the absolution, we shall find that she intended this office to prepare people for the other world, and considered them rather as dying, than likely to recover. This appears evidently from the questions and advices ordered to be asked and given; so that wherever death is in view, the office cannot be unseasonable, nor misapplied. And can any persons be more certain of death than those who are publicly condemned, who lie under fatal sentence, and irresistible power; who have the force of the county to dispatch them, and are just ready to receive the stroke? As to the previous questions, they were put and answered, the absolution was desired, and the confession received in prison; and in short, the church's directions were observed in every particular. But we "did not move them to make a special confession of their sins at that time." With submission, where lies the necessity, or even the expediency of such a practice? Does our church oblige dying persons to public confession? Does she require them to throw open the retirements of conscience, and the secrets of private life, to the view of the world? I am at a loss to understand why we should be charged with omissions on such accounts as these.

The Declaration, &c. proceeds with great vehemence, and charges us with "manifest transgression of the church's order, and prophane abuse of the authority of Christ." These are hard words, but I hope altogether undeserved. It is true, they instance only in Mr. Snatt, and Mr. Cook, but I must own the objection lies equally against myself; for I never saw sir John Freind during his whole imprisonment. But in assisting at his absolution, so far as laying on my hand amounts to, I did no more than what is easily defensible. I grant I had no immediate and particular knowledge of his condition, neither was it necessary. Our church, in conformity to antiquity, has made the priest the proper judge of the qualifications of the penitents, and supposes him fit to be trusted, and believed in that affair. Now Mr. Snatt and Mr. Cook (upon whose judgment and integrity I can very well depend) had given me a general account of sir John's pious disposition, and that he was well prepared for all the assistance the church could give him. The having so good information from first hands, from proper and authorized judges, is sufficient to warrant my part in sir John's absolution. This, besides what has been said, I shall make good from two parallel instances.

First, It is well known that bishops of the ancient church used to give a sort of certificates to those that travelled; by virtue of which, they were not only entertained and accommodated, but admitted to full communion all over Christendom. (Albasp. Not. in Con. p. 115.) From whence we may observe, that personal acquaintance, and particular exami-

* "Bishop Sanderson, that eminent casuist, about a day before his death, desired his chaplain, Mr. Pullen, to give him absolution; and at his performing that office, he pulled off his cap, that Mr. Pullen might lay his hand upon his bare head." Walton's Life of bishop Sanderson, p. 94. Former Edition.

nation, are not necessary to give a right to the privileges of Christianity. Where the credentials are good, the church is to enquire no farther; she is to presume upon the probity of the person recommended, and to treat him accordingly.

Secondly, Our own church, in some of the highest administrations, acts upon principles of trust and confidence. She conveys her privileges, and exercises her authority, without always insisting on personal inquiry and immediate proof. At the giving of holy orders, neither the bishops, nor the assisting presbyters, are always personally acquainted with those they ordain. The prudence of our church does not tie us up to such unreasonable rigours. Both practice, and the ordination form, suppose the contrary. And why then may not the priest assist in absolution as well as orders, without any previous experiment of the state of the person? Why may not he in the first, as well as the latter branch of his authority, act upon the warrant of unexceptionable testimony? By all parity of reason and force of consequence, the practice is no less defensible in one case, than in the other.

If it is objected, that the joining of all the three clergymen in the imposition of hands is unprecedented, and exceptionable; to this I answer, that if the action was lawful, singly performed, I cannot imagine how a concurrence of more authorised persons should make it otherwise? Is there any harm in union and solemnity? Or can religion be treated with too many circumstances of advantage? What Canon is there that stints the assistance to one, and forbids a plurality of persons? Timothy had the "hands of the Presbytery laid upon him," (1 Tim. iv. 14.) which without doubt, exceeded the number now objected. Our church, at her ordination, allows this ceremony to all the Presbyters present. And in the very case of absolution, the Penitent was to receive imposition of hands from the bishop and clergy; as appears from the testimony of St. Cyprian above-mentioned. Farther,

These Reverend Prelates argue, that "we must either look on the persons absolved as Impenitents, or Martyrs;" and they make their advantage of each branch of the supposition. But, with submission, I see no necessity of granting the disjunction. For there may be a third way of considering the matter. To speak to my own case: I absolved sir William Perkins as a Penitent; and I suppose every body must be absolved under that consideration: for absolution supposes both sin and repentance, in the notion of it. But as for the matter of sir William's repentance, that is never likely to be known from me. Neither am I in the least affected with the bishops' inference. For supposing I received a defective confession, am I accountable for that? However, I neither do nor am obliged to declare my opinion in this matter. But thus far I am positive, that there was nothing confessed to me, which the canon obliges me to reveal: and

what the canon does not enjoin me to discover, it enjoins me not to discover. (Can. 113. Vid. first defence.) And so there is an end of this dispute.

I hope by this time it may appear, that I am neither unfurnished with reason, or precedent, to justify what I have done. However, I shall give one late instance for the whole case, and so conclude.

At the execution of Mr. Ashton, Jan. 1690, absolution was given him in the same form, with imposition of hands, at the same place, and upon the same occasion; and a justifying Paper left by the person that suffered. Now at that time there were no exceptions made either to manner or thing. The performance was so far from displeasing, that the sheriff gave his thanks for the solemnity of the office. There were no complaints either at Lambeth, or Whitehall, no public invectives, no seizing of body and goods; in short, no signs of the least dissatisfaction. And who could imagine, that the bare repeating of an action should raise such a storm upon us now, which was so perfectly inoffensive before? To punish in this manner, without warning or precedent, without canon or law, is (with submission) somewhat unintelligible.

And now having defended myself, I shall reply nothing to all the unkind reflections, and tragical language of the Declaration. It is probably within my power to turn some of these reverend prelates artillery upon them. But my regard to their character, and inclination not to displease, makes me wave the advantage. However, their extraordinary usage has done me the honour of an opportunity to forgive them, which I thank God I heartily do.

April 21, 1696.

J. C.

P. S. I have just now received a sheet, called "An Answer to my Defence," &c. As for that little which is material in this Paper, it is already satisfied, and I do not love needless repetitions. And therefore to begin and end in a word with this answerer; If he has any thing remarkable, it is, in my opinion, his ill language; and that I can both pity and despise. April 25.

There were several pamphlets published on this occasion, against and in defence of this proceeding, but these are sufficient to shew the nature of the controversy.

In July following, Mr. Cook and Mr. Snatt were brought to the court of King's-bench, and the Proceedings against them are thus briefly related in Comberbach's Reports, p. 382.

Sitting in Middlesex, coram Holt, chief justice,
July 2, 1696.

REX *vers.* SHADRACH COOK *et* WILL. SNATT,
Clericos.

Indictment for absolving Traitors.

Upon an Indictment setting forth, That sir John Freind and sir William Perkins being

attainted, and about to be executed at Tyburn, for high treason, &c. the defendants conspiring and intending (as much as in them lay) to justify, or at least to extenuate and lessen their crimes, and to induce his majesty's subjects to believe that they died rather as martyrs than as traitors, and to incite the king's subjects to commit the like treasons, they did take upon them to absolve, and did pronounce a form of absolution of them the said sir William Perkins and sir John Freind, without any repentance, or any signs of repentance by them given.

It was proved, that the defendants asked the criminals the several questions directed by the Rubrick in the office of Visitation of the Sick, and Mr. Cook pronounced the words of absolution of one of the traitors; Mr. Snatt, and one Mr. Collier, (who is not now indicted) laying their hands upon his head, and after the words pronounced, saying, Amen; and Mr. Collier pronounced the words as to the other traitor, they all three laying on their hands, &c. It was proved, that the defendants were earnestly requested by sir William Perkins and sir John Freind, to assist them at the place of execution; and therefore the jury were directed to acquit them of conspiracy (though the attorney-general said the indictment was not for conspiracy, and 'conspirantes' was put adjectively only to introduce the other matter, and therefore was not material): and Holt directed the jury, that this proceeding of the defendants was certainly scandalous and irregular; for if the criminals had before made a private confession, the absolution should have been private likewise; but if they would give a public absolution, they ought to have required as public confession, and particularly with respect to those crimes for which they were attainted, being so notorious, &c. However, if the jury were of opinion they did it only ignorantly, and by mistake, (in which case it is properly connusable in the spiritual court) then to acquit them; but if they did it with a design to affront the government and to vilify the justice of the nation, then to find them guilty: but at the instance of the defendants counsel, it was directed to be found specially, that Snatt laid his hand on the head, and was assistant, while the other pronounced the words of absolution, and afterwards Snatt said, Amen (it being laid quod pronunciaverunt). And accordingly the jury acquitted them of the conspiracy, and found Cook guilty of the rest, and as to Snatt, *ut supra*.*

* 5 Modern, p. 363, reports the Case thus:

Term Mich. 9 W. 3, B. R. 1697. *Rex vers. Cook, Snatt and Collier.*

"They were found Guilty upon an Indictment for the following crime, *ss.* Sir John Freind and sir William Perkins were convicted for high treason, in conspiring the death of the king; and the defendants, being present with them at the place of execution, did, all of them, lay their hands on sir John Freind, who shewed

Pro Rege.

Attorney-General,
Solicitor-General,
Mr. Conyers,
Mr. Cowper,
Mr. Mountagu.

Pro Defendentibus.

Sir William Williams,
Sir Fra. Winnington,
Mr. Broderick,
Mr. Phipps,
Mr. Mompesson.

When this Special Verdict was argued, or how this matter ended, does not appear: but at the sale of the earl of Clarendon's Manuscripts, in Covent-Garden, April 1763, the following Argument was purchased in Manuscript.

The KING against COOK and SNATT.

It is an indictment for a misdemeanor on which a Special Verdict is found. I am, by your lordship's appointment, counsel for the defendants.

The indictment sets forth, That whereas sir John Freind and sir William Perkins were severally convicted and attainted of high treason, in conspiring the death of the king, and adhering to his enemies, and according to due course of law, and judgment thereon severally given, were drawn to Tyburn, to be there put to death; Jeremy Collier, and these two defendants, well knowing the premises, but intending to withdraw the king's subjects from their allegiance, and to incite them to commit the like treasons, at the gallows, being in the cart with sir John Freind and sir William Perkins, and immediately before their execution, conspiring, designing, and intending that execrable, horrible, and detestable high treason, for which sir John Freind and sir William Perkins were attainted, and then instantly to die, according to the course of law, to justify, or at least to extenuate, diminish, or set at nought; and to insinuate into the king's subjects, and persuade them, that sir John Freind and sir William Perkins were about to die innocent and undeservedly, and rather as martyrs than traitors; and to incite the king's subjects to commit the like treasons, and unlawfully and contumaciously, as priests of the church of England, in the presence and sight of a great concourse of people, and in the hearing of a great many of them, laying their hands on the heads of sir John Freind and sir William Perkins in the said cart, then and

no repentance for the crime for which he was about to die; and Cook pronounced the Absolution, and Snatt and Collier said, Amen.

"That they all three likewise laid their hands on sir William Perkins, who was likewise impenitent of this crime; and Collier pronounced the Absolution, and Cook and Snatt said, Amen; and that they all assisted and assented to the said Absolution.

"The jury made a special conclusion in their verdict, Whether the laying on the hands of three, and but one at a time pronouncing the Absolution, makes them all guilty of the whole matter?" Adjourn'.

there took upon themselves to absolve them, and did pronounce them to be absolved from all their sins, without any repentance, by the said sir John Freind and sir William Perkins, or either of them, for the high treason aforesaid first declared.

To this indictment these two defendants pleaded not guilty: And the issue being tried before your lordship, the jury find this special verdict: That Cook, Snatt, and Collier laid their hands on sir John Freind, and Cook pronounced the absolution, and Collier and Snatt said, Amen: That Collier and these two defendants laid their hands on sir William Perkins, and Collier pronounced the absolution, and Cook and Snatt said Amen: And that Cook and Snatt assisted, and assented to the said absolution.

As to the conspiracy, they find the defendants not guilty; and as to all the rest of the indictment, they find the defendants guilty: But whether, on the whole matter, the defendants, or either of them, be guilty of the matters and things charged on them in the indictment (besides the conspiracy) or no, the jury pray the advice of the court. And thereupon it now comes before your lordship. And

I hope with submission to your lordship, as this indictment is, these defendants shall be discharged. And to that end I shall crave leave humbly to lay before your lordship some considerations on these three points:

First, Whether what is laid in this indictment will amount to an offence?

Secondly, If it be an offence, I shall humbly submit it to your lordship, Whether the examination of it doth not belong to another jurisdiction? And,

Thirdly, If it should be an offence, and punishable in this court, yet there can be no judgment given against them on this indictment.

But before I come to these points, I must crave leave to explain what I take to be the meaning of one expression in the indictment, and that is, 'Absque aliqua pœnitentia per eos pro alta proditiōe prædicta prius declarata.' By *pœnitentia*, though it usually amongst the Canonists signifies penance, and sometimes repentance, absolution and penance, yet in this place I take it for repentance only. And by the words 'pro alta proditiōe prædicta prius declarata,' is meant publicly declared for that particular offence. For on the evidence it appeared, there was a general repentance of all their sins; and there might have been a private, particular repentance of this very treason to the priests, whilst they were in the prison, according to the rule of the Canonists, 'Posse in una die confessionem audivi, et in altera injungi pœnitentiam.' As I find it cited by the greatest casuist and best author I have met with on this occasion, 'Valerius Reginaldus de requisitis in confessione,' l. 8. n. 11. fol. 230. But when this was objected at the trial, the king's counsel answered, 'The repentance ought to be as public as the

absolution. Therefore, to reduce it all to a case on this indictment, I take it, these gentlemen (especially Mr. Cook, for Mr. Snatt's case doth somewhat differ) did publicly absolve sir John Freind and sir William Perkins, as they were about to be executed for high treason, without their particular repentance publicly declared for the crime for which they suffered. And I shall humbly submit it to your lordship, whether this be any offence in these gentlemen, or in either of them. They were persons, that by order, at least by leave of the court when sir John Freind and sir William Perkins were attainted, were permitted and appointed to officiate with the condemned criminals to prepare them for another world, when they were about to leave this by the judgment of our law. Accordingly they officiated, and were several times with the condemned criminals in the prison; where we may very well presume, that they brought their penitents to a particular confession and repentance, though we could not prove it at the trial; because the penitent was dead, and the absolver the person indicted.

And besides, the absolver was not obliged to discover the confession; nay, it is expressly forbidden by the 113th canon of our church, made by the convocation in the year 1603, which was called by the king's writ, and confirmed under the great seal, according to the form of the statute 25 H. 8, c. 19, as my lord Vaughan tells us in his reports, fol. 329. And the king or convocation, but certainly both of them with their joint power, may make orders and ordinances, which shall bind all the king's subjects, but more especially the clergy, as may plainly be inferred from the statute 25 H. 8, c. 19. And so are our books, 21 E. 4, 45, Bro. Abr. ordinary, pl. 1. Moor 755, 783. 2 Cro. 37. Noy 100. and 2 Ventr. 44. And so hath been the practice, in the first volume of the History of the Reformation, fol. 225. and the second volume, fol. 60, 69, and 70. In a case of this nature, I must beg leave of your lordship to make use of the writings of divines and other authors, and not strictly confine myself to our books of common law: for our law books are silent in this case; and indeed I do not find any other authors speaking directly to the point. Therefore, I must be forced to look into the nature of absolution, the power of the clergy, the practice of divines, and other collateral matters, for some light herein; which makes me dread growing tedious, and becoming very tiresome to your lordship's patience.

And, my lord, as to this particular case, these canons are in some manner confirmed by act of parliament: for the statute 13 Car. 2. c. 12. sect. the last, which seems to set aside the canons of 1640, doth establish the church as it was in the year 1639; and then these canons were in force and practised. For the king who then reigned, at his coronation, (the first that was after making of these canons) did not only swear to maintain to the church the laws of St. Edward, but likewise to preserve to the bishops,

and churches committed to their charge, all canonical privileges. 1 Rushworth's Collection, fol. 201. And the power of secrecy seems to me a privilege; and these canons are now received and observed as laws amongst the clergy. And, my lord, neither the indictment nor evidence did deny that there was a private repentance. Now, that a private confession and repentance had been sufficient, appears from the rule of the canonists, '*Non tenetur pœnitens tertio audiente confiteri, quia confessio cum sacerdote fiat in persona Dei omnia exploratissime cognoscentis, excludit omnem testem,*' Val. Reg. lib. 6. n. 78. fol. 182. '*De Sacramentali Confessione.*' Nay, the confession to God Almighty only is held sufficient: '*Exaudi, Domine, preces nostras, et confitentiam tibi. Parce, peccatis, ut quos conscientiae reatus accusat, indulgentia tuæ miserationis absolvat,*' &c. as is set down in the '*Ordo Romanus de Officiis Divinis,*' in the tenth tome of the *Bibliotheca Patrum*, fol. 30. and is verbatim rendered into English in our liturgy, in the communion, and in the form of prayer appointed to be used on the 30th of January, and in that appointed for our last general fast. And I shall presume to offer to your lordship's consideration some reasons, why such a private confession to God Almighty, or to his minister here on earth, is sufficient for absolution. One is drawn from the nature of the thing itself. No man is obliged by law to do any act to any other person, from whom he can receive no benefit by so doing. And the people cannot absolve, it is only the priest can do it; and therefore to him alone must be made the confession and repentance. And so is Linwood, the last impression, fol. 337. on the words, '*Debito caret fructu,*' says he, '*Fructus igitur sive utilitas pœnitentiæ est absolutio à peccatis, quam quis non consequitur ab eo qui non est suus iudex, nec habet potestatem eum ligandi vel solvendi.*' And the same author, speaking concerning confession, fol. 327. '*Verbo Confessionis,*' hath these words, '*Confessio tripliciter fit, aut in foro animæ interius coram Deo, aut in foro pœnitentiæ exterius coram Dei vicario, aut in foro contentioso coram iudice.*' And then he adds, '*Confessio est legitima coram sacerdote peccatorum declaratio.*' And there is not, as I can find, the least hint of making any confession or repentance to the people, but only to the priest, and that may be in private. But in this case there was likewise a public repentance declared; which the priests might well take for a repentance of that offence as well as for any other. That repentance indeed was general: for traitors being by no decree foreclosed absolution, and no particular form being prescribed, these gentlemen followed the Rubric in the form there set down for the Visitation of the Sick, which may very well be taken to have been designed for all that are in danger of death; and so our greatest divines have taken it. The learned Dr. Duport, in his Greek version of our liturgy, renders this office by a word that signifies as well to be

in peril or imminent danger, or the like, as to be visited with sickness; which likewise answers the canonists description or denomination of this sort of absolution; to distinguish it from the common and sacramental absolution, they call it '*absolutio in articulo mortis,*' without distinguishing between a natural and violent death, or between the innocent and malefactors. And if our law had designed to have excluded malefactors from the benefit of this office, it would have used the same caution as it doth against others in the office for burial of the dead, where it says, it shall not be used to those that die unbaptized, excommunicated, or are *felo de se*. And I do not find malefactors that suffer by the hand of justice excluded that office, and I think it is often performed for them; why then must this of Visitation of the Sick be denied them? There is no other office or form appointed for these sort of persons. And then, where there is no law there is no transgression; they are left to their own method and form, and therefore may use that set down in the common-prayer as well as any other. And here the priests asked sir John Freind and sir William Perkins, if they repented truly of all their sins, and were in charity with all the world? The penitents answering in the affirmative, the absolvers advising forgiveness, did, at the request of the penitents, in the form set down in the liturgy, pronounce the absolution, neither of the criminals signifying that he felt his conscience troubled with any weighty matter. And, with submission to your lordship, such signification ought to be previous to the motion for a special confession, for the words are, '*If he feel his conscience troubled;*' which I think is fully explained by the second homily of repentance, which condemns auricular confession, and then adds, '*I do not say but that, if any do find themselves troubled in conscience, they may repair to their learned curate or pastor, or to some other godly, learned man, and shew their trouble and doubt of their consciences to them, that they may receive at their hands the comfortable salve of God's word.*' But it no where enjoins such confession and repentance, much less doth it command the priest to exact them from the penitent. There is no order for the priest to examine whether he doth find his conscience troubled, if the penitent doth not intimate it to the priest. There is no direction for the priest to ask him any question about it. And Val. Reg. l. 2, c. 2. n. 13. out of Sotus, gives us this definition or description of the office and duty of a confessor in these words, '*Officium quidem confessarii de se non est interrogare pœnitentem, sed audire confitentem:*' And going on, he gives this reason, '*Cum in foro pœnitentiali non procedatur sicut in criminali per vim coactivam ad extorquendam à reo confessionem, sed per spontaneam voluntatem confitentis.*' I acknowledge, that in the church of Rome, to make absolution a complete sacrament, a special confession is required; as is directed by our church, when the

penitent signifies that he feels a burthen on his conscience: But neither in these, nor in any other cases, wherein special confession is required, is it any where ordered to be public. It is sufficient that it is made to the priest alone; and the common practice in these and all other cases is to have it private: All other persons are excluded the sick man's chamber. But supposing, my lord, that the meaning of the Rubric should be taken to be, that the priest should move him to make such a special confession, this is only directory; it is not compulsory, any more than the preceding paragraphs, where the priest is to admonish the sick person to make his will, and declare his debts, and, if he be of ability, to give charitably to the poor. And it would be difficult to maintain an indictment on any of these paragraphs against a priest, for absolving a sick man without admonishing him to make his will, declare his debts, or be liberal to the poor, who perhaps starved for want of such relief. Certainly in those cases the Rubric would be looked on to be only directory: And why not so in this? The like exposition hath been made on other acts of parliament. The statute 21 Jac. 1, c. 4, against vexatious informers, enacts, That no information shall be received, filed, or entered of record, before the informer hath made oath that the offence was committed within the county where it was laid, and, as he believes, within a year before exhibiting the information; and this oath to be entered of record. Yet I believe, it cannot be shewn that any such oath hath at any time been made, nor informer nor officer indicted for preferring, filing, entering, or receiving any information without such oath; for that statute hath (as to that part) been always held to be directory, that the judge or officer might require it, if they thought fit; but they are not thereby obliged in any case to exact it from the informer, any otherwise than as their own discretions guide them, 1 Cro. 316. But taking the clause in the case now before your lordship to be compulsory, yet it is not to be universally observed to all penitents; it is only in some cases, where the persons are not qualified without such special confession, and the priest is to consider and determine of the qualifications: For absolution is purely spiritual, and so left to the priest, that he is the only judge thereof. And if it might not be thought improper, I should crave leave briefly to mention the opinions of some of the fathers of the church on this occasion.

St. Chrysostom says, The Father judges no man, but hath committed all judgment to the Son; and the Son, till his second coming, hath left all judgment to his ministers. And St. Jerom, speaking of the priests, hath these words, 'Qui claves regni cœlorum habentes quodammodo ante diem judicii judicant.' And St. Gregory the great says of them, 'Principatum superni judicii sortiuntur, ut vice Dei quibusdam peccata retineant, et quibusdam relaxent;' and therefore Tertullian calls excom-

munication 'Præjudicium futuri seculi.' And the learned prelate Usher, in his answer to Malone the jesuit, saith, "We acknowledge most willingly, that the principal part of the priest's ministry is exercised in matter of forgiveness of sins." And it farther appears by what I before cited out of Linwood, and likewise by another expression in the same book, fol. 335, on the words Competentis literaturæ, where he says, 'Episcopus est judex tam animarum quam corporum; Presbyter vero non est judex nisi animarum.' And fol. 337, the word Sacerdotum is thus explained, 'Qui deputati sunt ad audiendas confessiones:' And in the next paragraph he hath these words, 'Verbum Dei dimittit peccata, sacerdos autem est judex.' And, my lord, what I would infer from these divines and Linwood, is, that the priest being the judge of the state of the soul of the penitent, he must at his peril, as he will answer it to God Almighty, take care of the confession and absolution; and if he errs, he may perhaps be punished for it in another world, but not in this. We usually esteem it a hard case to punish a man for erring in his judgment, for not being so wise as he ought to be, or so understanding as another. No judge is in any case, at common law, to be punished for an erroneous judgment, either by action or indictment, 9 E. 4, 3, a. Pl. 10, 1 Len. 324, Hut. 120. And our divines tell us, that God Almighty will judge us by our wills, not by our understandings. And therefore, if these gentlemen were mistaken in what they did, it being only an error of their judgments, though it may be deemed an imprudent action, yet I hope it will not be adjudged criminal. And, my lord, there may be this farther reason given, why it should be left to the priest to judge of the repentance, and give the absolution when he sees occasion. Suppose, my lord, an innocent man should be condemned for treason or felony, as it happened in the case of the uncle condemned and executed for the murder of his niece, mentioned in my lord Coke's third Institutes, 232. And the like case happened in Gloucestershire between thirty and forty years since, when Joan Perry and her two sons [See an account of them following this case of captain Thomas Green, for Piracy and Murder, A. D. 1705, in this Collection] were executed for the murder of one Harrison; and after they were executed, the person supposed to be murdered came into the country, and *viva voce* proved the innocency of those persons that were condemned and executed for that fancied murder. Now, supposing, in such a case, the person to be executed obstinately and resolutely denies the fact, shall the priest refuse him absolution? And because the innocent person will not accuse himself of what he was not so much as in thought guilty, must he therefore die the second death for his other sins, for which he does repent? For they are still retained by the priest, who refuses to give him absolution. Because such persons cannot condemn themselves for what their consciences do not accuse

them, can there be no forgiveness, no absolution for them? Will not charity allow they may be saved, and consequently entitled to absolution? Nay, will not charity extend to those that suffer in an ill cause, through a fault in their understanding? And I hope that the errors of our judgments, as well as the weakness of our memories, may be pardoned amongst our secret sins; and therefore such persons may not always be denied the benefit of absolution. It is no where denied to traitors; nay, the Canonists say, 'In articulo mortis, omnes sacerdotes quoslibet poenitentes a quibusvis peccatis et censuris absolvere possunt,' Val. Reg. l. 1, n. 58, fol. 9. And he there cites a council for it, where it was so determined. Nor is there any particular form or method prescribed for their repentance or absolution; therefore, methinks, a general repentance may deserve a general absolution; and perhaps, in some of these cases, the priest had been to blame, if he had denied absolution.

And now, with your lordship's patience, I will look into the practice of divines in such-like cases; though it cannot be expected that I should bring many precedents to warrant this, because it is seldom that absolution is given at the place of execution; the ordinary, or some other divine performing that office, usually doing that in private, when they have free access to the prisoner: And if it were not so done here, it was because, after these divines were appointed to be with the criminals, and to prepare them for another world, and had been with them, and, as we say, received their confession and repentance for the crimes for which they were condemned, and perhaps had thereupon given them absolution; yet after this, for two or three days immediately preceding the execution, they were kept from them, and not permitted to come to them till they were in the cart at the place of execution: And it may be intended, that the absolution that was then given them, was for the sins which they had committed since they saw them last. Therefore, unless the king's counsel can shew me a case with such circumstances, they cannot expect from me a direct precedent to justify our proceedings. But I shall crave leave to mention a few that I think will bear some proportion to the case now before your lordship. I shall begin with that of John Twyn, who was tried, convicted, and attainted at the Old Bailey, the 20th of February, 1663, the narrative of which was then printed by authority. He was convicted for printing and publishing a treasonable libel; and my lord chief justice Hyde, before whom the trial was, saith, [Vol. 6, p. 536, of this Collection] "I shall not spend my time in discourse to you to prepare you for death: I see a grave person, whose office it is, and I leave it to him. Do not think of any time here: Make your peace with God, which must be done by confession, and by the discovery of those that are guilty of the same crime with you. God have mercy upon you; and if you do so, he will have mercy upon you." Af-

terwards, and before he came to be executed, the ordinary pressed him to confession of those others concerned with him, which he refused; and yet the ordinary offered to administer the Sacrament to him. From whence I would infer, that it is the office of the Ordinary to prepare condemned criminals for another world, and consequently he must be the judge when they are prepared. And next, though the Chief Justice was of opinion, that God Almighty would not pardon him but on the confession of his own fault, and the discovery of his accomplices, yet the Ordinary tendered him the Sacrament, which comprehends the absolution, when he obstinately refused to make any such discovery; [See Twyn's speech and behaviour in vol. 6, p. 536, of this Collection] and yet no indictment against him for it. My lord Strafford, when he was going to be beheaded, being denied to speak with archbishop Laud; as he passed by his grace's lodgings, seeing the archbishop at his window, the earl of Strafford bowing himself to the ground, said, 'My lord, your prayers and your blessing.' The Archbishop lifted up his hand, and bestowed both. There was not time or opportunity for his grace to pronounce the absolution at large, nor to lay his hands on the head of the penitent, as these defendants did, but he came as near it as he could; he lifted up his hands, and bestowed both his prayers and benediction, and that without any particular confession or repentance. And though his grace was afterwards proceeded against, and, as they then called it, tried for High Treason, and all the dirt thrown on him that Prynne and several others could rake up against him, and his whole life searched into, and every particular action narrowly traced, and even his reputation, when he was a scholar at the university, produced as evidence against him; yet this blessing, this absolution was never so much as mentioned, though they had often opportunity so to do, when it was urged (as frequently it was) that his grace and the earl of Strafford were very intimate friends and acquaintance, and went hand in hand to destroy the government both in church and state: And yet this action was publicly taken notice of, as we find by the historians of those times. Rushworth, in the earl of Strafford's Trial, fol. 782. Franklyn's Annals, 901.*

Now, my lord, blessing and absolution in such circumstances amount to the same. No man blesses the impenitent. The form that the archbishop then used is not set down, nor is it, with submission to your lordship, any ways material. There are several forms of absolution, which in sense and virtue are the same, as archbishop Sparrow has it in his *Rationale on the Common-Prayer*; where he shews us, that there are three several forms of absolution in the liturgy; as first, in the morning and evening prayer, 'He pardoneth and

* See, too, vol. 3, p. 1531, of this Collection.

absolveth,' &c. The second is used in the Visitation of the sick, 'By his authority committed to me, I absolve thee,' &c. The third is at the sacrament, 'Almighty God, &c. have mercy upon you, &c. pardon and forgive you, &c.' The like form is appointed to be used in case of imminent danger at sea, and stiled an absolution. And, saith that reverend and learned prelate, "All these several forms in sense and virtue are the same: for it is all one as to the remission of sins in the penitent, whether the priest absolve him after this form, Almighty God, who hath given me and all priests power to pronounce pardon to the penitent; he pardons you—or thus, By virtue of a commission granted to me from God, I absolve you—or lastly, God pardon you."

I must now, my lord, in my way, crave leave to observe, that criminals, be their offences never so heinous, though they do not confess them, or shew any repentance for them, yet they are not kept from the public service of the church; nor are they denied or refused to be admitted to the blessed Sacrament*, where they have the benefit of this third absolution, and that in public. What reason then can there be to deny them this absolution, for the giving which these gentlemen stand now indicted, which hath not, I believe, been at any time denied to any malefactors, either in this or any other part of the whole Christian world? The emperor of Germany, in his manifesto against those persons that killed his officers and ministers at Prague, as a great aggravation of their offence says, they did it without giving them a moment of time to repent, or make confession, or receive the Sacrament, which is never denied to the worst offenders, 1 Rushworth, 7.—Without giving them a moment of time to repent, or make confession, or receive the Sacrament—It is in the disjunctive, my lord; and thereby Confession and Repentance cannot be meant of that particular fact for which they were then put to

* But in the Rubric, prescribing the order of the administration of the Lord's Supper, or Holy Communion; the first directions are as follows:

"So many as intend to be partakers of the Holy Communion, shall signify their names to the curate at least some time the day before.

"And if any of those be an open and notorious evil liver, or have done any wrong to his neighbours by word or deed, so that the congregation be thereby offended; the curate having knowledge thereof, shall call him and advertise him, that in any wise he presume not to come to the Lord's table, until he hath openly declared himself to have truly repented and amended his former naughty life, that the congregation may thereby be satisfied, which before were offended; and that he hath recompensed the parties to whom he hath done wrong, or at least declare himself to be in full purpose so to do, as soon as he conveniently may."

death, for that was the service of the emperor their master, and the manifesto stiles the authors of their deaths, 'Barbarous, cruel, and inhuman murderers.' But I shall proceed to give your lordship another instance, where there hath been a public absolution to a criminal condemned, and that even at the place of execution, without any special repentance for the crime for which he was about to suffer. And that was in the case of sir Thomas Armstrong, who, by judgment of this court upon an outlawry for high-treason, for conspiring against the king's life and government, was executed at Tyburn in June 1684. In the court he insisted on his innocency, and so he did in a Speech which he likewise left with the sheriff at the place of execution; yet, notwithstanding that, the reverend divine that then assisted to prepare him for another world, did in effect the same with these gentlemen that are now defendants (which I humbly submit to your lordship's consideration): for, after a long commendatory prayer, he useth this benediction; 'The grace of our Lord Jesus Christ, and the love of God the Father, and the fellowship of the Holy Ghost, be with us, and in a particular manner with this thy servant, now in the minute of death, and day of judgment.' And then speaking to sir Thomas Armstrong, says, 'Now, Sir, commend yourself to God by your devotions, make yourself ready, and then let that be the last thing you do.' Sir Thomas Armstrong says, 'Sir, I hope in God my sins are pardoned, and I do pray for it heartily. I forgive the world all their offences they have committed against me.' Then the doctor says, 'I pray God shew mercy to you, as you express charity to them;' and then immediately followed the execution. I have dwelt the longer, my lord, on this particular, because it must needs be of very great authority, the reverend divine that then assisted being Dr. Tennison, now archbishop of Canterbury. [See vol. 10, p. 105, of this Collection.] And the circumstances of that case are much the same with ours: in the indictment the same offence was laid as against sir John Friend and sir William Perkins, he suffered at the same place, and that reverend divine was likewise with him in the cart. There was also a paper delivered by the criminal to the sheriff, declaring his innocency; yet absolution was publicly given at the time and place of execution. Not indeed in the same words as these defendants used, but in those that are as effectual. I think it is apparent, that no particular form of words is requisite to an absolution. Whether we think the power of the church authoritative, or only declarative, whatsoever is an execution of that power that is given by our Saviour in St. John, and denotes the priest's absolving, or the priest's declaring that God doth absolve them, or the priest's recommending them to God for mercy or a pardon for their sins, that, with submission to your lordship, is as much an absolution, as when the priest doth in his own person absolve

them. So it is in our morning and evening service, and in the communion, and the service at sea, as I have before mentioned; and yet the rubrick stiles them absolutions. The whole christian church, for the first ten ages, used that form of recommending, and no other; and the Greek church doth still retain the same. St. Cyprian De Lapsis, fol. 136, the Oxford edition, on the words, 'Pro vobis Deum rogare possimus,' the learned Oxford annotators say thus—And I may well stile them the learned annotators, since that great master and judge of all learning, the present bishop of Worcester (Dr. Sillingfleet), in his Vindication of the Trinity, fol. 155, 164, stiles them so. Their annotations are in these words, 'Quantumvis nunc temporis formula judiciaria et potestativa' (Ego te absolvo quasi tradita à Christo per Apostolos feratur, ex adverso compertissimum habetur per decem priora secula in usu minime receptam, imo nec adhuc in Ecclesia Orientali invaluisse.) And that absolutions, ordinations, and consecrations were in a deprecatory form, plainly appears from Morinus, l. 8. De administratione pœnitentiæ, c. 12, sect. 7, fol. 397, 'Ipse Domine remitte, dimitte, condona peccata hujus', N. &c. And this, he says, was the common and vulgar absolution in the Greek church. So Theodorus, who wrote his Penitentials towards the latter end of the sixth century, (it was published per Jacobum Pettit, in quarto, A. D. 1677, at Paris) in the first book, and the first chapter, page 26, is this absolution, 'Deus omnipotens sit adjutor et protector tuus, et præstet indulgentiam de peccatis tuis;' and many others of the like nature are *sparsim* through both the volumes. In the roman pontifical there is this absolution, 'Misereatur vestrum, omnipotens Deus, et dimissis peccatis vestris perducatur vos ad vitam æternam.' And likewise in the Ordo Romanus I before cited, fol. 61, is this, which is stiled 'Absolutio singularis: Frater N. absolutionem et remissionem peccatorum tuorum, per invocationem sacrati nominis Dei, et per ministerium nostrum, percipere merearis hic et in æternum.' And in the same page are several other absolutions plural and singular, penned after the same manner, in such a deprecatory form, and all stiled absolutions. And in none of these absolutions do I see any enumeration of particular offences, nor have I found in any of these penitentials, that malefactors are excluded from this absolution. Mr. Newland, who was about two or three years since condemned and executed for the murder of Mr. Thomas, did positively deny that he was guilty of that fact, or of aiding, assisting, or abetting thereunto. Yet Mr. Stevens not only gave him the sacrament, and that three times, with other company; but likewise gave him absolution, as Mr. Stevens himself hath since in print published to the world. And what is lawful and justifiable at Newgate before three or four persons, cannot become a crime at Tyburn, though it be done in the presence of 500 people; for the place or number of people can-

not alter the nature of the fact, and make an innocent action an horrid crime. I am credibly informed, that in the case of Anderton the printer, who was executed for high treason about four or five years since,* there was the same form of prayer used for him by the divine that then assisted, and that at this very place of execution. In the case of Mr. Ashton, who was likewise executed for high-treason,† though he expressed no sorrow for his crime, and left a Paper behind him justifying the fact for which he died, yet the same form of prayer, the very same absolution, and at the same place of execution, with all the circumstances of the present case, were used and performed for him; and instead of any reprimand for so doing, the sheriff of Middlesex said thus to the absolvers, as I had it from one that was then present, and set it down in writing; 'Gentlemen, I thank you for performing the last offices so decently.' And, my lord, my clients do insist on it, that on these precedents and this encouragement, they were induced to act as they did at the execution of sir John Freind and sir William Perkins. I have, my lord, looked into the treatises of some divines upon this occasion; and though I find a mighty stir about auricular confession, whether the church doth require that or no, yet I cannot perceive that it is by any insisted on, that there must be in any case a public confession or repentance, no, not even in those cases where public penance is enjoined, unless in some few, where the ecclesiastical court hath made it part of the penance. Mr. Prynne, in his Canterbury's Doom, fol. 192, 3. tells us, that one Mr. Adams preached at St. Mary's church in Cambridge, A. D. 1637, and maintained special confession to the priest to be necessary; for which being summoned before the vice-chancellor, he and several other doctors ordered Mr. Adams to make a recantation of that doctrine, and declare it was only requisite in those cases where people could not quiet their own consciences: and likewise to declare, that it is against true christian liberty, that a man should be bound to the enumerating of his sins, as hath been used heretofore in the times of ignorance and popery. There were indeed some doctors that did oppose this recantation, and justified Mr. Adams, insisting it was needful to make such confession to the priest; but none pretended it was in any case requisite to be made to the people. But, as I said before, the vice-chancellor, and the major part of the doctors, ordered the aforesaid recantation, and well they might; for it is *verbatim* taken out of the second Homily of Repentance, which book of Homilies was composed by many eminent prelates of our church, and the reading of it enjoined by the rubrick, which is part of the act of uniformity. And that homily doth further say, that it is most evident and plain

* In the year 1693. See the Case in this Collection, Vol. 12, p. 1246.

† In the year 1691. See the Case in this Collection, Vol. 12, p. 646.

that auricular confession hath not its warrant from God's word; and it cites St. Austin, who says, 'What have I to do with men, as though they were able to heal my diseases?' and if a penitent be not compelled by the laws of God or holy church to make a particular confession of his sins to the priest, who gives that absolution, much less is he any ways obliged to satisfy the curiosity of the people by enumerating of his offences, or publicly declaring a repentance for his sins. Nor do they any where distinguish the case of condemned criminals from others. But the rules concerning it are general, 'Et generaliter dictum generaliter intelligendum est.' Whatever I find spoken concerning absolution is expressed indefinitely, which falls under another maxim, 'Indefinitum æquipollet universali.' And, my lord, one reason why I take it to be lawful to pronounce absolution to condemned malefactors, is, that be their crimes never so great, the sword of justice doth not strike deeper than the grave, and there is still room for a 'Deus misereatur animæ ejus,' a Lord have mercy on his soul.

Thus I have, with all humility, submitted to your lordships' consideration what I have to say, why the fact, of which these gentlemen stand accused, should in itself be no offence. Neither can it be made a crime, with submission to your lordship, by any ill intention that can be suggested to be adherent to it: For the actions of men shew their hearts; and if their works are not evil, you cannot from them, 'in foro humano,' prove their minds corrupt. Omitting the reason given by my lord chief justice North, on the reversal of the Judgment in the case of Barnardiston and Soame.* I shall trouble your lordship but with two cases, and the reasons of them, to prove the truth of this assertion. The one is Elliot's case, in the last impression of Croke's Charles, fol. 608, where my lord chief justice Vaughan says, It is clear and undoubted law, that whatsoever is in itself lawful cannot have an unlawful intent annexed to it; for then the most innocent act of a man's life would be liable to severe censures. And he instances in this, that a man might then be indicted for high treason, for drinking water with a design to lessen and destroy the customs and revenue, thereby intending to dethrone the king. The other case that I would mention is in Dyer, f. 296, pl. 19, in these words: "A subject of this realm, being a merchant of London, departed out of this realm without licence of the queen, only to the intent that he might live there free from the laws of this realm, and out of his due obedience to the queen, and not upon any account of merchandizing; Whether such a departure were any offence or contempt to the queen, or not? And by the opinions of almost all the justices, such a departure, before an express prohibition or restraint by proclamation, or writ of 'Ne

'exeat regnum' awarded by the king or prince, is not any offence or contempt; for it is a thing indifferent to depart the realm, and the purpose and cause, which is secret in the heart, is not examinable." That is the reason given in the book: And Jenkins, a man much for prerogative, in his second century, cap. 70, fol. 88, agrees this case to be law; and says, That the common law doth not allow an intent to be issuable or triable, and gives this reason for it, "Cor hominis est inscrutabile." Now, my lord, those that will not allow absolution to be a very good act, must grant that it is at least indifferent. And then the cause, purpose, end or intent of it being secret in the heart, is not examinable, and therefore cannot be justly said to be done for raising a rebellion, or causing a disturbance in the kingdom. And I do not know that in any case a man is punishable for an ill intent, except in one species of treason, the compassing the king's death; and in that case the intention must be proved by some overt act directly tending to the fact designed.

2. But I come now to the second point, That if this shall be deemed an offence, yet it is not enquirable nor punishable in this court. I must humbly submit it to your lordship's judgment, whether the power of absolution, which is given to the apostles and their successors by the author and establisher of all lawful power, both ecclesiastical and civil, in these words, in the 20th chapter of St. John, v. 23, 'Whose-soever sins ye remit, they are remitted; and whose-soever sins ye retain, they are retained,' be not an authority far above all sublunary jurisdictions; and these gentlemen, the successors of the apostles, not to be called to an account for what they did in the execution of that authority, but by Him alone who delegated that power to them. But supposing it should be examinable here on earth, with submission to your lordship, it is only in that court, by those persons, or that sort of men, who conveyed to these gentlemen that power given by our Saviour. And this I shall endeavour to prove, First, from the nature of the thing itself. Their commission for it is their ordination, which laymen cannot give. Nor is it to be tried by the common law; for profession in religion, or *infra sacros ordines*, is only triable by the ordinary, Co. Lit. 132, b. 2 Inst. 492.

That very learned prelate, the present bishop of Worcester, in his charge to his clergy, fol. 43. tells us out of Cajetan, 'Officium curiæ animarum est præcipuum ac spiritualissimum Dei donum.' And the bishop is substituted by our Saviour to give the ordination, which he doth in these words, 'Receive the Holy Ghost now committed unto thee by the imposition of our hands. Whose sins thou dost forgive, they are forgiven; and whose sins thou dost retain, they are retained.' Now, methinks, a man must naturally infer from hence, that since this authority is derived from our Saviour by the bishops; if any persons

* See the Lord Chief Justice North's Argument on that occasion in this Collection, Vol. 6, p. 1092.

on earth can visit and reform the errors or abuses in the execution of this power, it must be those who are intrusted to give the ordination: And of things of this nature their courts have usually had the consueance. Nay, the privileges of the clergy in old times went much further; for our pious and devout ancestors, following the directions of the son of Sirach, Ecclesiasticus 7, 29, 31, 'Fear the Lord and reverence his priests,' thought they could not pay sufficient respect and honour to the clergy, unless they exempted them from all temporal jurisdiction. So that even in temporal offences, and those of almost the highest nature, murder, and felony of course, and even in sacrilege, if the ordinary would demand the prisoner for his clerk, he was immediately taken from the temporal court, and subjected to the ordinary's jurisdiction, Stanford's Pleas of the Crown, 123, and 3d Institut. 114. And Horn, in his Mirror of Justice, c. 3, sect. 4, asserts, That if, in a temporal court, a clerk accused of any case criminal or mortal, pleads that he is a clerk, the judge had no farther consueance of the cause; for the church is so enfranchised, that no lay judge can have jurisdiction over a clerk. And the abridgment of the Book of Assizes, tit. Coronæ, fol. 74, says, that if a clerk will not pray the benefit of his clergy, yet if the Judge knows him to be so, he will not give judgment of death against him, as against a layman. And these privileges would have remained to this day, if acts of parliament had not altered them. And if the clergy were exempted from the temporal jurisdiction for offences of so high nature, if the argument 'a majori ad minus' holds good, they must certainly have been exempted from being punished in temporal courts for all their lesser crimes; and must still be so, where no statute law interposes, and that will lie on the other side to shew.

And so far of late years have the clergy been thought and esteemed to be exempt from the secular power, that on the treaty of the Spanish match, it was agreed, that the Infanta, who was then designed to be our queen, should have her Popish clergy, and a superior over them. And the 14th article runs thus, "that if any secular judge shall apprehend any ecclesiastical person for any offence, he shall forthwith cause him to be delivered to the aforesaid superior ecclesiastical, who shall proceed against him according to the canon law." These articles were then sworn to by the king, prince, and privy council; and therefore we must believe it to be done on very good advice. This is taken notice of by Mr. Rushworth, in his first volume, fol. 87. And although how far and in what cases spiritual were persons formerly out of the reach of the secular power, may admit of some debate; yet nothing is more plain than that spiritual causes cannot be determined by the civil power. 'Judex secularis de rebus spiritualibus cognoscere non debet,' says Fleta, l. 6. c. 37. f. 429. There is (as the incomparably learned Bishop of Worcester has it, in his charge to his clergy,

fol. 35), a common law ecclesiastical, which, although in many things it may be the same with the canon law that is read in books, yet hath it not its force from any papal or legatine constitutions, but from the acceptance and practice of it in our churches. And such a law, my lord, is coeval with the very government itself. The learned Selden, in his notes on the 17th chapter of Fortescue, says, That in time of paganism the Druids were the lawyers, and determined controversies; the same persons were their priests and judges. And sir Henry Spelman, in his discourse of Law Terms, tells us, That in the infancy of christianity the bishops and clergymen did hear and determine all causes amongst the christians. And how those matters were settled, when christianity came to be established amongst us, sir Thomas Smith will acquaint your lordship, in his treatise *De Republica et Administratione Anglorum*; a book I have often heard cited in this court, not only at the bar, but by very learned judges on the bench. In his third book, the 11th chapter, are these words: 'In quatuor potissimum causarum generibus Archiepiscopi Episcopique peculiarem jurisdictionem sortiuntur, in testamentis et legatis, in decimis et mortuariis, in nuptiis, adulterio aut fornicatione, et in iis demum omnibus quæ ad ordinem & decus Ecclesiasticum conservandum et religionem constabiliendam pertinent; nam majores nostri rempublicam primo ordinarunt, postea fidei Christianæ nomen dederunt et politiam sic constitutam, cum ea quam Apostoli, doctores theologique religionem invexerunt, semper retinuerunt; quicquid ad conscientiæ forum pertinebat, illis utpote peritioribus, et ob vitæ sanctimoniam morumque probitatem laudatissimis, quibusque confidebant, maxime delegabant.' I shall not take up your lordship's time to prove, out of *Magna Charta*, and other old laws, that the clergy have rights, liberties, privileges and immunities; but taking that for granted, shall proceed to examine, whether this case doth any way, and how, concern their rights and privileges. It cannot be denied, but that to be exempt from the ordinary and common jurisdiction is an immunity, and to have consueance of causes is a liberty and privilege: but the question still is, if the clergy are in cases of this nature exempt from the common jurisdiction of the king's temporal courts, and the ecclesiastical judges have consueance of the offence (if an offence it be) of which these gentlemen stand accused? My lord Coke, in his 5th Report, in the cause of the king's ecclesiastical law, fol. 9, says, "As in temporal causes the king, by the mouth of his judges of justice, doth judge and determine the same by the temporal laws of England; so in causes ecclesiastical and spiritual, as namely, blasphemy, apostacy from christianity, schisms, ordering, that is, (ordination), admissions, institutions of clerks, celebration of divine service, and others, the consueance whereof belongs not to the common law of England, the same are to be determined and

decided by ecclesiastical judges, according to the king's ecclesiastical laws of this realm." In the case of Holt and Dighton, in the 12th of king James the first, (it is reported 1 Rolle's Rep. 410). who were brought up into this court by Habeas Corpus, the return whereof was, that they were committed by the high commission court, and the cause of their commitment was, that they were demanded by the high commission court if they would conform themselves to the custom of the church of England, and receive the sacrament kneeling; and for that they would not give a direct answer to it, they were committed; and though it was moved by serjeant Harvey to have them discharged, yet Coke and Doderidge said, that the high commission court had jurisdiction of schisms and heresies, and in that case they were accused of a schism, and therefore they had jurisdiction of the cause; and so the court remanded them.

Now, my lord, within all and every one of these descriptions of spiritual causes comes this that is now before your lordship; for according to that of sir Thomas Smith, this concerns orders or ordination, for it was by virtue of their ordination that they did it. It relates to the decorum of the church, and concerns the establishment of religion; for the indictment says, it was done to the scandal of the Protestant religion now by law established. And that it is matter of conscience, is in itself apparent. The case comes likewise within my lord Coke's description of spiritual causes; for it concerns ordering and the celebration of divine service; for the question is, Whether they performed it as they ought to do? And the indictment itself shews it; which not only stiles the defendants clerks, but says they did it 'ut Presbyteri Ecclesiae Anglicanae'; which intimates it was done in celebrating divine service. And if kneeling at the sacrament be a matter of ecclesiastical conusance, and out of the reach of the temporal courts; though the rubrick is much more plain and express in that than in our case, yet if that nonconformity be called a schism, it is only examinable in the spiritual courts, whether ours be so or no. And the rather, my lord, shall the bishop's court, or the bishop himself, judge this matter, for that, by the common law ecclesiastical, the bishop is appointed the visitor of all that enter into holy orders, and he is to see if they live and act according to their ordination, and to punish them that do amiss. And absolution is one of the great ends of ordination; and for this purpose doth the bishop make his frequent visitations. Now, my lord, where the law doth appoint a particular visitor, he alone is to look to that charge, and no one else to interfere: and that is the reason why a Mandamus did not formerly go out of this court to restore a monk or friar, nor at this time for a fellow of a college, a proctor of Doctors Commons, or the like. And, I think, on that point the cause of Exeter College was adjudged against Dr. Berry, in the House of Lords. To this I must crave leave to add,

that where the ecclesiastical court hath conusance of any cause, all other things that are incident or relating to it are likewise within their jurisdiction: 'Cognitio principalis trahit ad se accessorium.' And the books are so full of instances thereof, that I need not mention any. And if any inferior officer transgresses in acting or doing that which belongs to ecclesiastical conusance, the archbishops and bishops are to punish it, and the temporal judge is not to interfere. Exactions and extortions look more like temporal offences, than what these defendants stand now convicted of; for those in their own nature tend to stir up the people to sedition and rebellion; yet these offences, when committed by spiritual men or in ecclesiastical affairs, by the common law our courts could not meddle with them. Mr. Prynne, in his *Animadversions on my lord Coke's fourth Institutes*, fol. 233. cites this record out of the petitions in parliament, Anno 18 E. 1. 'Hominibus de London' conqueruntur de officialibus et ministris Ecclesiae de multimodis vexationibus et exactionibus nimis onerosis, per quas plus extorquent de populo quam omnes curiae laicales; et petunt quod Rex opponat remedium festinanter, ne destruat populus in occulto.' The beginning of the king's answer is somewhat doubtfully penned. Mr. Prynne gives it in a distinguishing character: 'Si curia Regis possit amendari, faciat.' But the rest of the answer is direct; 'Cellarius emendet in temporalibus, Archiepiscopus faciat in spiritualibus.' But these oppressions and extortions, it seems, continued; and some attempts there were to punish them by indictments at common law; but such indictments were thought illegal: for in the Close Roll of 16 E. 3, par. 2, mem.

* Rot. Claus. 16 Ed. 3, par. 2. mem. 12. dorso, in Turri London. 'Rex dilectis et fidelibus suis Hugoni de Courtney, Comiti, Devon', et Sociis suis, Justiciariis nostris ad diversa transgressionibus, oppressionibus et extorsionibus, damna, gravamina et excessus nobis et populo nostro illata in Com' Devon' audiend' et terminand' assignat' salutem. Cum in ultimo concilio nostro apud Westm' tento, ad requisitionem Prelator' regni nostr' Angliae concessimus, quod processibus omnibus et singulis coram Justiciariis nostris inchoatis seu factis contra viros Ecclesiasticos, cujuscunque conditionis aut status fuerint, super extorsionibus et excessibus per ipsos in nostri ac jurium coronae nostrae prejudicium in exercitio jurisdictionis Ecclesiasticae factis, ad exigend' in ipsos hijs occasionibus promulgand' usque ad proximum parlamentum nostrum supersedeatur; et quod inquisitiones super extorsionibus et excessibus hujusmodi contra eos per Justiciarios citra dictum parlamentum nullatenus de novo fiant; Vobis mandamus, quod omnibus processibus coram vobis in com' predict' inchoatis versus quoscunque viros Ecclesiasticos, pro extorsionibus et excessibus per ipsos in nostri et jurium coronae nostrae

12, dorso, I find a special ‘Supersedeas processibus omnibus et singulis coram justiciariis nostris inchoatis seu factis contra viros Ecclesiasticos, cujuscunque conditionis aut status fuerint, super extorsionibus et excessibus per ipsos in nostri ac jurium coronæ nostræ prejudicium in exercitio jurisdictionis Ecclesiasticæ factis.’ And that there should be no more new indictments against them before the next parliament. And in the Close Roll 17 E. 3, par. 1, m. 24, dorso, is the like writ to the justices of Oyer and Terminer for the county of Hereford, in which there is a *Supersedeas* to stay the proceedings at common law against some particular persons for those offences. And in the close roll of 18 E. 3, m. 14, dorso, (Sir William Dugdale is mistaken in the year, when he calls it the 17th) is the summons to parliament, the next parliament after the aforesaid writs; and the summons runs thus: ‘Quia pro quibusdam arduis et urgentibus negotiis, honorem Dei, et decus et defensionem ecclesiæ Anglicanæ, et salubre regimen populi et regni nostri Angliæ summe contingentibus, ordinavimus parlamentum nostrum,’ &c. At which parliament there was an act made, which is in the printed statutes 18 E. 3. c. 6. in these words: “Whereas commissions be newly made to divers justices to make inquiry upon judges of holy church, whether they made just process or excessive in causes testamentary, and other, which notoriously pertaineth to the consueance of holy church: the said justices have inquired, and caused to be indicted judges of holy church, in blemishing the franchise of holy church, that such commissions be repealed, and from henceforth defended.” And so the officers of the ecclesiastical courts went on with their oppressions and extortions, and the temporal courts could not lay hold of them for those offences, as appears by several petitions and answers in the parliament rolls, 21 E. 3, n. 51. 1 H. 5, n. 23, till the statute, 21 H. 8, c. 5, brought them within the consueance of the courts of common law. And if the archbishops and bishops can alone, (the statute being out of the case) exclusive of all secu-

‘prejudicium in exercitio jurisdictionis Ecclesiasticæ factis, usque ad proximum parlamentum nostrum supersederi faciatis; et Vic’ nostr’ com’ prædict’ detis in mandatis, quod exigend’ in ipsos vel eorum aliquem pmissa occasione promulgand’ usque ad dictum parlamentum nostrum supersedeat: ac vos inquisitionibus super extorsionibus et excessibus hujusmodi contra dictos viros Ecclesiasticos citra parlamentum prædict’ de novo capiend’ similiter supersedeatis, juxta promissionem nostram prædict.’ (T. prefato Custode apud Kenynton, 15 die Novembris.—Per Concilium.—Eodem modo mandatum est Thomæ de Berkele, et Sociis suis, Justic’ ad diversa transgressionem, &c. in com’ Som. (T. ut supra.)’

And there is a space in the roll, supposed to be left for entering of other writs of the like nature, that were then issued forth.

lar power, look after and punish the irregularities of their commissaries, though they tended to the prejudice of the king and his royal prerogative, their power must be full as great over all ecclesiastics, and in an eminent manner over the clergy, in all matters relating to their function, and especially in all things which concern the discipline of the church, of which the bishops are judges, as well as of the doctrine. Bracton, in his fifth Book, ‘De Exceptionibus,’ c. 2, fol. 401, a.’ treating concerning the jurisdiction of courts hath this expression: ‘Clericus in nullo conveniendus est coram judice seculari, quod pertineat ad forum Ecclesiasticum, sicut in causis spiritualibus, vel spiritualitati annexis, ut si pro peccato vel transgressionem fuerit pœnitentia injungenda, et quo casu Judex Ecclesiasticus habet cognitionem; quia non pertineat ad Regem injungere pœnitentias, nec ad judicem secularem, nec etiam ad eos pertinet cognoscere de iis, sunt quæ spiritualibus annexa.’ And if the temporal courts cannot hold plea ‘de pœnitentia injungenda,’ certainly they cannot punish ‘pro pœnitentia non declarata.’ Besides, I think it cannot be denied, that absolution is spiritual, ‘vel saltem spiritualitati annexa.’ More instances I could produce, if I thought it necessary, to prove that where the ecclesiastical court hath consueance of the celebration of divine service or other spiritual matters, it must hold plea of what is incident or belonging to it; and therefore of the mind, intention, and design with which any spiritual office is performed, if such mind can be fathomed, and intention punished. And I presume, my lord, there will be no occasion to prove that all the rights, liberties, privileges and immunities, that the clergy lawfully enjoyed in the time of popery, do still belong to the present church of England, unless they are taken away or altered by act of parliament; for though the errors were corrected, and abuses reformed in matters of doctrine and of foreign jurisdiction, yet the legal rights of the church, and power of the clergy, were not shaken or invaded by the reformation.

3. And now, my lord, I come to the third and last point I propose to speak to; and that is, supposing what these gentlemen stand accused of is an offence, and that this court hath consueance of it; yet, with submission to your lordship, there is no judgment to be given against us on this indictment. I believe the king’s counsel cannot shew me any rule at common law concerning absolution. So that, if we are guilty of any offence, it is for not observing the Rubric. If we have acted according to the letter and intent of that, no indictment will lie against us for the fact we are now accused of: and if we have deviated from the Rubric, then the indictment ought to have been framed on the act of uniformity. It is a rule laid down in our books, That where a statute makes that an offence which was not so before, an indictment for that offence must conclude ‘contra formam statuti.’ So is 1 Saunders

249. 2 Rolle's Abr. 82. 1 Croke 449, and Jones 379. And I could instance in many precedents that are drawn accordingly. I shall mention some few on this very act of parliament. They are all in the same term, Mich. 15 and 16 queen Eliz. in this court, and against the same person, Robert Johnson, of St. Clements Danes, clerk. One of the indictments is 'for speaking against the Book of Common Prayer, contra formam statuti.' Another against him, 'for omitting the Litany, Epistle and Gospel, in saying the Divine Service.' Another against him, 'for christening a child, and not signing him with the sign of the cross.' another against him, 'for marrying a couple without a wedding ring.' another against the same person, 'for saying morning and evening service without a surplice.' And though the preamble and inducement to every one of these indictments make an heavy complaint against the person that is so indicted, as if he intended to destroy the Protestant religion by law established, and overthrow the government, yet they all conclude 'contra formam statuti.' Now, my lord, according to the rule and precedents I have cited, this indictment that is now before your lordship should have set forth, that the defendants did not move sir John Friend and sir William Perkins to a special confession of their sins, but without it gave them absolution, 'contra formam statuti.' But supposing, my lord, it should be answered, that the indictment is rather for the ill intention of the defendants, than for not observing the Rubric; with humble submission to your lordship, if such an indictment may be brought, yet this before your lordship is not rightly framed, but is insufficient and uncertain in relation to that very intent: For the indictment says, these defendants conspiring, intending, and designing the execrable, horrible, and detestable treason, for which sir John Friend and sir William Perkins were then just going to be executed, to justify, or at least to extenuate, diminish, and undervalue, &c. did absolve them. Now, my lord, *non constat* which they aimed at, justifying or undervaluing; and they cannot be found guilty of all: for though the verdict be general as to this, yet it is according to the indictment, which is in the disjunctive, 'Et in disjunctivis sufficit unum verificari.' Therefore our common law doth always require certainty, but especially in indictments; they ought to be certain to every intent, that a certain judgment may be given on them. Where a man in pleading sets forth his title by a conveyance, in which are the words 'give, grant, release, confirm, bargain, sell,' &c. he must shew which of them he makes use of, and which he applies to his purpose, or else his plea is naught, 1 Ventr. 109. The return of a Habeas Corpus sets forth the commitment, 'Et hæc est causa captionis seu detentionis,' adjudged an ill return, 1 Ventr. 324. In Trinity Term last, in this court, there were several indictments against Baker and others for exercising the trade of a rope-maker, 'existens

'misterium infra regnum Angliæ vel Walliæ;' and there, although the offence was the same whether it were a trade in England or Wales, yet for the uncertainty which the disjunctive made, the indictment was quashed. And in the last term (H. 9 W. 3. B. R.) Sanky and another quaker were brought up by Habeas Corpus,* and the return set forth a commitment by two justices, by virtue of the statute 27 H. 8, c. 20, reciting a certificate from the commissary, that a cause of subtraction of tythes or other ecclesiastical duty was depending in the ecclesiastical court, to which the defendants refused to answer. In that cause, though the words of the act of parliament are strictly pursued, which gives the same remedy where the fact is for other ecclesiastical dues as it does for tythes, yet because the certificate on which the return was grounded, did not set forth in particular for what the suit was commenced in the ecclesiastical court, but only in the disjunctive, for that reason the commitment was held insufficient, and the parties discharged. In Mr. Rowe's case, Bendlow, fol. 60, in Replevin, the plaintiff claims common appurtenant to a manor or a messuage called Cursall Grange, by prescription, and they were at issue on the prescription; but in arrest of taking the inquest, it was shewn to the court, that the prescription was uncertain for the common, to wit, to the manor or messuage: where he ought to have claimed it to one only. And the court adjudged them to re-plead, though the place itself was expressly and certainly named, and called Cursall Grange. In the same book, fol. 177, pl. 39, an ejectment 'de una acra terræ sive prati' adjudged ill; and so is the same case reported, Dyer 264, pl. 39, and 1 And. 31, pl. 73. An inquisition on a 'diem clausit extremum' finds, that a man was seized 'de uno messuagio sive tenemento,' was held void and insufficient, Ley. 9, 13 Rep. 48. So an ejectment 'de uno messuagio sive tenemento' is ill, even after a verdict, 1 Rolle's Rep. 7, 334. 2 Rolle's Abr. 80. 3 Lennard, 228. Ley. 43. 2 Cor. 621. 1 Siderfin, 295. 1 Cro. 188, and many other books. And in Noy's Reports, on the like occasion, it is said, that a writ in the disjunctive is void. And in Popham, fol. 203, it is held, that an ejectment 'de burgagio sive tenemento' is naught. Though indeed in serjeant Hardresse's Reports, fol. 173, in the case of Danvers *versus* Willington, it was held, that an ejectment 'pro uno messuagio sive burgagio' in Hay *infra* Muros was good enough; but the reason given was, because 'messuagium et burgagium' signify the same thing in a borough. There was a cause (Pasch. or Tr. 8 W. 3.) about two years since in this court, it was an indictment against Stoker, for that he 'fabricavit, seu fabricari causavit,' a certain bill.† Exception

* See Lord Raymond, 323. Holt, 657. 12 Mod. Rep. 165.

† See Stocker's Case, Salkeld, 342. 371. 5 Mod. Rep. 137.

was taken to it, because it was in the disjunctive, whereas it ought to have been positive and particular. And I think the counsel for the prosecutor could never get over that exception; and, to the best of my remembrance, there was but one answer that was aimed at, and that was, that the offence and fact were the same; for he that caused it to be counterfeited, might be truly said to counterfeit it: but I think that was not held a good answer to that exception. But in our case that cannot be pretended: 'Justificare' and 'Vilipendere' are of a very different signification. The very indictment doth insinuate as much; 'Justificare, vel saltem extenuare, diminuere, et vilipendere.' The 'vel saltem' doth shew, that the subsequent words are not of so great force as those precedent. And indeed almost opposite they are; for he that justifies, denies that it was an offence; whilst he that diminishes or undervalues it, says truly, it was an offence, but not so great as is pretended. And, my lord, by reason of this uncertainty, the court must be in doubt what judgment to give; for it is evident, he that would justify sir John Freind's offence would deserve a greater punishment, than he that should only lessen it, and say it was not so great an offence as Charnock's. Such an invasion is not so horrid and villainous, nor of so deep a dye, as that barbarous assassination that was intended. After such a manner, methinks, a man might lawfully extenuate an offence, when it would be highly criminal to maintain and justify the fact. Besides, 'Vilipendere' may be taken to vilify, contemn, and condemn the fact; and must that be thought a crime? And the *necnon* afterwards, with those other aggravations that are there added, cannot mend the matter: for all that harangue of persuading persons that sir John Freind and sir William Perkins were innocent, and the inciting the people to treason and rebellion, depend purely on the justification or extenuation of the crime; for if the fact were justified, people would be sooner induced to follow their example, than if it were acknowledged to be an offence, but the heinousness of it lessened, diminished, or vilified. And which of these the defendants aimed at was doubtful to him that drew the indictment, doubtful to the jury, and therefore I hope the court will give no judgment on it. Besides this, my lord, there is, I presume, another exception that may prove fatal to this indictment; and that is, the insufficient setting forth the attainders of sir John Freind and sir William Perkins, in not shewing when, where, or before what judges they were attainted, which, with submission to your lordship, ought of necessity to have been done. I acknowledge that a bare inducement requires not much certainty: but when it is such a matter, on which the whole doth so depend that you can make nothing without it, and when it is traversable, then it is substance, and must of necessity be certainly expressed. For instance, if J. S. be accused, either civilly or criminally, of an

offence, which is not so but with relation to a fact of J. D. there the fact of J. D. must be certainly expressed. As in *Hetley*, 73. 3 Cro. 752. Plowman, a constable, was indicted for suffering one, who was arrested 'pro quodam felonia antea facta,' to escape; and because it was not shewn what felony it was, and when done, he was discharged. So in this case, if it be an offence to absolve traitors, whether they are attainted or no, then the treason ought to be specially and particularly set forth, and when and where it was committed: but if it be not an offence to absolve traitors, unless they are attainted, then that attainer ought to be as fully and plainly expressed as the time and place where those traitors were executed, which in this indictment is carefully set forth. And that this indictment is faulty in this particular, I shall endeavour to prove, as well by precedents, as by the opinions and judgments in our books of law. But inasmuch as this indictment is 'primæ impressionis,' I must trespass on your lordship's patience, whilst I refer to other precedents in which records are mentioned and recited, and from a parity of reason reduce them to the present case. I shall begin with precedents of declarations. If an action of debt be brought against a sheriff for the escape of one in execution, the time and place, and the court in which the judgment was obtained, is always mentioned, *Hern.* 74. *Robinson*, 311. *Brown's Entries*, 1 par. 18. 2 par. 15. *Brownlow's Lat. Rediviv.* 33. *Thompson*, 122. and *Vidian* 193, 197. and several other books.

So against a sheriff for not taking one in execution that was in his presence, sets forth the judgment, and out of what court, when and where the execution issued. *Upper Bench Precedents*, 79. *Aston*, 57. 2 *Brownlow*, 35, 36.

An action for maliciously indicting the plaintiff for felony sets forth, when, where, and before whom the indictment was. *Vidian*, 145. *Hansard*, 24, 25, and 53.

An information against one for taking and carrying away the goods of a *felo de se*, sets forth the inquisition, and before whom it was taken. *Old Book of Entries*, 225, b.

An information for intruding into lands which came to the king's hands by attainder, sets forth the record of attainder, where, when, and before whom. *Rastall's Entries*, 387, 412. *Plowden's Commentaries*, 547. *Ashton*, 181.

And so, my lord, in all good precedents, where records of attainder are mentioned, the time, place and court are always set forth. So is *Wiat's attainder*, *Co. Entries*, 79. *Rastall*, 413, b. *Plowden's Com.* 449.

So is *Littleton's attainder*, *Co. Entries*, 422, b. And *Trussel's attainder*, *Co. Entries*, 246, b. the duke of Somerset's attainder, *Co. Entries*, 481, and the attainder of John Bary, in the same book, fol. 699.

So if the master of the Crown-Office takes an inquisition concerning the escape of any prisoners of this court, according to the 39th of H. 6, c. 33, the record on which they were

committed is fully taken notice of, as I have seen a precedent, Mich. 4 & 5 El. Rot. 7. In the case of Mr. Braddon and Mr. Speake, the indictment* doth not only say that my lord Essex did murder himself at such a time and place, but adds further, 'as by inquisition taken at the Tower of London aforesaid, upon view of the body of the said Arthur earl of Essex, and now in this court remaining of record, does more plainly appear.' So the indictment against Tasborough and Price,† for suborning Dugdale to retract his evidence that he had given against the Popish Recusants, &c. sets forth the record, where and before whom such convictions were. So in the case of Thompson, Pain and Farewel, for printing and publishing a scandalous pamphlet relating to sir Edmond-bury Godfrey's death, the information‡ doth not begin like this indictment, 'Whereas Green, Bury, and Hill, were attainted of murder;' but sets forth, That it was in such a court, in such a year and term, with the indictment and attainder at large, and where the record is to be found.

I could instance in many more precedents of the like nature; but I fear I have tired your lordship's patience too much already, and therefore shall conclude with one that will lead me to the opinions and judgments in our books of law, which I hope will be of use to fortify the precedents I have cited to prove this indictment vicious. It is in Keilway, 193. An inquisition that finds the attainder of one Bays: the record is large, and therefore I shall not recite it, nor make any other observations on it than what are in the very report, which are in these words: "Memorandum. This Inquisition was drawn by good advice, that is to say, by the council of king Henry the 7th; yet the inquisition which entitled the king to the land, by reason of the attainder of the said Bays, doth not make any mention of the indicters, nor of the names of the justices of peace who took the indictment, but only the day of the indictment taken, and the day of his attainder, without expressly mentioning what kind of felony, but 'pro quadam felonia,' and the names of the justices before whom he was attainted." These are the words of the reporter: and, my lord, that this case is of general concern, appears by the next case in that book, Keilway, 194. An indictment was found on the escape of certain persons convict, without shewing before what justices the conviction was; and after the matter was considered at the bar and the bench, the indictment was held insufficient: but says that case, "The names of the justices of peace before whom the original indictment was taken is not material, nor the specifying of the felony, 'prout patet supra' in the case of Bays; for where the court is instructed to whom to write to certify the record,

all the special matter shall come in by the certificate: and although the justices of gaol-delivery, or other justices, before whom the conviction or attainder is, do not certify the original, it is not material, so that they certify the body of the record of the attainder or conviction." These are the words of that book: and, my lord, it must be on the same reason, that where a man pleads a conviction of recusancy, he must shew before whom it was, Noy, 89. 97. And so are the precedents in Winche's Entries, 522, 523, 524. 2 Brownl. 15. Hern. 503. So in an action for maliciously indicting a man for treason, it is not sufficient to say he did indict the plaintiff; nay, if he adds *coram* such persons, justices of the peace, and omits 'ad gaolam deliberand' assignat', it is ill, 2 Cro. 357. And in an action for maliciously indicting a man of perjury, he must set forth the indictment, and shew that it was preferred before one that had consueance of such matters. And that is not all; he must likewise shew, that the cause in which he swore was *coram iudice*, 3 Cro. 725. He that pleads a presentment in a court leet, must set forth the day when the court was holden, 2 Saunders, 290. 1 Ventris, 107. And therefore to plead that at 'quandam curiam' he was amerced, is ill, Modern Rep. 75.

An indictment of maintenance in 'quodam placito coram Domino Rege pendente,' not mentioning where the King's-Bench sat, was held fatal in arrest of judgment, 1 Ventr. 302.

An indictment for a second offence, where the punishment is greater than for the first, ought to recite the former conviction, 1 Lenard, 295. So it was done in Roger Booth's Case, Mo. 666, pl. 913. In 3 Keble, 737, an indictment for a second offence of printing did set forth the first, but did not say where it was; therefore Twisden held the indictment naught. And if there be a necessity of setting forth so precisely the first conviction, to make the second offence the greater, methinks, in reason, it must as certainly be set forth, where it gives the very *esse* to the offence. And if such a general way of referring to records should be allowed in indictments, it would not only overthrow all the precedents and other authorities I have cited, but the defendants must needs lie under several inconveniences. They would then be cut off from the privilege of pleading 'Nul tiel Record,' or traversing it, as was done in Bays's Case before-mentioned: for, although such a traverse might amount almost to the general issue, yet comprehending matter of law, the defendants may plead it specially, Hobart, 127. And if the defendants plead the general issue, how shall they know where to go to find out the record, to see whether a true copy be produced against them? And it cannot be a sufficient answer to say, that the indictment sets forth that 'debite et legitime' they were convicted and attainted; it must be shewn after what manner they were attainted, that the court may judge whether it was legally done or no. In Patrick Harding's Case, in the first year of this king and the late queen (it is re-

* See the Indictment in English and Latin, vol. 9, pp. 1128, 1129, of this Collection.

† See the Indictments in English and Latin, vol. 7, pp. 881, 884.

‡ See the Information, vol. 8, p. 1359.

ported in 2 Ventr. 316),* the indictment against him was for high-treason, and did set forth that he adhered to the king's enemies. The jury found, that he listed and sent soldiers to the French king, then an enemy to our king and queen: but the court held the indictment too short there, because it mentioned 'hostibus et inimicis' generally; whereas it should have set forth who those enemies were, that the court might take notice whether they were enemies, as the law intended.

In the case of Woodly and Bezly, 2 Cro. 291. Yelverton 213. 1 Brownlow 114. In debt for rent upon a lease for years, the plaintiff derives his title by the grant of the reversion by way of bargain and sale in fee from the first lessor, and declares, that by indenture of such a date, one grants, bargains and sells for money to him the reversion in fee, which indenture was inrolled such a day 'secundum formam statuti;' and on *nil debet* pleaded, there was a verdict for the plaintiff: yet judgment was arrested, because the plaintiff had not shewn in what court the indenture was inrolled; though it might have been, and undoubtedly it was alledged, that it was but a conveyance to the title, and an inducement to the action, and 'secundum formam statuti' shews it was 'debite et legitime.' So in Allen 19. King against Somerland. In debt for rent the plaintiff declares on a lease for years made by a stranger, who bargained and sold the reversion 'per indenturam debito modo inrotulat' 'in Curia Cancellaria.' After a verdict for the plaintiff, on *nil debet* pleaded, it was moved in arrest of judgment, that he had not alledged the inrollment to be within six months, nor 'secundum formam statuti;' and though it were said to be *debito modo*, yet that would not mend the matter, nor aid the incertainty, and therefore judgment was arrested. So in the same book and folio, Colman against Painter. In an action by the lessee against his lessor on a covenant for peaceable enjoyment, he assigns for breach a former lease to J. S. The defendant pleads, that the lease to J. S. was with condition of re-entry for non-payment of rent, and that before the lease made to the plaintiff, the rent was behind, and 'legitime demandat' 'secundum formam indenturæ,' and upon non-payment he re-entered, and made the lease to the plaintiff: and upon demurrer it was resolved, that the demand was insufficiently alledged; for, says the book, he ought to set forth certainly, when and where it was made, that it might appear to the court to be legal.

I shall trouble your lordship but with one case more to this point; it is in 3 Lennard 72. A Quo Warranto was brought by the queen against sir John Constable, who claimed certain wreck in the county of York. The defendant pleaded, that Edward duke of Buckingham was seized of such a manor, to which he

had wreck appendant, and that he was 'de alta proditione dedito modo attinctus,' and that found before the escheator; and shewed further, that that manor descended to queen Mary, who granted the same to the earl of Westmoreland, who granted the same to the defendant: upon which it was demurred; and exception was taken to the plea, because the attainder is not fully and certainly pleaded. It was argued by Plowden, counsel for the defendant, that the attainder was certainly pleaded, 'scilicet, debito modo attinctus:' For, says he, it is shewn that the wreck is appendant to the manor, and then if he hath the manor, he hath the wreck also: and if he had the manor, it is not material to the queen how he hath it; for the queen doth not claim the same, but impeacheth the defendant for using there such a liberty. But he there grants, that if the heir of the duke had demanded the manor there against him, the attainder ought to have been pleaded certainly. And if so much certainty be required in pleading an attainder that makes a title to an estate, that attainder must needs be as fully, as clearly, and as certainly set forth; that is the ground-work and foundation of an indictment for that which is called a very great offence, which is not for absolving two persons in the parish of Paddington, nor for absolving two impenitent traitors, but for absolving two persons attainted of high-treason, who did not repent of that treason of which they were attainted.

There are, my lord, I think, some other faults in the indictment. It mentions, That sir John Freind and sir William Perkins were attainted for high-treason, in compassing the king's death, and adhering to his enemies; which were two treasons in each of them, and consequently four in all. Yet afterwards the indictment says, that these defendants intending to justify the horrid treason aforesaid (in the singular number.) So in the conclusion, that the absolution was given 'absque aliqua pœnitentia pro alta proditione prædicta prius declarata,' without shewing which treason in particular was unrepented of; and each of them was not obliged to repent of all the treasons, for they were not all his own. And is like the case this very term in this court, where a rescous was returned against two persons, that they had rescued J. S. prædict' without shewing which, and there was J. S. senior, and J. S. junior before-mentioned; and for this incertainty that return was quashed. And it seems to me to bear some resemblance to the case of Tindall and Cobbs, 3 Lennard, fol. 9, 10. In an action of waste, the declaration shews the demise of the manor of Wolverton and other lands, and assigns the waste 'in quodam bosco vocat' Wolverton Wood, parcel' præmissor'; and it was held insufficient, for that it could not be parcel of the manor and other lands also.

I must likewise humbly submit it to your lordship, whether the fact itself be sufficiently set forth, 'et eos absolvi pronuntiaverunt,' pro-

* See, also, in vol. 12, p. 645. of this Collection, a Note of Patrick Harding's Case from the MSS. of sir William Williams.

nounced them to be absolved : whether it does not refer to somewhat to be done hereafter, and ought not rather to have been, ' eos absolutos pronuntiaverunt.'

The proclamation for evidence before the jury is sworn, which ought to be after, and several other informalities in the indictment and proceedings, I should have spoken to ; and have justified and maintained the imposition of hands, from the doctrine and practice of our

church ; and likewise have said somewhat to the matter that is specially found, to prove that these defendants are thereby acquitted of the whole : but these things will (I doubt not) be much better done by such other counsel as your lordship shall please to hear for the defendants. I am sensible I have already been too tedious, for which I humbly beg pardon of your lordship, and pray your judgment for the defendants.

392. The Trial of JOSEPH DAWSON, EDWARD FORSEITH, WILLIAM MAY, WM. BISHOP, JAMES LEWIS, and JOHN SPARKES, at the Old-Bailey, for Felony and Piracy : 8 WILLIAM III. A. D. 1696.*

Admir. Angl. ss.

THE Sessions of Oyer and Terminer, and gaol delivery, held for our sovereign lord the king, for the Jurisdiction of the Admiralty of England, at Justice Hall in the Old Bailey, in the suburbs of the city of London, on Monday the 19th day of October, in the 8th year of the reign of our said sovereign lord king William the 3d, over England. &c. before the right hon. Edward Russel, esq. Henry Priestman, esq. ; sir Robert Rich, kt. and bart. ; sir George Rooke, kt. sir John Houblon, kt. and James Kendal, esq. Commissioners for executing and exercising the office and place of Lord High Admiral of England, respectively assigned and deputed ; the right worshipful sir Charles Hedges, kt. Doctor of Law, Lieutenant in the High Court of Admiralty of England, Commissary General of our sovereign lord the king, and President and Judge of the said court ; the right hon. sir John Holt, kt. Lord Chief Justice of the King's Bench ; sir George Treby, kt. Lord Chief Justice of the Common Pleas ; sir Edward Ward, kt. Lord Chief Baron of the Exchequer ; sir Thomas Rokeby, kt. and one of the Justices of the King's Bench ; sir Samuel Eyre, kt. another of the Justices of the King's Bench ; sir John Turton, kt. another of the Justices of the King's Bench ; sir John Powell, kt. one of the Justices of the Common Pleas ; sir Littleton Powis, kt. one of the Barons of the Exchequer ; William Bridgeman and Josias Burchet, esqrs. ; Secretaries of the Admiralty of England ; Thomas Lane, William King, and John Cooke, respectively Doctors of Laws ; and others his Majesty's Justices named in the said Commission.

* This case, under the name of *Rex v. May, Bishop and others*, is cited in *East's Treatise of the Pleas of the Crown*, ch. 17, s. 3, from a Manuscript Commentary by Mr. Justice Treby upon lord Hale's Summary, of which an account is given by Mr. East immediately after the preface to his Treatise.

His Majesty's Commissioners being then and there met, the Commission was read, and proclamation made for attendance : After which, the gentlemen of the grand jury were called and sworn, and received their charge from sir Charles Hedges, kt. Judge of the High Court of Admiralty, who set forth unto them the nature of the Commission, the extent of the jurisdiction of the court, and the subject matter of their enquiries.

Then the witnesses for the king being sworn, the grand jury withdrew, and after a little time returned, finding *Billa vera* against Henry Every, not yet taken, Joseph Dawson, Edward Forseith, William May, William Bishop, James Lewis, and John Sparkes, prisoners, for feloniously and piratically taking and carrying away, from persons unknown, a certain ship called the *Gunsway*, with her tackle, apparel, and furniture, to the value of 1,000*l.* and goods to the value of 110*l.* together with 100,000 pieces of eight, and 100,000 chequins, upon the high seas, ten leagues from the cape St. Johns, near Surat in the East Indies. Then Dawson, Forseith, May, Bishop, Lewis, and Sparkes, were brought to the bar, and their Indictment was read.

Joseph Dawson confessed that he was Guilty ; but the rest pleaded Not Guilty, and put themselves upon their trials ; and thereupon the petty jury was called, and the persons whose names follow were sworn : William Walker, John Child, Edward Leeds, Thomas Clarke, Nathan Green, Henry Sherbrooke, Benjamin Dry, John Sherbrooke, Samuel Jackson, Thomas Emms, Henry Hunter, John Hall.

Then the King's Learned Counsel opened the Indictment, &c. and

Dr. *Newton* made a Speech, which is as follows :

My Lord, and Gentlemen of the Jury ;

The prisoners are indicted for piracy, in robbing and plundering the ship *Gunsway*, belonging to the Great Mogul and his subjects, in the Indian seas, to a very great value.

And the end was suitable to their beginning; they first practised these crimes upon their own countrymen, the English, and then continued them on to strangers and foreigners: For the ship in which this piracy was committed, was an English vessel, called the *Charles the Second*, belonging to several merchants of this city, designed for other ends, and a far different voyage, which by these criminals, with the assistance of one Every, their captain in all those villainies, was seized near the Groyne in Spain, in May 1694, from which place, having first, by force, set captain Gibson the commander on shore, they carried off the ship, and with it committed many and great piracies for several years (as will appear in the course of the evidence) in most of the parts of the known world, without distinction, upon all nations, and persons of all religions.

Their last piracy was this in the Indies, the greatest in itself, and like to be the most pernicious in its consequences, especially as to trade, considering the power of the Great Mogul, and the natural inclination of the Indians to revenge: But they are now brought hither on their trial, and, if the matters they are charged with shall be proved, to receive that judgment from you their crime deserves; and that is piracy, which by so much exceeds theft or robbery at land, as the interest and concerns of kingdoms and nations are above those of private families, or particular persons: For suffer pirates, and the commerce of the world must cease, which this nation has deservedly so great a share in, and reaps such mighty advantage by: And if they shall go away unpunished, when it is known whose subjects they are, the consequence may be, to involve the nations concerned in war and blood, to the destruction of the innocent English in those countries, the total loss of the Indian trade, and thereby the impoverishment of this kingdom.

The Witnesses for the king, viz. John Dan and Philip Middleton, were then called and sworn, and in the opinion of the court gave a full evidence against the prisoners, which was very clearly summed up by the lord chief justice Holt; the tenour whereof is particularly set forth in the following Trials; but the jury, contrary to the expectation of the court, brought in all the prisoners Not Guilty; whereupon the sessions was adjourned to Saturday the 31st of October following, and the prisoners were committed upon a new warrant for several other piracies.

October 31, 1696.

The Court being sat (at which were present sir Charles Hedges, judge of the high court of Admiralty, the lord chief justice Holt, the lord chief justice Treby, the lord chief baron Ward, Mr. justice Rokeby, Mr. justice Turton, Mr. justice Eyre, Mr. baron Powis, Dr. Lane, Dr. King, and Dr. Cook), the court proceeded in this manner.

Cl. of Ar. Cryer, make proclamation.

Cryer. O yes, O yes, O yes. All manner of persons that have any thing more to do at this sessions, draw near and give your attendance: and you sheriffs of the city of London, return the several precepts directed to you, and returnable here this day, upon pain and peril that shall follow thereon.

Then the grand Jury were called over, and the appearances marked.

Cl. of Ar. Make proclamation.

Cryer. O Yes, &c. The lords the king's justices charge and command all persons to keep silence while the charge is giving.

Sir Charles Hedges, the Judge of the Admiralty, said to the Grand Jury upon this occasion:

Gentlemen of the Grand Jury;

The opinion which this court had of the good intentions, abilities, and integrity of the last Grand Jury was so fully answered at our late meeting in this place, that I am confident all good Englishmen, who were witnesses of their proceedings, will concur in giving them public thanks for the good services which they then performed: I wish that all others, who were concerned in the dispatch of that day's business, had the like pretence to have the same; the public justice of the nation would not then have lain under any manner of reproach, neither would you have had this farther trouble. But seeing that it hath so happened, it is become absolutely necessary that a farther and a strict enquiry should be made after those crimes which threaten, and tend to the destruction of our navigation and trade; and therefore I am assured of your patience, whilst I shew you briefly:

1. What the crimes are, which you are to enquire after.

2. How far the jurisdiction and your power in making these enquiries doth extend.

3. What is the duty incumbent on you in this behalf.

1. As to the crimes, I shall not repeat what was mentioned touching all the particulars thereof, at the opening of this sessions; but confine my discourse to those, which I find by the calendar will, at this time, necessarily fall under your examination; and those are piracies.

Now piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty. If any man be assaulted within that jurisdiction, and his ship or goods violently taken away without legal authority, this is robbery and piracy. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, or tackle, apparel or furniture, with a felonious intention, in any place where the lord Admiral hath, or pretends to have jurisdiction, this is also robbery and piracy. The intention will, in these cases, appear by considering the end for which the

fact was committed; and the end will be known, if the evidence shall shew you what hath been done.

2. Now the jurisdiction of the admiralty is declared and described in the statute and commission, by virtue of which we here meet, and is extended throughout all seas, and the ports, havens, creeks, and rivers beneath the first bridges next the sea, even unto the higher water-mark.

The king of England hath not only an empire and sovereignty over the British seas, but also an undoubted jurisdiction and power, in concurrency with other princes and states, for the punishment of all piracies and robberies at sea, in the most remote parts of the world; so that if any person whatsoever, native or foreigner, Christian or Infidel, Turk or Pagan, with whose country we have no war, with whom we hold trade and correspondence, and are in amity, shall be robbed or spoiled in the Narrow Seas, the Mediterranean, Atlantic, Southern, or any other seas, or the branches thereof, either on this or the other side of the line, it is piracy within the limits of your enquiry, and the cognizance of this court.

3. Concerning the duty incumbent upon you in making your enquiries and presentments, you may consider that there is a great trust and authority committed to you; and therefore it will be expected that a suitable care should be had, and your power executed according to a well-regulated discretion: as you are, on the one hand, to take care that the court be not troubled, nor any man put in hazard of his life, through any frivolous, or malicious prosecution; so, on the other side, and more especially in the cases of great and public offences, you are to use your utmost endeavours that justice, the support of government, be not obstructed by any partial proceedings.

You are not obliged in all cases to require a clear and full evidence, but only to examine till you find, and are satisfied in your consciences, that there is sufficient and just cause to put the party accused upon his trial. You cannot convict, but may in effect acquit the greatest criminals; and therefore, if you do but find proofs enough to create a presumption against the party accused, when the case seems odious, and is of great consequence and importance, your safest way is to put it in a proper method for the petty jury, who are to receive full satisfaction from the evidence that shall be given in the presence of the party; and according to that evidence, have power to determine whether guilty, or not guilty, condemn, as well as acquit.

And upon this occasion, seeing many who are upon that service are present, it seems fit that they should also know that they have no power to do more or less than what is agreeable to the evidence: they are not to interpose in points of law, or to be swayed by any consideration whatsoever, but what shall arise from the proofs judicially made; they are indeed judges of the fact, but they are not arbitrary;

they are as much restrained by the dictates of conscience, informed and convinced by reasonable proofs, as the judges on the bench are by the rules of law.

No man can believe just as he lists; and therefore a determination, or judgment at will and pleasure, will never be thought to deserve the name of a verdict: for whatever may be pretended, the world will not be persuaded that a jury hath pursued the dictates of conscience, unless some reasonable grounds for its proceedings shall appear; and therefore, whenever it shall happen that notorious malefactors escape unpunished, notwithstanding that in the opinion of most good men there was a full and sufficient evidence for their conviction, it is to be wished, and indeed it seems to me to be necessary, in cases that relate to the laws of nations, that the reasons which induced such a determination, should be given for the public satisfaction; otherwise, since foreigners look upon the decrees of our courts of justice as the sense and judgment of the whole nation, our enemies will be glad to find an occasion to say, that such miscreants as are out of the protection of all laws, and civil government, are abetted by those who contend for the sovereignty of the seas. The barbarous nations will reproach us as being a harbour, receptacle, and a nest of pirates; and our friends will wonder to hear that the enemies of merchants and of mankind, should find a sanctuary in this ancient place of trade. Nay, we ourselves cannot but confess, that all kingdoms and countries who have suffered by English pirates, may, for want of redress in the ordinary course, have the pretence of justice, and the colour of the laws of nations to justify their making reprisals upon our merchants, wheresoever they shall meet them upon the seas. If a jury happens in these cases to be too severe, there is room for mercy, and I am confident, that, upon a just representation, the innocent never failed of obtaining it; but for a fault, neglect, or error on the other hand, there is no relief for injured foreigners, but by their carving out, as we may be sure they will, for themselves, such a satisfaction, upon our merchants, as they shall think fit, whenever they shall have an opportunity; and so our whole nation must unavoidably suffer both in reputation and interest, and all as it were through our own default.

I hope what hath been said upon this unexpected occasion, will not be looked upon as intended to influence any jury; I am sure it is far from being so designed: religion, conscience, honour, common honesty, humanity, and all laws, forbid such methods: there is no doubt but the judge, as well as the jurymen, then best discharges his duty, when he proceeds without favour or affection, hatred or ill-will, or any partial respect whatsoever.

Every man ought to be extremely tender of such a person as he has reason to believe is innocent; but it should be considered likewise, on the other side, that he who brings a noto-

rious pirate, or common malefactor to justice, contributes to the safety and preservation of the lives of many, both bad and good; of the good, by means of the assurance of protection, and of the bad too, by the terror of justice. It was upon this consideration that the Roman emperors in their edicts made this piece of service for the public good, as meritorious as any act of piety, or religious worship.

Our own laws demonstrate how much our legislators, and particularly how highly that great prince king Henry the fifth, and his parliament, thought this nation concerned in providing for the security of traders, and scouring the seas of rovers and free-booters. Certainly there never was any age wherein our ancestors were not extraordinary zealous in that affair, looking upon it, as it is, and ever will be, the chief support of the navigation, trade, wealth, strength, reputation, and glory of this nation.

Gentlemen, our concern, as our trade is, ought in reason to be rather greater than that of our fore-fathers; we want no manner of inducements, no motives to stir us up, whether we consider our interest or honour; we have not only the sacred word, but also the glorious acts of the best of kings, which sufficiently manifest to us, that the good and safety of this nation is the greatest care of his life. Let every man, therefore, who pretends to any thing of a true English spirit, readily, cheerfully, follow so good, so great, so excellent an example, by assisting and contributing, to the utmost of his power and capacity, at all times towards the carrying on his noble and generous designs for the common good, and particularly at this time, by doing all that he can, to the end that by the administration of equal justice, the discipline of the seas, on which the good and safety of this nation entirely depends, may be supported and maintained.

Then the Witnesses being sworn in court, the Grand Jury withdrew to hear their evidence; and in the mean time T. Vaughan,* J. Murphey, and Tim. Brenain, were arraigned, whom the keeper of Newgate, by order, brought to the bar.

Cl. of Ar. T. Vaughan, Hold up thy hand. (Which he did.) Thou standest indicted, &c. Art thou Guilty of this high treason whereof thou standest indicted or Not Guilty?

Vaughan. Not Guilty.

Cl. of Ar. Culprit, How wilt thou be tried?

Vaughan. By God and this country.

Cl. of Ar. God send thee a good deliverance.

Cl. of Ar. J. Murphey, Hold up thy hand. (Which he did.) Thou standest indicted, &c. How sayest thou, J. Murphey, Art thou Guilty of the high-treason whereof thou standest indicted, or Not Guilty?

Murphey. Not Guilty.

Cl. of Ar. How wilt thou be tried?

Murphey. By God and the king.

Officer. You must say, By God and my country.

Cl. of Ar. God send thee a good deliverance.

Cl. of Ar. Bring Tim. Brenain to the bar. (Who was brought accordingly.)

Cl. of Ar. Tim. Brenain, Have you any copy of your indictment?—*Brenain.* Yes.

Cl. of Ar. When had you it?

Brenain. This day se'nnight.

Cl. of Ar. Tim. Brenain, Hold up thy hand. (Which he did.) Thou standest indicted, &c. How sayest thou, Art thou Guilty of the high treason whereof thou standest indicted, or Not Guilty?—*Brenain.* Not Guilty.

Cl. of Ar. How wilt thou be tried?

Brenain. By God and my country.

Cl. of Ar. God send thee a good deliverance.

Mr. Mompesson. Will your lordships please that he may be tried now?

L. C. J. Treby. Does he desire to be tried now?

Mr. Mompesson. Yes, my lord; there is no evidence against him, and he is sick.

Sol. Gen. We are not now prepared for the trial.

L. C. J. Treby. If the king's counsel and the prisoner be agreed, with all my heart.

L. C. J. Holt. He may be tried with the rest.

Then T. Vaughan, J. Murphey, and T. Brenain had notice to prepare for their trials on Friday next, at two of the clock in the afternoon.

Then the Grand Jury came into Court.

Cl. of Ar. Gentlemen of the grand jury, are you agreed in your bills?

Grand Jury. Yes.

Cl. of Ar. *Billa vera* against Joseph Dawson, Ed. Forseith, W. May, W. Bishop, J. Lewis, and J. Sparkes, for piracy and robbery.

Cl. of Ar. Keeper of Newgate, set Joseph Dawson, Ed. Forseith, Will. May, Will. Bishop, Will. Lewis, and J. Sparkes, to the bar. (Which was done accordingly.)

Cl. of Ar. Joseph Dawson, Hold up thy hand, (which he did). Ed. Forseith, Hold up thy hand, (which he did). W. May, Hold up thy hand, (which he did). W. Bishop, Hold up thy hand, (which he did). James Lewis, Hold up thy hand, (which he did). Jo. Sparkes, Hold up thy hand, (which he did).

Then the Indictment was read, and set forth:

“That Henry Every, alias Bridgman, Joseph Dawson, Edward Forseith, William May, William Bishop, James Lewis, and John Sparkes, late of London, mariners, on the 30th of May, in the 6th year of the reign of our sovereign lord king William, and the late queen, did, against the peace of God, and our said sovereign lord the king that now is, and the late queen, by force of arms, upon the high and open seas, in a certain place, about three

* For his Trial see the next Case.

leagues from the Groyne, and within the jurisdiction of the Admiralty of England, piratically and feloniously set upon one Charles Gibson, a subject of our said sovereign lord the king that now is, and of the late queen, being then and there commander of a certain merchant-ship, called the Charles the Second, carrying 40 pieces of ordnance, belonging to certain subjects of the said king, and the late queen (to the jurors as yet unknown); and then and there put the said Charles Gibson in bodily fear of his life; and then and there, within the jurisdiction aforesaid, feloniously and piratically did steal, take and carry away from the said Charles Gibson the said ship, called the Charles the Second, her tackle, apparel, and furniture, of the value of 1,000*l.*; 40 pieces of ordnance, of the value of 500*l.*; 100 fusees, of the value of 100*l.*; 15 ton of bread, of the value of 150*l.*; and 200 pair of woollen stockings, of the value of 10*l.*, in the possession of the said Charles Gibson then being; the ship, goods, and chattels of the subjects of our said sovereign lord the king, and the late queen, (to the jurors unknown) against the peace of our said sovereign lord the king, and the late queen, and dignities, &c."

How sayest thou, Joseph Dawson, Art thou Guilty of this piracy and robbery, or Not Guilty?

Dawson. I am ignorant of the proceedings.

Officer. He pleads ignorance.

Cl. of Ar. You must plead Guilty or Not Guilty.—*Dawson.* Guilty.

Cl. of Ar. How sayest thou, Ed. Forseith, art thou Guilty, or Not Guilty?

Forseith. Not Guilty.

Cl. of Ar. How wilt thou be tried?

Forseith. By God and my country.

Cl. of Ar. How sayest thou, Will. May, art thou Guilty, or Not Guilty?

May. Not Guilty.

Cl. of Ar. How sayest thou, W. Bishop, art thou Guilty, or Not Guilty?

Bishop. I desire to hear the whole indictment read again.

L. C. J. Holt. You have heard it just now, and may hear it again if you desire it.

Bishop. The former indictment.

L. C. J. Holt. No, there is no occasion for that; this is an indictment for a fact distinct from that.

Cl. of Ar. This is a new indictment, not the old one. Art thou Guilty of this piracy and robbery, or Not Guilty?—*Bishop.* Not Guilty.

Cl. of Ar. How sayest thou, James Lewis, art thou Guilty, or Not Guilty?

Lewis. Not Guilty.

Cl. of Ar. How sayest thou, J. Sparkes, art thou Guilty, or Not Guilty?

Sparkes. Not Guilty.

Cl. of Ar. How wilt thou be tried? [As of the rest.]

Sparkes. By God and my country.

Cl. of Ar. God send thee a good deliverance.

Cryer. O Yes, &c. You good men of the city of London summoned to appear here this

day, to try between our sovereign lord the king and prisoners at the bar, answer to your names as you are called, and save your issues.

Cl. of Ar. Jo. Degrave, Benjamin Hatley, Jo. Ayres, &c.

L. C. J. Holt. Have you any of the former jury in this pannel?—*Cl. of Ar.* Yes, my lord.

Counsellor Conyers. We shall except against them for the king.

L. C. J. Holt. If you have returned any of the former jury, you have not done well; for that verdict was a dishonour to the justice of the nation.

Cl. of Ar. You, the prisoners at the bar, these men you hear called, are to pass between our sovereign lord the king, and you; if therefore you will challenge any of them, you are to challenge them as they come to the book to be sworn, and before they are sworn.

Then they were called over, and some being challenged for the king, and some by the prisoners, the persons sworn in this jury were these: J. Degrave, J. Ayres, G. Broom, T. Hicks, R. Meakins, J. Shelswell, Alex. Pollinton, J. Glover, Nath. Carpenter, Jo. Bickley, Nath. Troughton, Hum. South.

Cl. of Ar. Make Proclamation.

Cryer. O Yes, If any one can inform my lords, the king's justices, the king's serjeant, the king's attorney general, or his majesty's advocate in his high court of admiralty, before this inquest be taken, of the piracy and robbery whereof the prisoners at the bar stand indicted, let them come forth and they shall be heard, for the prisoners stand at the bar upon their deliverance; and all others may depart.

Then the Grand Jury came into court again, having found two other bills against the prisoners at the bar, one for piratically taking away a Moorish ship, and another for committing piracy on two ships belonging to Denmark. And then the Grand Jury was adjourned to Friday next.

Cl. of Ar. Ed. Forseith, hold up thy hand. (And so of the rest.) You that are sworn, look upon the prisoners, and hearken to their cause; they stand indicted, &c.

Mr. Whitaker. May it please your lordships, and you gentlemen of the jury, the prisoners at the bar stand indicted for felony and piracy, for that they, about the 30th of May, in the 6th year of the reign of his present majesty king William, did make an assault on captain Gibson, commander of the ship Charles the Second, and put him in fear of his life, and piratically stole away the ship and all the furniture; and this is laid to be against their duty and allegiance, and against the peace of our sovereign lord the king, his crown and dignity; to which indictment they have pleaded not guilty. We shall go on to call our witnesses, and prove the charge against the prisoners at the bar, and doubt not but you will do your duty. Then

Dr. Littleton, Advocate General to his majesty, in his High Court of Admiralty, spake as follows:

Gentlemen of the jury; You have heard the Indictment opened, and we shall now call our witnesses, who will relate to you what enormous and horrid crimes the prisoners at the bar have committed in the prosecution of the fact laid in the indictment: Crimes, that the bare intention, had they not taken effect, would have merited the highest punishment: But this is not their case, for they were not disappointed of their wicked lusts and desires; for as their crimes are great, so have they been consummate as well as voluntary and malicious. I may well say, that their wickedness has been as boundless and as merciless as the element upon which their crimes have been committed; nor is there any part of the world that hath not been sensible of their rage and barbarity.—Therefore, Gentlemen, as you are lovers of christianity, as you are lovers of honesty; nay, as you are lovers of yourselves, who bear the character of honest men, if we prove this charge against the prisoners, you must and ought to find them guilty, remembering that the doing justice upon wicked and profligate men, is the greatest mercy and protection to the good and honest. We shall therefore proceed to call our witnesses, not doubting but that you will act like honest men, for the honour and welfare of your country, without having any respect to the dishonourable proceedings of the former jury.

Mr. Whitaker. Call J. Gravet. (He appeared, and was sworn.) Let him stand up.

Sol. Gen. (Sir John Hawles.) Mr. Gravet, pray, will you give my lords and the jury an account of what you know of the prisoners running away with the ship Charles the Second.

Gravet. I was second mate in the ship at that time. There was violent hands laid on me; I was seized, and a pistol clapped to my breast, and carried away.

Sol. Gen. Who did it? Begin before.

Gravet. I was seized by the carpenter of the ship; he took me by the throat, and clapped a pistol to my breast.

L. C. J. Treby. Begin where the ship was lying.

L. C. J. Holt. You was a mate in this ship: Now pray give an account of the whole matter.

Gravet. I was upon my watch upon the deck.

Prisoners. Pray speak up.

Gravet. And there was a boat came from the James Galley, with people in her: And as soon as the boat came, the carpenter seized me, and took me by the throat, clapped a pistol to me, and said, if I resisted I was a dead man. They took me, one by one arm, and another by the other, and led me to my cabin, and one with a pistol stood at my cabin door, till they were got two leagues without the Groyne. Then Every came to speak to captain Gibson, who was then sick, and was guarded on both sides; and when he had done speaking with him, and was returned from captain Gibson, he came to me again, and said, I suppose you

do not intend to go with us; I said, I would not. Then I, and the rest that would not go with them, had liberty to go ashore; and I would have gone to my coffer, and taken my clothes, but they would not let me; and told me I should carry no more than the clothes on my back.

Sol. Gen. Did any of the prisoners at the bar say so?

Gravet. That I cannot tell.

Mr. Conyers. Then go on.

Gravet. Then I went to Every, and I had some of my clothes; he was so kind to give me them: he gave me a a coat and waistcoat, and his commission that he left behind him; and W. May took me by the hand, and wished me well home, and bid me remember him to his wife.

Mr. Conyers. Was there liberty for any of them that would, to go ashore?

Gravet. Captain Gibson told me so, and there were about seventeen went off.

Mr. Conyers. No matter what captain Gibson told you; you say you went off: Might any one that would, go?

Gravet. That I cannot tell.

Mr. Conyers. You say there was about seventeen went off: Would the boat hold more?—Gravet. Yes, Sir.

Mr. Cowper. Did you see any hindered that would have gone off? Were any of the prisoners at the bar there?—Gravet. No.

Sol. Gen. Do you know E. Forseith, &c.?

Gravet. I know some of them.

Mr. Conyers. Name the men that you say you know.

Gravet. Joseph Dawson, W. May, J. Sparkes.

Sol. Gen. They belonged to what ship?

Gravet. To the Charles.

Mr. Conyers. Was there not a boat came from the ship James, before you went away? Was there any of the prisoners at the bar that came in that boat?

Gravet. There were about twenty six that we had account of.

Mr. Conyers. From what ship did they come?—Gravet. From the James.

Mr. Conyers. Were any of the prisoners at the bar any of them?

Gravet. Indeed, Sir, I cannot tell.

Cl. of Arr. Call T. Druit. (Who appeared, and was sworn.)

Sol. Gen. Mr. Druit, was you aboard the ship (called the Charles the Second) when she was carried away?—Druit. No, Sir.

Sol. Gen. Do you know any thing of the carrying of that ship away?

Druit. I was not in that ship; I was mate of the James; and about nine came one from aboard the Charles the Second, and asked me for the drunken boatswain? And I replied short; and he went away again, and said the ship was going to be run away withal. Whereupon I went with ten men to recover the ship; and after I had advised with the commander, I ordered the pinnace to be manned; and when

I came, the last that went into the boat was one Pike; and I bid them put back, and they would not, but went away to the ship Charles.

Mr. Conyers. How many were there that went away in that boat?

Druit. About five and twenty.

Mr. Conyers. Did you know all the men? Were any of the prisoners at the bar there? Look on them.

Druit. Yes, my lord, there was E. Forseith, W. Bishop, and J. Lewis.

L. C. J. Holt. What boat did they go away with? the James boat?—Druit. Yes, my lord.

L. C. J. Holt. Then they came from the James to the Charles the Second? Name their names again.

Druit. Ed. Forseith, Ja. Lewis, and Wm. Bishop.

Sol. Gen. You saw them go off, did you not?

Druit. It was so dark that we could not see them.

Mr. Cowper. Were these three men sent?

Druit. They were sent.

Mr. Cowper. Or did they go of their own head?

Druit. No, I do not say so; but I went to command them back again, and they refused.

Mr. Cowper. Did they make answer?

Druit. No; they only went away damning and sinking.

Mr. Conyers. Were there any guns sent after them?—Druit. Yes.

Mr. Conyers. What was it for?

Druit. It was to bring them back again.

Mr. Cowper. And they would not come back?

Druit. They did not come.

Mr. Cowper. Then they would not come.

Cl. of Ar. Call David Creagh. [Who was sworn.]

Prisoner. This man is a prisoner for piracy, my lord.

L. C. J. Holt. What if he be?

Prisoner. I do not understand law; I hope your lordship will advise us.

L. C. J. Holt. I will do you all right. If he be so, that is no objection against him; he may be a good witness for all that.

Cl. of Ar. He is not a prisoner for piracy, but for treason.

L. C. J. Holt. Though he be a prisoner for treason, he is not attainted. What is his name?

Cl. of Ar. David Creagh.

Sol. Gen. What do you know about the prisoners running away with the ship Charles?

Creagh. Upon the 7th of May, 1694, I came to the Groyne, in company with the boatswain and several others, on board the Charles; and when I was going in to the captain of the Charles, captain Gibson, I found Mr. Every, the carpenter, and some others, drinking a bowl of punch: and after I was come from the captain, I came and sat down with them, and Mr. May drank a health to the captain, and prosperity to their voyage: and we not knowing their design then, thought it was to our lawful captain, and prosperity to the voyage he was designed for.

L. C. J. Holt. What was your voyage?

Creagh. It was to the Spanish Indies. And afterwards the company broke up, and retired, and went to their cabins. And when we were in our cabins, we heard a great noise above deck; and captain Humphreys, that commanded the galley, called to us, to tell us his men were run away with the boat, and were gone to captain Gibson. To which Every answered, that he knew that well enough: so the men came aboard; and as I was coming out of my cabin to see what the matter was, I was met by Every, the carpenter, and two Dutchmen; and they obliged me to retire again to my cabin. And captain Humphreys fired two guns at us. But we presently got out of reach of the guns, and proceeded on the design. And I came out of my cabin, and went on the quarter-deck, where I met Every and the carpenter together; Every was conning the ship.

L. C. J. Holt. What is the meaning of that?

Creagh. That is, to direct in the steering of her. So Every took me by the hand, and asked me if I would go with him? And I answered, I did not know his design. He said, there were but few that knew it. Says I, Tell me who do know it, that if you will not tell me yourself, I may ask them that can tell me. But he said, we should all know by to-morrow morning eight o'clock. I told him, that would be too late to repent of the design. The carpenter stood by him, and said, Do you not see this cock? Yes, says I, I do. Says he, This man, and old May, and Knight, I can trust with any thing; they are true cocks of the game, and old sportsmen. Then, said I, I suppose they know your design. Yes, says he, they do; and if it were a thing of ten times the consequence, they should know it. Upon this, the carpenter came to me, and said, If you do not go down, I will knock you on the head. And as I was going down, I met with W. May, the prisoner at the bar. What do you do here? says he. I made him no answer, but went down to my cabin; and he said, God damn you, you deserve to be shot through the head; and he then held a pistol to my head. Then I went to my cabin, and presently came orders from Every, that those that would go ashore, should prepare to be gone. And when the captain was got out of bed, who was then very ill of a fever, Every came and said, I am a man of fortune, and must seek my fortune. Says captain Gibson, I am sorry this happens at this time. Says he, If you will go in the ship, you shall still command her. No, says capt. Gibson, I never thought you would have served me so, who have been kind to all of you; and to go on a design against my owners orders, I will not do it. Then, says Every, prepare to go ashore. Upon which the captain, and several others of us, went into the boat. When we were by the ship's side, I heard them order the doctor to be secured; but if there was any more would go into the boat, they might: and we came into the boat, to the number of six.

teen; and they gave us four oars in the pinnace, and set us adrift.

L. C. J. *Holt*. Where did he set you?

Creagh. He set us aboard the *James*, my lord.

L. C. J. *Holt*. That is, you were turned off from this expedition.

Creagh. Yes, my lord.

Mr. *Conyers*. Was there any room for more in the boat?—*Creagh*. Yes, there was.

L. C. J. *Holt*. Was there liberty for any more to go?—*Creagh*. Yes, my lord.

Sol. Gen. What do you know of the prisoners at the bar?

Creagh. I know only W. May.

Mr. *Cowper*. What time past from the coming of the boat, to the time of your going off?

Creagh. About two hours, Sir.

Mr. *Cowper*. Was there any guns fired in that time?

Creagh. Yes, Sir, one or two from the *James*, by captain *Humphreys*.

Mr. *Cowper*. Was this done in the ship with silence? Or was there any uproar, or opposition?

Creagh. No: there could be no opposition; for the men came from the whole squadron, and came upon us, and surprized us, being assisted by those that belonged to the *Charles*.

Mr. *Cowper*. But did nobody make opposition to their going? Did not capt. *Gibson*?

Creagh. No, captain *Gibson* could not, being sick.

L. C. J. *Holt*. But he went ashore?

Creagh. Yes, my lord.

L. C. J. *Holt*. Was any body stopped that would go?

Creagh. No, my lord, none but the doctor.

Sol. Gen. Now call Jo. Dan. [Who appeared, and was sworn.]

Mr. *Conyers*. What ship were you aboard of at the Groyne?

Dan. The *Charles* the Second.

Mr. *Conyers*. Now, pray, give my lord and the jury an account what you know of the taking away of the ship *Charles* the Second, and what passed there?

Dan. Yes, Sir: We came to the Groyne, and had been there about three or four months, and we had been about eight months out of England, and we lay for our wages, and there was no wages to be got. But inasmuch as we wanted wages, Every, and several others, contrived to carry this ship away. So that night, which was Sunday, they went ashore; and when they came aboard again, made some men privy to it, whom I know not. And the Monday following, I think, the packet went out in the morning, and the night being fair, was ordered to give notice; and they came to the *Dove*, and about nine or ten her boat broke off, and she haled us; for they told captain *Humphreys* they were coming to run away with our ship. So he hales the *James*; and presently some of the officers came and ordered their pinnace to be manned; and it was so. And when they gave this order, there was

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Every and 25 or 26 men. And as they came aboard, our cables were cut, and ready to go. And coming under the castle, we cut all the boats but two, and stood out to sea about two or three leagues; and there Every went to captain *Gibson*, and, as they said, to ask him if he would go to them, or not. He said, no. Then he said, he must prepare to go ashore; and he did so, and several others with him. And the word was given about, that they that would go ashore might go; but whether these men heard it or no, I cannot tell; and no man's name was mentioned to be stopped, but the doctor. And when they went away, they cried, there was water in the boat, and they desired a bucket of us, to heave it over, and we gave them one; and away they went, I think about 15 of them, and no more did offer to go as I saw, nor did I see any hinder any that would go: and afterwards, they that went off went about their business, and we about our business. And we came to the Isle of May, and victualled ourselves there; and there we met with three English ships, out of which we took some necessaries for ourselves, and among the rest several men; nine men we took out of them.

Sol. Gen. Were the prisoners at the bar in the ship, when they went away?

Dan. Yes.

Sol. Gen. Name them.

Dan. Ed. *Forseith*, W. May, J. Lewis, Jo. *Sparkes*, W. Bishop.

Mr. *Conyers*. Which of them was aboard the *Charles*, that belonged to her?

Dan. W. May, and J. *Sparkes*; and Ed. *Forseith*, Ja. Lewis, and W. Bishop, came from the *James*.

Mr. *Cowper*. Was it not generally understood, that they were going to run away with the ship, when they came to captain *Gibson*?

Dan. Yes, Sir, they knew to be sure.

Sol. Gen. Did you know that they assented to it?

Dan. No, Sir, I did not hear them say so.

Just. *Eyre*. Did they desire to go ashore with the rest?—Dan. I saw none hindered.

L. C. J. *Holt*. Was Ed. *Forseith* in the ship then?

Dan. Ed. *Forseith* was in the ship then.

L. C. J. *Holt*. Was he at the Isle of May, taking in necessaries with you?

Dan. Yes, Sir.

L. C. J. *Holt*. What did he do in the company?

Dan. He was in the ship, and came from the *James*.

L. C. J. *Holt*. And so did Bishop, and so did Lewis?

Dan. Yes, my lord, these three; and the other two belonged to the *Charles*.

Mr. *Whitaker*. Did any of the ship's crew go ashore at the Isle of May?

Dan. Yes, Sir, I think so.

Sol. Gen. But I think, you say, that the word was given about, that any might go that would.

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Mr. Conyers. Go on with the proceedings after you were at the Isle of May.

Dan. After we had victualled, we took in some men.

Prisoners. We have been tried for that already, my lord.

L. C. J. Holt. Go on.

Dan. After we had been there, and took in what we had occasion for, our quarter master said, he would give them bills for what he took of them. Then we went to the coast of Guinea, and took several negroes, and carried them away with us. And afterward we went to the Island of Princes, where lay two Danes, and we fought them, and took them; and after we had taken them, some of the men went ashore at the island of Princes, and others went along with us; and we brought the ships to Vandepo, and burnt one, and carried one with us. Then we came to cape Lopes.

L. C. J. Holt. Where is that?

Dan. Under the equinoctial line; and there we fired a shot through the little one to sink her, for the men could not agree, and so we could not carry her with us. We went about the Cape, and touched at Madagascar.

Dr. Littleton. Had not these men their part and share of the plunder?

L. C. J. Holt. You go too fast, Sir.

Mr. Conyers. What was the next ship you met with, after you had rounded the cape?

Dan. The next was a small vessel, about 30 or 40 ton, and we put her ashore, and took a small matter out of her, and let her lie; and there we put this gentleman, Mr. May, ashore. And we seeing three English ships a coming, we left him there, and went to the equinoctial line; and afterwards, for want of bread and water, we came again, and took another small vessel, and some rice and pody out of her, and sunk her, and then went to the Cape again, and took in W. May again, and met another vessel, and took rice and meal out of her, and sunk her too. And then we went to the Red Sea to a town called Meat; and the people would not trade with us, and we burnt it. And thence we went up to the Red Sea, as far as we could, and going up to the cape Adin, we met with two English privateers more, and they came and joined with us.

L. C. J. Holt. You call them privateers; but were they such privateers as you were?

Dan. Yes, my lord. I suppose they had commissions at first; but I suppose they did not run so far as that.

Mr. Conyers. Did you go all on the same design?

Dan. Yes, they sailed on with us, and we made the best of our way, and came up into the Red Sea in a little time, and came to an anchor at Bob's Key, and had lain there but a night and a day, and there came up three Englishmen more from America; and they likewise consorted with us; and we lay there about five weeks; and in that time we expected the fleet to come down.

Mr. Conyers. What fleet?

Dan. The Moorish fleet, that came from Mocha. They passed us on Saturday night unseen, and we took a vessel, which gave us an account that they were gone. And then we followed them; and about three days after we made land, we came up with one of them of about 2 or 300 tons, and we fired a broadside at her, and small shot, and took her, which, after we had taken her, we plundered, and took out some gold and silver.

Mr. Conyers. And what did you do with it?

Dan. We brought it aboard our ship.

Mr. Conyers. Did you share it?

Dan. Not then, but after we took the other ship.

Mr. Conyers. What was that other ship?

Dan. After we had taken her, we put some men aboard to keep her with us; and about two days after we were lying at anchor at St. John's, and there was a great ship called the Gunsway; and we weighed anchor and fought her about two hours, and took her, and put some men aboard her and plundered her. And after we had done as much as we thought convenient, we sent her to Surat with the people in her. And then we stood farther to the Indian coast, and shared our money about a week after.

L. C. J. Holt. That was a brave prize, was it not, the best you had all the voyage?

Dan. Yes, my lord.

L. C. J. Holt. Did you all share?

Dan. Yes, all that were in the ship.

L. C. J. Holt. You have given a good account of this matter, Was Edward Forseith there?—Dan. Yes, my lord.

L. C. J. Holt. What did he do? Was he active?—Dan. I did not see him act.

L. C. J. Holt. Had he a share?

Dan. Yes, my lord, he had.

L. C. J. Holt. Was W. May there?

Dan. Yes, my lord.

L. C. J. Holt. What did he do there?

Dan. He could do but little then; he had his share.

L. C. J. Holt. And when you took him in again, what did he do? Did he do his business as a seaman?

Dan. Yes, my lord, till he was sick.

L. C. J. Holt. Was W. Bishop there?

Dan. Yes, my lord, he was among the rest.

L. C. J. Holt. What did he do? Did he consent and agree to what was done?

Dan. He had share of the money.

L. C. J. Holt. Did J. Lewis share too?

Dan. He had a share, as far as was allowed by the company.

L. C. J. Holt. Did J. Sparkes share with you too?

Dan. Yes, my lord, as far as the company thought fit to give him.

Mr. Cowper. When you say 'as the company thought fit,' what do you mean? How did they share it?

Dan. Some had 1,000*l.* some 500*l.* others 300*l.*

Mr. Cowper. Had all the prisoners some share?—Dan. Yes, Sir, all had some share.

Mr. *Whitaker*. What did you do with the Charles the Second, after the voyage?

Dan. We left her at Providence.

L. C. J. *Holt*. If any of you prisoners at the bar will ask him any questions, you may.

Just. *Turton*. What provisions were aboard the Charles when she was taken away?

Dan. I cannot tell.

Just. *Turton*. What quantity of bread was there?

Dan. A pretty deal, I cannot tell the quantity.

Just. *Turton*. And were there any guns aboard her and small arms?

Dan. Yes, my lord, there were.

May. My lord, may I speak for myself?

L. C. J. *Holt*. If you will ask him any questions, you may; you shall be heard again to speak for yourself by and bye.

May. I desire he may be asked where I was taken sick?

L. C. J. *Holt*. He asks you, where he was taken sick?

Dan. I cannot justly tell that, I think it was at Allibore, at the coast of Guinea.

May. I did not lie down with it.

Dan. No, you did not; but your first being taken sick was at Allibore.

May. My lord, I desire you will ask him, whether he thinks I had any knowledge of the going away of the ship?

L. C. J. *Holt*. You hear what he says; what do you say?

Dan. I know nothing of that.

L. C. J. *Holt*. You were there, and you had a share of the prize; you drank an health to the success of your voyage.

May. I hope, my lord, you will not be angry for asking questions.

L. C. J. *Holt*. No, nobody is angry, you may ask what questions you will.

Then Philip Middleton was called and sworn.

Mr. *Conyers*. Pray tell what you know of taking away the ship Charles the Second?

Middleton. I cannot say any thing of running away with the ship, for I was asleep then; but afterwards, in the morning, they called up all hands; and the captain said, Every man should share alike, only he would have two shares.

L. C. J. *Holt*. Who said so?

Middleton. Capt. Every. From thence they went to Bonyvis, and took in some salt; and from Bonyvis they went to the isle of May, and there they took three English ships, and plundered them; and they took the governor aboard their own ship till they had done, (for then they could demand what victuals they had a mind to) and then they sent him away again: And from the Isle of May they went to the coast of Guinea, where they put out English colours, to make the natives come aboard to trade; and when they came aboard, they surprized them, and took their gold from them, and tied them with chains, and put them into the hold; and when they came to a place

called the Island of Princes, they gave seven of them away for slaves; And then they went to Vandepoe where they cleaned their ship; and from Vandepoe they went to Cape Lopes, and from Cape Lopes to Annibo, and from Annibo about the Cape; and at Madagascar they watered their ship, and got provisions, and cows to salt up; and from thence they went to Joanna, and from Joanna they went to take a junk, and took rice out of her, and sunk her; and from thence they went to the Equinoctial line, and because they were short of water and rice, they went back again to Joanna; and the wind being contrary, they went to Commeroe; and there they met a small French vessel, and they took her, and sunk her; and then went to Joanna again, and there took in Mr. May again: and then went to Meat; and because the natives would not trade with them, they burnt their town: And then they went to Bob's Key, by the mouth of the Red Sea; but before that, they met with an English vessel, that was on the same account that we were; and we rode there a night or two; and they saw there another sail a coming, which proved to be another English vessel: And in the morning they saw two more; May, Farrel, and Wake, were the captains: And on Saturday night all the Mocha fleet passed by: And on Sunday morning they took another vessel, that told them the said fleet was gone by; and so they consulted whether they should follow them or stay there. And then they went after them and overtook them, and took one that was about three or four hundred ton, and took gold and silver out of her; and sent men aboard her to plunder and keep her. And next day they spied another sail, and got up their anchor, and stood to her, and took her; she was called the Gunsway; they killed several men aboard, and when they had taken and plundered the ship, they left the men aboard to go to Surat again. And then they went to Rachipool in the East Indies, and got water and necessities; and from thence to Degorees, and watered again; and then to Dascaran, where they set about twenty five Frenchmen ashore, and fourteen Danes, and some English; for they were afraid, if they came to England, and were caught, they should be hanged; and they thought themselves there secure. From that place they went to Ascension, and then to the Island Providence in the West Indies: And then they wrote a letter to the governor, to know if he would let them come in, and said they would present the governor with twenty pieces of eight, and two pieces of gold, if he would let them come in; and the captain, because he had a double share, he offered forty pieces of eight, and four of gold; and with that they sent some men down, Adams and others, with the letter: And they came again, with a letter, from the island, that they should be welcome, and come and go again when they pleased.

Mr. *Conyers*. Look on the prisoners at the bar. Were they all there?

L. C. J. *Holt*. Do you know Ed. Forseith? Was he there? Did he belong to the Charles the Second?

Middleton. He came from the James.

L. C. J. *Holt*. Was W. May there?

Middleton. He was aboard the Charles.

L. C. J. *Holt*. Was W. Bishop there?

Middleton. W. Bishop came from the James.

L. C. J. *Holt*. Was J. Lewis there?

Middleton. Yes, he came from the James.

L. C. J. *Holt*. Was J. Sparkes there?

Middleton. Yes, he was aboard the Charles.

L. C. J. *Holt*. Had all the men their shares?

Middleton. Yes, such as the company thought fit to allow them, all of them.

L. C. J. *Holt*. Had these men their shares of the several prizes they took?

Middleton. Yes, they had.

L. C. J. *Holt*. Were they active in the taking of the prize?

Middleton. They were, as far as I saw.

L. C. J. *Holt*. Were not divers others set ashore besides capt. Gibson?

Middleton. I never heard any repine, or wish they had been ashore, or that they had never come along with the ship.

L. C. J. *Holt*. But, do you know of any others that were set ashore?

Middleton. Yes, a great many, Mr. Gravet and several others.

Mr. *Cowper*. I think, you said, some French and English were set ashore in the Indies?

Middleton. Yes, Sir.

Mr. *Cowper*. Were they set ashore willingly?

Middleton. They desired to be set ashore.

Juryman. He says in the morning capt. Every called them above deck, and gave leave to any to go ashore that were not willing to go with them; we desire to know whether any of the prisoners were there at that time?

Middleton. I know not that; all hands were called up.

Just. *Turton*. What number of persons were aboard when the dividend was made?

Middleton. About a hundred and sixty.

Just. *Turton*. What might the shares be?

Middleton. Some 1000*l.* some 600*l.* and some 500*l.* and some less, according as the company thought they deserved.

Just. *Turton*. Had not you a share?

Middleton. Yes, what the company thought fit, and they told me that would serve to put me out an apprentice, and that I should never go near my friends.

Just. *Turton*. How much was that you had?

Middleton. Above an hundred pounds.

Mr. *Conyers*. What became of it?

Middleton. Jo. Sparks robbed me of it.

L. C. J. *Holt*. The king's counsel have done with the evidence, and therefore now is your time for to speak, if you have any thing to say for yourselves. Ed. Forseith, what have you to say?

Forseith. My lord, I desire you would call Mr. *Druit*, and ask him whether I was one of the pinnace's crew?

L. C. J. *Holt*. You hear what he says.

Druit. Yes, you were, and I commanded you to come back, and you refused.

Forseith. Did not you command me to go?

Druit. Yes, and I afterwards commanded you to come back, and you refused.

Forseith. You did not command me back.

Druit. Yes, I did, and fired at you, and shot through the boat.

Forseith. I held water with my oar, that was all I could do.

L. C. J. *Holt*. What did you command him to do?—*Druit*. To rescue the ship.

L. C. J. *Holt*. Instead of rescuing the ship, you run away with her. He commanded you back, and you refused to come back.

Forseith. I could not bring her back myself, nor come back, unless I should leap over-board.

L. C. J. *Holt*. Have you any more to say?

Forseith. My lord, when I was in the boat, I knew not who was in it, nor how many. When I came a-board the Charles, the sails were loose, and I was in a very sorry condition; they cut the boat off, and put her adrift; I could not get into her, she was gone in a minute's time, I did not know which way, or what men there were in her, nor heard nothing until two o'clock the next day. And I hope, my lord, as we are but poor sea-faring men, and do not understand the law, you will take it into consideration.

L. C. J. *Holt*. But all you seamen understand that law, that it is not lawful to commit piracy; and he that doth, deserves to be hanged.

Forseith. My lord, I never did.

L. C. J. *Holt*. Did you think it no piracy to rob?

Forseith. I was forced to do what I did.

Just. *Eyre*. You all compelled one another.

Forseith. My lord, I was sent of an errand. I hope as we are poor men in this condition, you will take into consideration.

L. C. J. *Holt*. We shall. Have you any more to say?—*Forseith*. No, my lord.

L. C. J. *Holt*. W. May, what do you say?

May. Here is one of the king's evidence, that testifies that I knew nothing of the ship's going away; and I believe very few knew it, I believe not above nine or ten.

L. C. J. *Holt*. None of them say you were at the consult; but one says that you said, 'God damn you, you deserve to be shot through the head;' and held a pistol to him.

May. I never was any higher than the under-deck; I was coming up the hatch-way, and captain Every was standing, and commanding the ship.

L. C. J. *Holt*. Every was no officer, he had nothing to do to command; he was under captain Gibson, and took the ship from Gibson.

May. My lord, I know nothing of the ship's going away.

L. C. J. *Holt*. You should have stuck to captain Gibson, and endeavoured to suppress the insolence of Every. Captain Gibson was the commander, you ought to have obeyed

him; and if any had resisted him, or gone to put a force upon him, you should have stood by him.

May. I was surprized.

L. C. J. Holt. How?

May. By captain Every, and knew nothing of it.

L. C. J. Holt. You were zealous from the beginning, and said to one, 'Damn you, you deserve to be shot through the head.'

Just. Turton. And one says, you drank a health to your good voyage.

May. Presently after I heard this rumour, I came up the hatch-way, and capt. Every says, "You, May, I believe you do not love this way, pray get down to your cabbin." So I went to my cabbin, which one that is now at Virginia could testify; which I hope will be considered, that I cannot have my witnesses for me.

L. C. J. Holt. What have you more to say? Have you any witnesses to call?

May. I stayed in the cabbin a considerable time. I was thinking I must leave my old captain without seeing him; and I begged them to give me leave to come to him; and there was two men stood with naked cutlases, and would not let me come to him. We had some confabulation together, and I begged the favour to come in, and at last they permitted me; and the doctor was anointing the commander's temples. And as I was coming along, I had my hand cut; and I went to the doctor, to desire him to bind up my hand. When I came out again, they began to hurry the men away. Here was Mr. Gravet, the second mate, who is now one of the king's evidence; and I told him he should remember me to my wife, I am not like to see her; for none could go, but who they pleased: for when those men were in the boat, they cried to have a bucket, or else they should sink, they having three leagues to go: and I do not know how they could go so far with more, when their boat was like to sink with those that were in her, as some of the king's evidence have testified.

L. C. J. Holt. Who will you call?

May. Mr. Dan. (Who appeared.)

L. C. J. Holt. Mr. Dan, answer the question, Whether there was calling for a bucket several times by the men that were in the boat?

Dan. They did call, and a bucket was given them to pump with.

L. C. J. Holt. You were willing to be rid of them.

May. I have more to say. Afterwards, if I should have denied to go with them, I might have been killed by them; and I knew not whether it be better to be accessory to my own death, or to suffer by the law of the nation.

Sir Ch. Hedges. You seem to say that you were under a constraint and terror. Did you make any complaint or discovery so soon as you had liberty, or at your first coming into the king's dominions?

May. Yes, at Virginia.

Sir Ch. Hedges. Where did you first arrive in England?—*May.* At Bristol.

Sir Ch. Hedges. When you came to Bristol, did you discover it to any magistrate?

May. When I came to Bristol, I had a design to discover it to the Lords of the Admiralty.

L. C. J. Holt. Did you go to a magistrate?

May. I was several days in the king's collector's house, and did discover the whole to him; and at Providence.

L. C. J. Holt. You speak now of Providence; but in England who did you discover it to?

May. I was taken sick, and could not go abroad.

L. C. J. Holt. You might have sent to the mayor of Bristol.

May. I knew nothing of it, I intended to declare it to none but the Lords of the Admiralty. I knew no man there, but two men that were fellow-tradesmen in Virginia. I came from Virginia by the first ship; and if that ship had come away before the fleet, I had been at home long before. I lay sick at Bristol four or five days, and the fifth day I got passage for London in the coach; and was taken three miles off Bath by the king's messenger, by one who betrayed me, and I was carried back to Bath again. And there was the duke of Devonshire; and there they examined the whole matter, in every particular, as I have now declared to the court. And my lord desired the messenger should take me away again, and see me safe to London; which was all he said to me. I have more to say, as to my being put ashore at Joanna. I had no place to go to, but lay in a lamentable condition; I could not put water to my mouth without help, and remained useless of hands or feet, despairing of my life. I desired to go ashore, to see if the air would do me any good; and I went ashore at Joanna, with another man, Gunning, and others, for refreshment. So the second day we went in, there appears three ships, which were East-India men. Captain Every being surprized by these ships, hastened his men and water aboard to get out to sea, that he might not be surprized in the road without his men on board, who were come ashore for the sick. And I told them, I will not go with you, I will rather trust to the mercy of my countrymen, or the mercy of the negroes: I should endanger my life, if I go aboard; if I stay, no question my countrymen will have compassion on me; and if I have committed any thing worthy of death, they have authority to put me to death according to the law of the nation. And I applied myself to Mr. Edgcomb, when he came ashore, and he gave me scurrilous language. But I replied, I am a weak man, for me to stay behind is death; I had rather suffer death by the laws of my country, than to be left to the mercy of these negroes. Mr. Edgcomb says, I will take you down with me, and will hang you there too.

L. C. J. *Holt*. Where?

May. At Bombay, where he said I should be tried. His mate, and several other Englishmen, came to see me, and brought me one thing or other to refresh me. And at last, at night, he sent his doctor and purser to me, who said, the captain is just now sending his boat for you. I replied, I am ready, here is all I have in the world; and he goes away about two o'clock in the morning. And I remained seven or eight weeks at the mercy of those negroes, and had perished, but that a negroe hearing an Englishman was there, came to me; he lived at Bednal-Green, and spoke English very well. He went from England in the ship *Rochester*, taken at Guinea some time before. The captain commanded this negroe to go for the long-boat, and turn her adrift; which he does, but goes away with her himself; and in the fight, says, the ship blew up by an accidental fire, and several were lost. This negroe I got to look after me, and he did really feed me, and got me all necessaries belonging to me: and by that means I saved my life. Now when captain Every came in again, I could not go nor stir.

L. C. J. *Holt*. Do not call him captain; he was a pirate.

May. He commanded me, I was forced to obey him.

L. C. J. *Holt*. For that matter call *Gravet* again, because you and he were very kind together; you shook hands with him, and bid him farewell, and remember you to your wife. Mr. *Gravet*, do you remember, when you went into the boat, did W. May take his leave of you, or was he unwilling to be left behind?

Gravet. When we had liberty to go out of this ship, this man, W. May, took me by the hand, and wished me well home, and bid me remember him to his wife; and was very merry and jocund, and knew whither they were going.

Just. *Turton*. Did he express any inclination to go with you?

Gravet. No, my lord, not at all.

L. C. J. *Holt*. Have you any more to say?

May. Yes, my lord, I remained in this condition till I came to Providence; and the king's evidence can testify what I say. I only beg mercy of this honourable bench, to consider my weak state and condition that I have been in.

L. C. J. *Holt*. Have you done?

May. Yes, my lord.

L. C. J. *Holt*. Then the next. W. Bishop, what have you to say?

Bishop. I belonged to the ship *James*: and at the Groyne the men began to complain about wages, and that was the first beginning of the disturbance about this plotting. We were shipped out of England in sir James Houblon's service, to the Spanish West-Indies. Upon this mutiny among the men for their wages, several men went aboard the king's ships, and desired to be entertained on board any of them to go for England; and we all went away

again to the ship, because we could not be entertained. But this design of Every's I did not know of. On the 17th day captain Humphreys calls, and says, my men are gone aboard the *Charles*, I think. And he calls out, says he, Mr. Druit, man the pinnace. I being then on the deck, at night, the men all quiet, as I thought, I went into the pinnace, and I was no sooner in, but in comes fifteen or sixteen more that knew of the design: but I was then sent, and knew it not. And they put off the boat and overpowered us; and several of us would have gone aboard again, and they would not suffer us. And when we came aboard the ship *Charles*, they had cut the cables, and the sails were loose, and several men went from the *Charles* to the *James* in a boat; and they commanded the innocent to do what they pleased, with pistols and cutlasses: and they commanded me to go into the hold to do what they pleased. And I not knowing of this matter, the men that were in the boat called, hand the buckets, or we shall sink. And I heard afterwards that none went ashore, but whom they pleased, that is, Every and his crew. And I not knowing of it, could not go; and if I had known it, I had not been admitted to go. Then we were carried two leagues without the Groyne.

L. C. J. *Holt*. Have you any witnesses to call?

Bishop. The king's evidence is my witness; he commanded me to go into the boat.

L. C. J. *Holt*. Will you ask him any questions?—*Bishop*. No, my lord.

L. C. J. *Holt*. James Lewis, what have you to say?

Lewis. I had been in France, a little before the ship came to the Groyne, a prisoner there; but I knew nothing of Every's design. By the command of our officer I went aboard the boat, and as soon as we were in her, we were overpowered, and carried away; they took the oars out of our hands, and carried us to the ship *Charles*. And when we came aboard, they put the boat adrift, and then they commanded me into the fore-castle; they had arms, but we had none, and so were forced to obey them. When the boat was going off, I heard a noise of crying out for a bucket. And when we were gone from the Groyne, we were forced to do what they would have us; it was against my consent, and against my will.

L. C. J. *Holt*. J. Sparkes, what say you?

Sparkes. When captain Humphreys called to them that were gone into the boat, I was asleep; but with the noise of *Gravet's* crying out, He is coming, I awaked; and all put the candles out, for fear I should see them. And when the men were come aboard, I went on the deck, and they trowed the hammocks, and knocked me down.

L. C. J. *Holt*. Who did it?

Sparkes. The hammocks they brought from the other ships. I durst not do any otherwise than they bid me; I was innocent of the thing. I asked what they were going to do, and they said they were going for England.

L. C. J. Holt. Who told you so?

Sparkes. John Dan.

L. C. J. Holt. J. Dan, did you tell J. Sparkes the ship was going for England?

Dan. I do not remember I saw him all the night.

L. C. J. Holt. I would ask you, if you had no share of the plunder?

Sparkes. I was forced to take it.

L. C. J. Holt. Phil. Middleton, you had some share, had you not?

Middleton. Yes, my lord.

L. C. J. Holt. What became of it?

Middleton. They took it away from me.

L. C. J. Holt. Who took it from you?

Middleton. J. Sparkes robbed me of it by night.

L. C. J. Holt. Did he take all away?

Middleton. Yes, all that I had there: 270 odd pieces of gold; it was in a belt.

Sparkes. He took out his money and shewed it to the troopers, and they made him drunk, and got it from him; and the next morning he said they took it from him.

Middleton. I was forced to say so, because if I said he had it, he would have made no more but to cut my throat.

L. C. J. Holt. Have you any more to say?

Sparkes. No, my lord.

Sol. Gen. May it please your lordship, and you gentlemen of the jury, I am of counsel in this case for the king against the prisoners at the bar. They are arraigned for a very high crime, a robbery upon the seas. It was not a less crime because committed on the sea, but rather the more. These men had a trust reposed in them to assist their captain in his voyage; but instead of that, they resist their captain, turn him out, and run away with the ship. They could not find shelter in any other part of the world, and I hope you will make it appear such crimes shall not find shelter here, more than in other parts of the world. These are crimes against the laws of nations, and worse than robbery on the land: for in case of a robbery on the land, we know who is to pay it; but in a robbery by sea, it often happens that innocent persons bear the loss of what these men do. It has been very plainly proved against the prisoners, that the ship Charles was run away with from the Groyne. And it is as plain by two witnesses, that all the prisoners at the bar were in this ship; by three, that W. May in particular was one of them; and by one, that W. May was so far concerned, that because J. Gravet seemed to dislike it, he said he deserved to be shot through the head: so that he that would make himself the most innocent of the five, is most guilty.

Now they have only this to say for themselves, that they were forced to do what they did. But it has been proved to you that they were not forced; it was said, all might go that would, And it is not proved on their side, that any one of the prisoners did seem to dissent from their going away. It is proved,

that they all made use of this ship to very bad purposes; that they took and plundered several ships, and shared the booty. We do not produce this to prove them guilty, but to shew that they made use of this ship to this very purpose. Now if you allow what they say, that they were forced to go away; then you must never convict, at any time, one or two highwaymen that rob in the company of four or five; for they may say too, that they were overpowered, and forced by their company. It is so, not only in case of robbery, but in all other crimes also. They have said a great deal indeed, but without any manner of probability of truth. They have produced no witnesses for themselves, to prove any thing they have said. And the witnesses for the king have given testimony without any exception. And, I hope, you will vindicate the credit of the nation, and find them guilty, as the evidence has proved them.

L. C. J. Holt. Gentlemen of the jury, these five prisoners, E. Forseith, W. May, W. Bishop, Ja. Lewis, and J. Sparkes, are indicted for a piracy and robbery committed on the high seas, some distance from the Groyne, in taking and carrying away a ship, and several goods therein contained. She was called the Charles the Second. This was done in May last was two years, 1694. You have heard what evidence has been given on this indictment against the prisoners.

It has appeared that this ship was bound in a voyage to the West Indies. Two of the prisoners, W. May and J. Sparkes, were seamen then on board this ship, and engaged in the voyage; the other three were not mariners in that, but in another ship, called the James, that lay, at that time, near the Groyne; but they came aboard the ship Charles before, and continued on board her when she was carried away.

That there was a piracy committed on the ship Charles, is most apparent by the evidence that hath been given; that is, a force was put on the master, and some others of the seamen on board her, who, because they would not agree to go on a piratical expedition, had liberty to depart, and be set ashore. But the ship was taken from the captain, who was possessed of her for the use of the owners, and was carried away by Every, and others of his crew that remained on board her; and others came from the James: which taking was a piracy; that is manifested by the use they did put her to; for they did afterwards commit several other piracies with her, and took several English and Danish ships, and then went to several islands, countries and places, as to the isles of May and Princes, to Madagascar, and then to Joanna, and afterwards to Meat, and then to the Red Sea; and at the entrance of the Red Sea committed more piracies, in the manner as you have heard, and has been very particularly described to you. So that I must tell you, beyond all contradiction, the force put on the captain, and taking away this ship,

called the Charles the Second, was a piracy ; and for that particular fact these prisoners are now charged.

The matter you are now to enquire after, is, Whether all the prisoners were guilty of this piracy, or which of them.

As for E. Forseith, Bishop, and Lewis, it hath appeared to you, that they, with others, were aboard the ship James ; and that there was a report spread about of a plot against the captain of the Charles the Second, and a design to carry that ship away. To prevent which, there were some of these men sent out in a boat, by the captain of the James, to this ship, to assist captain Gibson ; but instead of preventing this piracy, they staid behind, and went along with those men that carried away the ship.

As to W. May and J. Sparkes, that were of this ship's crew, they continued on board, and were parties in all those piracies.

There was a consult, it seems, by some particular persons, of which Every was the ring-leader, how to effect this design ; capt. Every, as they call him, though he was no captain, but was under the command of capt. Gibson, that had the conduct of this ship.

It is true, it is not proved to you that these men were at that consult ; for, it seems, they were too many, for they were about 160 that remained on board when the ship was carried off.

Now for W. May, Jo. Gravet, second mate, that was aboard, though he had a pistol clapped to him to prevent any resistance, yet had liberty to depart ; and upon his going off, discoursed with May, who shook hands with him, and bid him farewell, and remember him to his wife. And therefore it is evident that W. May was under no force to stay ; he staid with his good will, and did consent to the piracy. And then another witness is D. Creagh, who says, that May was so zealous in the matter, that he said to him, ' God damn him, he deserves to be shot through the head.'

Sparkes was on board the ship, and had a designed end, and no compulsion was used towards him, since he had liberty to depart ; but the staying behind by the rest, is a great evidence to induce you to believe they were parties in the design ; for why else should not they go ashore as well as others, since there doth not appear any restraint upon them to stay, especially when a general word was given, that those who would go on shore should go on the deck, and a boat was ready to carry them off ?

They say, they wanted a bucket in the boat, and they gave them one to lave out the water ; that is a plain evidence they were willing to be rid of those that were not willing to engage with them ; and if they had not approved of the design, they were not hindered from going in the boat. As for those that came from the James, there was no manner of force on them, but they were sent from the captain to assist the captain of the Charles ; for those two ships

having lain near together at the Groyne, there was some intelligence of such a design in agitation, and these three forsook their own ship. Every declared his design to some : And he told them what shares they should have ; and because he was their captain and commander, he thought himself entitled to a double share.

And then you have heard what was done in the whole progress of this wicked design ; every one of these men had their share ; even this W. May, though he was sick for some time, and was set ashore at Joanna, and at the ship's return taken in again, yet he had his share of all the prizes. W. Bishop had his share, James Lewis had his share, and John Sparkes had his share ; and, says this young man, Philip Middleton, I had my share, which was above an hundred pound, which was thought by them to be a good share for a boy ; and Sparkes took him at a disadvantage, and having an opportunity, took it from him.

Now if there be a piracy committed, though contrived but by one man, yet if others do concur in it, they are equally guilty.

Now, though these prisoners tell you, there was a force upon them, it is a mere suggestion, without any manner of evidence ; but there is evidence of their consenting and confederating in this wicked enterprize.

Indeed there hath been a trial before, which you have all heard of ; for the city and nation have discoursed of it ; consider therefore the evidence. You have a great trust reposed in you, for you are not to act arbitrarily, but you are accountable to God Almighty, to whom you are sworn, and to the government for the verdict you give. If you are not satisfied in your consciences that the evidence is sufficient to find these men guilty, in God's name acquit them. But if you are satisfied in the sufficiency of the evidence to convict them, you must find them guilty.

Cl. of Ar. Cryer, swear an officer to keep the jury ; which was done, and the jury went out to consider of their verdict. And, in the mean time, the six prisoners were again arraigned upon two several indictments ; the one for piratically taking away a Moorish ship, and the other for committing piracy upon two Danish ships. To both which indictments Joseph Dawson pleaded Guilty ; the other five pleaded Not Guilty, and put them upon their trials.

Then the Jury having been withdrawn a little while, returned into court.

Foreman. If there be any evidence to prove that John Sparkes consented to the running away of the ship, we desire it may be heard again.

L. C. J. Holt. He was with them at the carrying off the ship, and at the taking of the several prizes, and had his share afterwards. What is consent ? Can men otherwise demonstrate their consent, than by their actions ?

Juryman. But we understand, my lord, that

he was tried upon his consenting to carry away the ship.

L. C. J. Holt. What do you mean by consenting? If a ship be carried away with force from the captain, divers piracies are committed with her, one continues aboard and receives a share of the profit of the several piracies; is not that an evidence of consent to the piratical design? Was it not proved that many went out of the ship that were not willing to go on that design? And that was with the leave of the rest that remained.

Just. Eyre. And one stood on the deck, and said with a loud voice, that they that will not go, may have liberty to go ashore.

Mr. Conyers. No man was hindered but the Doctor, being a useful man.

L. C. J. Holt. When a ship is run away with, and people are aboard that ship so run away with, that proves their consent, unless they can produce evidence to the contrary.

Just. Turton. The captain was in his bed sick of a fever at that time, and was not willing to go with them, and they sent him away from them.

Just. Eyre. And every man had his share.

Then the Jury consulting together a very little time, agreed on their verdict.

Cl. of Ar. Gentlemen of the jury, answer to your names. *J. Degrave.*

J. Degrave. Here. (And so of the rest.)

Cl. of Ar. Gentlemen, are you all agreed of your verdict?—*Jury.* Yes.

Cl. of Ar. Who shall say for you?

Jury. Our foreman.

Cl. of Ar. Set E. Forseith to the bar. E. Forseith, hold up thy hand. (Which he did.) Look upon the prisoner; is Edward Forseith guilty of the piracy and robbery whereof he stands indicted, or not guilty?

Foreman. Guilty.

Cl. of Ar. Look to him, keeper. What goods and chattels, &c.

Foreman. None that we know of.

Cl. of Ar. W. May, hold up thy hand. (Which he did.) Is W. May guilty, &c. or not guilty?—*Foreman.* Guilty.

Cl. of Ar. Look to him, keeper, &c. W. Bishop, hold up thy hand. (Which he did.) Is W. Bishop guilty, &c. or not guilty?

Foreman. Guilty.

Cl. of Ar. Look to him, keeper, &c. J. Lewis, hold up thy hand. (Which he did.) Is J. Lewis guilty, &c. or not guilty?

Foreman. Guilty.

Cl. of Ar. Look to him, keeper, &c. J. Sparkes, hold up thy hand. (Which he did.) Is J. Sparkes guilty, &c. or not guilty?

Foreman. Guilty.

Cl. of Ar. Look to him, keeper, &c.

L. C. J. Holt. Gentlemen, you have done extremely well, and you have done very much to regain the honour of the nation, and the city.

Then the Court adjourned to Friday next the 6th of November, two of the clock in the

afternoon, on which day Edward Forseith, &c. were tried upon two other Indictments for several piracies.

An Abstract of the Trial of Edward Forseith, James Lewis, William May, William Bishop, John Sparkes, (Joseph Dawson having pleaded Guilty upon his Arraignment) at the Sessions House in the Old Bailey, Friday, November 6, 1696, where were present Sir Charles Hedges, Judge of the High Court of Admiralty, the Lord Chief Justice Holt, the Lord Chief Justice Treby, with several others of his Majesty's Judges and Commissioners.

After several challenges made by the prisoners, of the persons returned upon the Jury, these twelve gentlemen were sworn, viz. Roger Mott, John James, Richard Rider, William Hunt, John Hammond, Abraham Hickman, John Watson, Benjamin Hooper, John Hibbert, Richard Chiswell, Daniel Ray, William Hatch.

Then the Clerk read the two Indictments upon which they were tried, viz. one for seizing, robbing, and carrying away two ships belonging to Denmark, on the 30th of August, 1694. The other for that they, on the 28th of September, 1695, in a place 40 leagues distant from Surat, did forcibly and piratically set upon a Moorish ship, and take away her tackle and goods, to a great value.

Then *Dr. Newton*, one of his Majesty's Advocates, spoke to the Jury as followeth:

My Lord, and Gentlemen of the Jury; The crime the prisoners at the bar stand charged with, and which has been opened to you upon the indictments, is piracy; which is the worst sort of robbery, both in its nature and its effects, since it disturbs the commerce and friendship betwixt different nations; and if left unpunished, involves them in war and blood: for sovereign powers and nations have no courts of justice afterwards to resort to, as the subjects of princes have, in their own countries, for redress or punishment; but they can only have recourse to arms and war, which how expensive, and how dangerous they are, and what calamities and ruin they carry along with them, no person can be a stranger to. So that those who bring not such criminals to judgment, when it lies in their power, and is their duty to do so, are answerable, in a great measure, before God and man, for all the fatal consequences of such acquittals, which bring a scandal on the public justice, and are often attended with public calamities.—It is not therefore, gentlemen, to be supposed, that wise or honest men, (and there are none who would be thought to be otherwise) who love their country, and wish its peace and prosperity, would be guilty in that kind.—Gentlemen, this piracy was begun in Europe, carried on through Africa, and ended in the remotest Indies; so that, in a manner, all the world is concerned in this trial, and ex-

pects and demands justice of them, if they are guilty, at your hands.

Then the Witnesses were produced to prove the facts charged upon the prisoners, viz. Jo. Dean, David Creagh, Phil. Middleton, and others; who fully proved against them, That the prisoners, with several other wicked persons not yet taken, did forcibly take away the ship *Charles the Second* from the lawful commander, captain Gibson, with a piratical design; and in the said ship did afterwards commit several piracies. At the Isle of May they took three English ships. From thence they went to the coast of Guinea; and when some of the natives came on board with their gold, to trade with them, they took away their gold, and carried them away for slaves. And then went to the Isle of Princes and took two Danish ships, and took out what was in them, viz. 40 pound weight of gold dust, and other merchandize; and they offered to restore one of the ships to the master after they had robbed her, but the master said she was insured, and he would not take her again. And afterwards they burnt one of the ships, and carried away the other. Then they went to Bob's Key, at the mouth of the Red Sea, waiting for the *Mocha* fleet, which one night passed by them unseen; but were informed the next day that they were gone. And then calling a council, they agreed to follow them; and accordingly went after them, and came up with one of them which was about 250 ton, and with small resistance took her, and put some men on board her, and took gold and silver out of her to the value of 30 or 40,000*l.* with other merchandize: and afterwards met with the ship called the *Gunsway*, and robbed her likewise of all her furniture, to a very great value. And about a week after, they shared all the prizes they had taken; and some had 1,000*l.* some had 800*l.*, some 700*l.* some 500*l.* every man in the ship his share, as they thought they deserved. And it was particularly proved by the evidence against the prisoners, that they had their shares. [The more particular relation of which is already printed at large in the foregoing Trial.]

When the king's evidence had done, the prisoners were permitted to say what they could in their defence; but the same appearing to be very weak, the lord chief justice Holt summed up the evidence; and the jury going out to consider their verdict, after a short stay, brought them in all Guilty.

Then the Court adjourned to the 10th of November following.

After the Trial of John Murphey was over, the Pirates were brought to the Bar.

Cl. of Ar. Joseph Dawson, you by your own confession are convicted of piracy and robbery: what have you to say why sentence of death shall not be passed upon you according to law?

Dawson. I submit myself to the king and the honourable bench.

Cl. of Ar. Edward Forseith, what have you to say, &c.

Forseith. I am an innocent man;—and went on to justify himself, &c.

Judge of the Admiralty. You and the rest of the prisoners at the bar have had a very fair trial, and been fully heard upon your defence; but the jury, your countrymen, upon whom you put yourselves to be tried, have found you guilty: so that the insisting upon your justification cannot now avail you any thing, the verdict being given; but if you have any thing to offer in arrest of judgment, or can shew any cause why the court should not proceed to give judgment according as the law directs, against persons convicted of piracy, you shall have liberty to speak, and will be heard.

Forseith. I desire to be sent into India to suffer there.

Cl. of Ar. William May, what have you to say, &c.

May. My lord, I being a very sickly man, never acted in all the voyage. I have served my king and country this thirty years, and am very willing to serve the East-India company where they please to command me; and desire the honourable bench to consider my case, and if I must suffer, I desire to be sent into India to suffer there.

Cl. of Ar. William Bishop, what have you to say, &c.

Bishop. I was forced away; and when I went, was but 18 years old, and am now but 21, and desire mercy of the king and the court.

Lewis. I am an ignorant person, and leave myself to the king's mercy.

Sparkes. I leave myself to the king's mercy, and to the honourable court.

Judge of the Admiralty. Joseph Dawson, you stand convicted upon four indictments, by your own confession, for piracy and robbery. And you, Edward Forseith, William May, William Bishop, James Lewis and John Sparkes, having put yourselves upon your trials according to the customs and laws of your own country, have been found guilty upon three several indictments, for the same detestable crimes committed upon the ships and goods of Indians, of Danes, and your own fellow-subjects. The law for the heinousness of your crime hath appointed a severe punishment, by an ignominious death: and the Judgment which the law awards, is this:

‘That you and every one of you be taken
‘from hence to the place from whence you
‘came, and from thence to the place of execution; and that there you, and every one of
‘you be hanged by the necks, until you and
‘every one of you be dead: and the Lord
‘have mercy upon you.’

According to this sentence, Edward Forseith and the rest were executed on Wednesday, November the 25th, 1696, at Execution-Dock, the usual place for the execution of pirates.

393. The Trial of Captain THOMAS VAUGHAN, at the Old-Bailey, for High-Treason on the High Seas: 8 WILLIAM III. A. D. 1696.*

THE Court being sat, at which were present, sir Charles Hedges, judge of the high court of admiralty, the lord chief justice Holt, the lord chief justice Treby, the lord chief baron Ward, Mr. Justice Turton, and others of his majesty's commissioners; the court proceeded on this manner.

Cl. of Ar. Make proclamation.

Cryer. O yes, O yes, O yes. All manner of persons that have any thing more to do,

* See 2 Salk. 634, and Holt, 689. See also East's Pl. Cr. c. 2. s. 40. 43.

"Captain Vaughan was not an alien enemy, but being a natural born subject of this realm, he became a traitor; for that he was put in prison, for that he answered, and with his life. But it was for that act of hostility merely. With regard to his character of a subject he remained till the moment of his execution, as if that act had never been committed. There is very little light to be procured from our books, to assist us in our inquiry, how far a neutral joining in an act of hostility is to be considered as having acquired the character of alien enemy. The subject was indirectly discussed in the case of captain Vaughan, to which I have alluded. He was charged in the indictment with adhering to the king's enemies by cruising 'cum subditis Gallicis;' the fact was that many of his crew were not natural born subjects of the French king, but Hollanders. It was made a question whether the Hollanders should be called 'subditi Gallici,' and though the point was not authoritatively decided because some of the crew were certainly French, which was sufficient to support the indictment, yet it was held by Holt, C. J. and agreed to by the rest of the court, that the Hollanders by accepting a commission from the French king became 'subditi Gallici,' and so remained during the continuance of their service in a state of qualified subjection arising out of the service and determining with it. This, had it been the very point in judgment, would have gone a great way towards deciding the present question. The commission under which the plaintiff being a German acted was put an end to by the capture of the frigate, in which he was. After that time he had no opportunity of continuing in the service of the state of Holland, and his temporary character of alien enemy ceased and determined with the authority under which he acted. Captain Vaughan's case as far as it goes draws a line and fairly marks out when that character begins and when it shall end." Per Eyre, Chief Justice in giving judgment in the case of Sparenburgh v. Bannatyne. 1 Bos. and Pul. Rep.

&c. and were adjourned to this hour, draw near and give your attendance. God save the king.

Then the Grand Jury were called over, and the appearances marked. And witnesses being sworn in court to give evidence to them against Thomas Vaughan, they withdrew to hear the same.

Then the Keeper of Newgate was ordered to bring his prisoner, Thomas Vaughan, to the bar. (Which he did.)

Cl. of Ar. Thomas Vaughan, hold up thy hand. (Which he did.) Thou standest indicted, &c. How sayest thou, Thomas Vaughan, art thou guilty of the high-treason whereof thou standest indicted, or not guilty?

Vaughan. Not Guilty.

Cl. of Ar. Culprit, how wilt thou be tried?

Vaughan. By God and this country.

Cl. of Ar. God send thee a good deliverance.

And then the Court proceeded to the Trial of the Pirates, and gave notice to Mr. Vaughan to prepare for his Trial on Friday next, the 6th of November, 1696.

November 6, 1696.

Cl. of Ar. Cryer, make proclamation.

Cryer. O yes, O yes, O yes. All manner of persons that have any thing more to do at this sessions of Oyer and Terminer, adjourned over to this day, draw near and give your attendance. And you sheriffs of the city of London, return the precepts to you directed, upon pain and peril which will fall thereupon.

Then the Under-Sheriff returned the Precepts.

Cl. of Ar. Make proclamation.

Cryer. O yes. You good men of the city of London, summoned to appear this day, to try between our sovereign lord the king and the prisoner at the bar, answer to your names as you shall be called, every one at the first call, and save your issues.

The whole pannel was called over, and the appearances of those that answered recorded, and the defaulters were again called over.

Mr. Phipps.* Will your lordship please to order that two men may be brought from the Marshalsea, on the behalf of the prisoner?

* That the st. 7 W. 3, c. 8, extends to persons indicted under st. 28 H. 8, c. 15, for high-treason committed on the high seas, see East's Pleas of the Crown, c. 2. s. 43. Whether corruption of blood is wrought by judgment of treason committed on the high seas, see East as above, and Foster's Crown Cases, &c. there cited, pp. 222. 226. 1 H. P. C. c. 27. Salk. 85.

L. C. J. *Holt*. You shall have an order.

Then the court went on the trial of the Six Pirates;* and after the trial was over, Thomas Vaughan was called to the bar.

Vaughan. My lord, my irons are very uneasy to me, I desire they may be taken off.

L. C. J. *Holt*. Ay, ay, take them off.

Mr. *Phipps*. If your lordship please, we have some doubts as to the indictment.

L. C. J. *Holt*. If you have any exceptions, you ought to have made them before the prisoner pleaded to it.†

Mr. *Phipps*. I thought you had allowed it, my lord, in former cases.

L. C. J. No, we did not allow it as of right due to the prisoner; the exceptions should have been made before the plea. You were indulged in being heard at first in the cases of Rookwood, Cranburne, and Lowick: but it was not the intent of the act to alter the method of the proceeding, and so upon consideration hath it been determined. The prisoner hath time given by the act to make any exception to the indictment before he pleaded; but you may move what you will afterwards in arrest of judgment, if it be material.

Cl. of Ar. Thomas Vaughan, those men that you shall hear called, and personally appear, are to pass between our sovereign lord the king and you, upon trial of life and death; if therefore you challenge them, or any of them, your time is to speak unto them as they come to the book to be sworn, before they be sworn.

Mr. *Phipps*. There was one man here that desired to be excused, because he was on the grand-jury; therefore it seems there are some returned upon this jury that were on the grand-jury, which I think ought not to be.

L. C. J. Challenge them then.

Mr. *Phipps*. We do not know the men.

Then the Pannel was called over, and a great many challenges made, and the twelve men that were sworn, were these: Edward Leeds, Nath. Green, Hen. Sherbrook, J. Sherbrook, T. Emms, Peter Parker, Caleb Hook, Joceline Roberts, Tho. Parker, Peter Gray, Roger Poston, — Woolley.

Cl. of Arr. Cryer, make proclamation.

Cryer. O yes. If any one can inform my lords the king's justices, and the king's serjeant, the king's attorney-general, the king's advocate in his high-court of admiralty, before this inquest be taken of the high-treason whereof Thomas Vaughan, the prisoner at the bar, stands indicted, let them come forth, and they shall be heard; for now the prisoner at the bar stands upon his deliverance; and all others that are bound by recognizance to give evidence against the prisoner at the bar, let them come forth and give their evidence, or else they forfeit their recognizance.

* See the preceding Case.

† East's Pl. Cr. c. 2, s. 46. *Layser's Case*, *infra*, A. D. 1722.

Cl. of Ar. Thomas Vaughan, hold up thy hand. (Which he did.) You that are sworn, look upon the prisoner, and hearken to his cause. He stands indicted by the name of Thomas Vaughan.

"Whereas, * That before and until the 8th day of July, in the 7th year of the reign of our sovereign lord king W. 3, there was open war between our said lord the king, and Lewis the French king: And that the said war continued on the said 8th day of July, in the 7th year aforesaid, and doth still continue. And that for all the time aforesaid, the said Lewis the French king and his subjects were, and at present are enemies of our said lord the king that now is: And that at the time of the said war, and before the said 8th day of July, in the 7th year aforesaid, the said Lewis the French king set out, amongst others, a certain small ship of war, called the *Loyal Clencarty*, of which Thomas Vaughan, a subject of our said lord the king that now is, was commander, with several French subjects, enemies of our said lord the king, to the number of fifteen persons, in a warlike manner, to take and destroy the ships, goods, and monies of our said lord the king, and his subjects, and against our said lord the king, to wage war upon the high-seas within the jurisdiction of the admiralty of England. And that at the time of the said war between our said lord the king, and the aforesaid Lewis the French king, Tho. Vaughan, late of Galloway, in the kingdom of Ireland, mariner, being a subject of our said now lord the king, as a false rebel against the said king his supreme lord, and not having the fear of God before his eyes, nor considering the duty of his allegiance, but being moved and seduced by the instigation of the devil, and altogether withdrawing the cordial love, and true and due obedience which every true and faithful subject of our said lord the king ought by law to have towards the said king; and the said war as much as in him lay, against our said lord the king designing and intending to prosecute and assist; the said Tho. Vaughan, on the said 8th day of July, in the said 7th year of the king being a soldier a-board the ship of war, called the *Loyal Clencarty*, in the service of the said Lewis the French king, and being then on the high-seas, within the jurisdiction of the admiralty of England, about fourteen leagues from Deal, did then and there by force and arms, falsly, maliciously, wickedly and traitorously aid, help, and assist the enemies of our said lord the king, in the ship of war called the *Loyal Clencarty*. And afterwards the said Thomas Vaughan, in the execution and performance of his said aiding, helping, and assisting, maliciously, falsly, and traitorously sailed a cruising to several maritime places within the jurisdiction aforesaid, by force and arms to take the ships, goods, and money of our said lord the king, and his subjects; against the duty of his allegiance, the peace of

* East's Pl. Cr. c. 2, s. 54.

our said lord the king, and also against a statute in that case made and provided.

“ And the said jurors of our said lord the king, upon their said oaths, farther represent, that the aforesaid Thomas Vaughan, as a false traitor against our said lord the king, further designing, practising, and with his whole strength intending the common peace and tranquillity of this kingdom of England to disturb; and a war and rebellion against the said king upon the high-seas, within the jurisdiction of the admiralty of England, to move, stir up, and procure; and the said lord the king, from the title, honour, royal name, and imperial crown of his kingdom of England, and dominions upon the high-seas, to depose and deprive; and miserable slaughter of the subjects of the said lord the king, of this kingdom of England, upon the high-seas, and within the jurisdiction aforesaid, to cause and procure; on the said 8th day of July, in the said 7th year of the king, upon the high-seas, about fourteen leagues from Deal, and within the dominion of the crown of England, and within the jurisdiction of the admiralty of England aforesaid, falsely, maliciously, devilishly, and treacherously, by force and arms, with divers other false rebels and traitors (to the jurors unknown), war against our said now lord the king, prepared, prompted, levied, and waged. And that the said Thomas Vaughan in performance of his said war and rebellion, then and there, by force and arms, maliciously, wickedly, and openly assembled and joined himself with several other false traitors and rebels (to the jurors unknown) to the number of fifteen persons, being armed, and provided in a warlike manner with guns and other arms, as well offensive as defensive. And the said Thomas Vaughan, then and there, being aboard the said ship of war, called the *Loyal Clencarty*, assembled with the other false rebels and traitors as aforesaid, maliciously, wickedly and traitorously sailed a cruising to several maritime places, with the aforesaid ship of war, called the *Loyal Clencarty*, with an intent to take, spoil, and carry away the ships, goods, and money, of our said lord the king, and his subjects, by force and arms, upon the high and open seas, within the jurisdiction aforesaid; against the duty of his allegiance, the peace of our said lord the king, his crown and dignities; and likewise against the form of a statute in this case made and provided.” *

THOMAS NODEN, }
SAMUEL OLDHAM, } Jurors.

* The Indictment in Latin runs thus :

“ Jurat pro Dom' Rege super sacram suum presentant, quod ante & continue usque ad octav' diem Julii, anno regni dom' nostri Willielmi tertii, Dei gratia Angl', Scot', Franc', et Hibern' Regis, fidei defensor', &c. 7. fuit bellum apertum inter Dom' Willielmum nunc Regem Angl', &c. et Ludovicum Regem Gallicum, quodque bellum illud eod' 8. die Julii, anno 7, supradict', et semper postea lucusq'

Upon this Indictment he hath been arraigned, and upon this arraignment he hath pleaded not guilty; and for his trial he hath put himself upon God and his country, which country you are. Your charge is to enquire whether

continuat' fuit, et adhuc existit, quodque per totum tempus præd' dictus Ludovicus Rex Gallicus, et ejus subdit', fuer', et adhuc existunt inimici dicti Dom' Regis nunc, ac quod tempore belli illius, et ante prædict' octavum diem Julii, anno septimo suprad', dict' Ludovicus Rex Gallicus (int' al') quand' navicul' armat', vocat' 'Le Loyal Clencarty' (cujus Tho' Vaughan subdit' dicti Dom' Regis nunc Angl', &c. adtunc fuit capitaneus) cum quamplur' subdit' Gallicis, inimicis dicti Dom' Regis nunc, ad numerum 15. personar' replet', præparavit ad naves ac bona, catall', et denar' dict' Dom' Regis nunc Angl', &c. et subditor' suor' super alto mari, ac infra jurisdiction' admiralitatis Angl' modo guerrino capiend' et spoliand', et bellum præd' contra dict' Dom' Regem nunc super alto mari, ac infra jurisdiction' admiral' Angl' præd' gerend': Quodque tempore belli præd' inter ipsum Dom' Regem nunc, et præd' Ludovicum Regem Gallicum, Thomas Vaughan nuper de Galloway in regno Hibern' nauta, existens subdit' ejusdem Dom' Regis nunc Angl' &c. ut falsus proditor contra eundem Dom' Regem nunc, supremum Dom' suum, timorem Dei in corde suo non habens, nec debit' ligeanc' sue ponderans, sed instigatione diabolica mot' et seduct', cordialem dilectionem, ac veram et debitam obedientiam, quas quilibet verus et fidelis subdit' dict' Dom' Regis nunc erga ipsum Dom' Regem de jure gerere tenetur, penitus subtrahens, ac machinans et intendens, quantum in se fuit, bellum prædict' contra dictum Dom' Regem nunc prosequi et auxiliari, idem Thomas Vaughan dicto 8. die Julii, anno regni dict' Dom' Regis nunc 7. supradicto, vi et armis, &c. super alto mari in quodam loco circa 14 leucas a Deal distante, ac infra jurisdiction' admiral' Angl', seipsum præfat' Thomam Vaughan ut militem (Angl' a Soldier) ad bellum præd' contra dict' Dom' Regem nunc geren' et prosequen', in servitium ipsius præfat' Ludovici Regis Gallici, in navicul' armat' præd', vocat' 'Le Loyal Clencarty,' falso, malitiose, nequissime, et proditorie posuit; et quod ipse idem Tho' Vaughan in navicul' armat' præd', vocat' 'Le Loyal Clencarty,' adtunc et ibidem sic existen', vi et armis, &c. adtunc et ibidem super alto mari præd', ac infra jurisdiction' admiralitatis Angl' præd', dictis inimicis dicti Dom' Regis nunc, in dicta navicula armata, vocat' 'Le Loyal Clencarty,' adtunc et ibidem scilicet existen', falso, malitiose, nequissime, et proditorie fuit adhærens, auxilians, et confortans; et quod præd' Tho' Vaughan in execution' et performance adhæSIONIS, auxiliATIONIS, et confortationis sue præd' postea, scil' dicto 8. die Julii, anno supradict', ibidem super alto mari præd', ac infra jurisdiction' admiralitatis Angliæ, simul cum dictis inimicis dict' Dom' Regis nunc, in navicul' armat' præd', vocat'

he be guilty of the high-treason whereof he stands indicted, or not guilty. If you find him guilty, you are to enquire what goods or chattels, lands or tenements he had at the time of the high-treason committed, or at any time since. If you find him guilty, you are to enquire whether he fled for it. If you find that he fled for it, you are to enquire of his goods and chattels, as if you had found him guilty. If you find him not guilty, nor that he did fly for it, you are to say so and no more; and hear your evidence.

Mr. Whitaker. May it please you, my lord, and the gentlemen of the jury, the prisoner at the bar, Thomas Vaughan, stands indicted for high-treason: that whereas on the 9th of July, there was a war between his majesty the king of England, and Lewis the French king; amongst other warlike preparations that the French king did make, he did set forth a ship called the Loyal Clencarty; that the prisoner at the bar, as a false traitor, did list himself aboard this ship; and on the high-seas, about eleven leagues from Deal, did traitorously aid the king's enemies to take the king's ships. This is said to be against the duty of his allegiance, and the peace of our sovereign lord the king, his crown and dignity. He stands further indicted, for that he, the said Thomas

Vaughan, with several other false traitors, did levy war, and arm themselves with arms, offensive and defensive, and was cruising on the high-seas, off of Deal, with an intent to take the king's ships, and to kill and destroy the king's subjects, against the duty of his allegiance, and the peace of our sovereign lord the king, his crown and dignity. To this indictment he has pleaded not guilty. We shall call our witnesses, and prove the fact, and doubt not but you will do your duty.

Dr. Littleton. Gentlemen of the jury, you have heard the indictment opened, as also what sort of crime the prisoner at the bar stands charged with, viz. That he, being a subject of the crown of England, has, together with his accomplices, armed himself in a military way, to murder and destroy his fellow-subjects, and as much as in him lay, to ruin his native country, by ruining the trade and traffic, which is the great support and riches of the nation. And that this crime might be consummate, he, with his accomplices, has done what in him lay, to dethrone and dispossess his sacred majesty; as well knowing it was in vain to expect to make the nation unhappy, as long as we enjoy so great and good a prince. So that you are to look on the prisoner as an enemy and traitor to his own country; and not

'Le Loyal Clencarty,' adtunc et ibidem existen' ad quamplur' locos maritimos in eadem navicul' armat', vocat' 'Le Loyal Clencarty,' in exploratione (Anglice *cruising*) ea intentione, ad prædand' naves, bon', catall' et denar' ejusdem Dom' Regis, et subditor' suor' super alto mari præd', ac infra jurisdiction' præd', vi et armis, &c. malitiose, nequissime, et proditorie navigavit, contra ligeanc' suæ debitum, contra pacem dicti Dom' Regis nunc, coron' et dignitat' suas, &c. necnon contra formam statut' in hujusmodi casu edit' et provis', &c.

"Et jur' præd', pro dicto Dom' Rege super sacram' suum præd' ulterius præsent', quod præd' T. Vaughan, ut falsus proditor contra dict' Dom' Regem nunc Angl', &c. suprem' Dom' suum ulterius machinans, practicans, et tota vi sua intendens pacem et communem tranquillitat' hujus regni Angl' perturbare, et guerram et rebellion' contra dict' Dom' Regem super alto mari præd', ac infra jurisdiction' admiralitat' Angl' suscitare, movere, et procurare, et dict' Dom' Regem a titulo, honore, & regali nomine, coron' imperial' regni sui Angl', & dominior' suor' super alto mari præd' deponere & deprivare, & stragem miserabilem subditor' ejusdem Dom' Regis nunc hujus regni sui Angl' super alto mari, ac infra jurisdiction' admiral' Angl' præd' navigan', causare & procurare, præd' 8. die Julii, anno regni dicti Dom' Regis nunc 7. suprad', super alto mari, circa 14. leucas a Deal distante, ac infra dominium coron' Angl', & infra jurisdiction' admiralitat' Angl' falso, malitiose, diabolice, & proditorie, vi & armis, &c. cum quamplur' al' falsis rebellib' & proditorib', jur' præd' ignot', guerram contra dict' Dom' Regem nunc pa-

ravit, ordinavit, levavit, & gessit; & quod idem Thomas Vaughan, in executione & performance guerræ & proditoris suæ præd' adtunc et ibidem, scil' præd' octavo die Julii, anno 7. suprad', super alto mari circa 14. leucas a Deal distante, ac infra jurisdiction' admiralitat' Angl' in dicta navicul' armat', vocat' 'Le Loyal Clencarty,' vi & armis, &c. cum quamplur' aliis falsis rebellib' & proditoribus, jur' præd' ignot' ad numerum 15. personar', modo guerrino armat' & arraiat', viz. tormentis, & al' armis, tam invasivis, quam defensivis, vi & armis, &c. falso, malitiose, & proditorie, adtunc & ibidem congregat' & assemblat' existen', seipsum simil' armat' & arraiat', malitiose, proditor', & aperte assemblavit & conjunxit; & quod præd' T. Vaughan adtunc & ibid' in dicta navicul' armat', vocat' 'Le Loyal Clencarty,' cum dictis al' falsis rebellibus & proditorib' (sicut præfertur) assemblat' existen', postea, scil' dicto 8. die Julii, anno 7. supradict', super alto mari præd', ac infra domin' coron' Angliæ, & infra jurisdiction' admiralitat' Angl' præd', simul cum dictis al' rebell' & proditorib', in navicul' armat' præd', vocat' 'Le Loyal Clencarty,' adtunc & ibidem, ad quamplur' locos maritimos in eadem navicul' armat', vocat' 'Le Loyal Clencarty,' in exploratione (Angl' *cruising*) ea intentione ad prædand', spoliand' & asportand' naves, bon', catall', & denar' dicti Dom' Regis, & subdit' suor' super alto mari præd', ac infra jurisdiction' prædict', vi & armis, &c. malitiose, nequissime, & proditorie navigavit, contra ligeanc' suæ debit', contra pacem dicti Dom' Regis nunc, coron' & dignitat' suas, &c. necnon contra formam statut' in hujusmodi casu edit' & provis', &c."

only so, but as one of the worst and most dangerous enemies; since he being a subject of these islands, was the better able to spy out our weaknesses and defects, and thereby to do us the greater mischief. It is not to be expressed what ruin and desolation it would have caused to this nation, had this man and his accomplices brought their wicked intentions to effect. And all this was done to aid and assist the grand enemy of Christendom, and of our own country in particular, the French king. Therefore, as you are lovers of your king and country, and your fellow-subjects, whom the prisoner and his accomplices would have destroyed; I am sure you will take care to do the nation justice, and that he be brought to condign punishment. Gentlemen, there is one thing further that I must not omit, viz. That the prisoner at the bar being in custody for these very crimes about a twelve-month since, did not think fit to trust to his innocency, nor to his pretended French extraction, but the day before he was to be tried, he thought fit to break prison, withdraw from justice, and run his country: which, though not a confession and full proof, yet is a great evidence of his guilt.

Sol. Gen. (Sir John Hawles.) May it please your lordship, and you gentlemen of the jury, the prisoner at the bar, Thomas Vaughan, stands indicted for two sorts of treason: the one is for levying war against the king, the other is for aiding and abetting the king's enemies. And to prove the first, the levying of war, we shall prove that he was a captain of a French ship, called the *Granado*, of St. Maloes; and that with that ship he took and carried away many of his majesty's subjects, and took several merchant ships, and carried them to France. We shall likewise prove that he was captain of another French ship, called the *Loyal Clencarty*, with which he was cruising off of Deal, where we had several ships lying at the same time: and there he being on board the said ship *Clencarty*, was taken prisoner, with a commission, by which he was constituted captain of the *Loyal Clencarty*, under the hand of Lewis the French king.*

And to prove him aiding and abetting to the king's enemies, we shall prove against him this particular fact; that he and his accomplices did in the year 1692, come to London, and went to Tower-wharf, to enquire what vessels were ready to go down the river; and there was one laden with piece-goods, and he put himself, and several other of his accomplices into this vessel, to go down the river; but they had contrived the matter, and brought it so to pass, that they fell on those men who had the government of the ship, and carried away this vessel to France. Now, if this be true, the

* "The fact whether war or not is triable by the jury, and public notoriety is sufficient evidence of the fact." Foster's Discourse, 1. c. 2, s. 12. Peake's Law of Evidence, c. 2, s. 2. East's Pleas of the Crown, c. 2, s. 20.

prisoner is certainly guilty of aiding the king's enemies: and to prove he was guilty of this, we will prove to you, that even in France, where he was at perfect liberty, he owned he was the contriver of all this, and that he had a thousand pound for his share of what was taken from our merchants. If we prove these two facts against him, I doubt not but you will find him guilty. We will call our witnesses.

Cl. of Arr. T. Eglington, Rich. Crouch, Samuel Oldham, John Bub, — Noden. (Who appeared, and were sworn.)

Vaughan. With submission to your lordships, and the honourable bench, I beg that they may be put asunder, out of hearing of one another.

L. C. J. Let it be so; though you cannot insist upon it as your right, but only a favour that we may grant.*

Mr. Cowper. Set up Richard Crouch. Is your name Richard Crouch?

Crouch. Yes, Sir.

Mr. Cowper. Give my lord and the jury an account of what you know of the ship *Coventry* taking of the *Clencarty*, and what you know concerning the prisoner at the bar in taking of her?

Crouch. We weighed our anchor about four o'clock.

Mr. Cowper. Where were you?

Crouch. At the Nore.

Mr. Cowper. In what ship?

Crouch. The *Coventry*. After we had been under sail a matter of an hour, we came to an anchor with a little wind; so, sir, this Thomas Vaughan met with a couple of pinks, they were small vessels, that he designed to take; but he saw us, and so lay by all night.

Mr. Cowper. Who lay by?

Crouch. Thomas Vaughan, the prisoner at the bar.

Mr. Cowper. In what vessel was he?

Crouch. In a two-and-twenty-oar barge; he lay by at the Gun-fleet: The next morning we weighed anchor at day-light; we saw him, and chased after him, and we made them, and he made us; and we made what haste we could, and coming up, we fired a gun at him, and then we fired another, and then we went ashore.

Mr. Cowper. What do you mean that he run his vessel on the sands?

Crouch. Yes; and then we fired another gun at him, and then he got off again; and then we fired another gun, and could not bring him to, and then he got off the sands again; and when we came up to him, we manned our long-boat, and pinnace, and barge, and had him at last. When he came on board, he said, I cannot deny but I am an Irishman, and that my design was to burn the ships at the Nore.

Mr. Cowper. Did he himself confess it?

* See Peter Cook's Case, p. 311, of the present volume; and Peake's Law of Evidence as there referred to.

Crouch. Yes, he did; that is the man, I know him well enough.

L. C. J. When you took him, in what ship was you?—*Crouch.* In the Coventry.

L. C. J. Out of what ship was he taken?

Crouch. The two-and-twenty-oar barge.

L. C. J. What ship did he belong to?

Crouch. I reckon it was my lord Barclay's barge.

L. C. J. Who did it belong to then?

Crouch. To the king of France.

L. C. J. What company was there in her? How many men had she aboard?

Crouch. About five-and-twenty hands.

Mr. Cowper. Did you ever hear him say any thing of a commission he had?

Crouch. I heard he had a French commission, but I did not see it.

Mr. Cowper. Did you hear him say any thing of it?—*Crouch.* No.

Mr. Cowper. But he told you his design was to burn the ships at the Nore?—*Crouch.* Yes.

Mr. Cowper. What ships?

Crouch. The English ships; there were several ships there then.

L. C. J. Were there no Frenchmen aboard the barge?—*Crouch.* No, that I can tell.

Mr. Lechmere. From whence did he come, from England, or France?

Crouch. From Calais in France.

L. C. J. Pristhee hear me, This two-and-twenty-oar barge, did it belong to any other ship?

Crouch. No, not that I can tell.

L. C. J. Did he call that vessel the Loyal Clencarty?—*Crouch.* Yes, my lord.

Then Edmund Courtney was called.

Sol. Gen. Mr. Courtney, pray tell my lord and the jury what you know of the going away of a Custom house boat?

Courtney. I will tell you, if you please.

Mr. Phipps. My lord, I think they ought not to examine to that, because it is not laid in the indictment. The carrying away of the Custom house barge is not mentioned in the indictment; and by the new act for regulating trials in cases of treason, no evidence is to be admitted or given of any overt-act, that is not expressly laid in the indictment.

L. C. J. Nothing else? Suppose a man be indicted for levying war against the king, or adhering to the king's enemies, cannot they prove any act that makes out a levying of war, or an adherence to the king's enemies?

Mr. Phipps. With submission, not by that act, my lord, unless it be laid in the indictment.

L. C. J. Levying of war is the treason; may they not prove that levying of war, without being confined to any special or particular act?

Mr. Phipps. With submission, by the 25th of Edw. 3. levying of war, as well as imagining the death of the king, must have the overt acts, that are to prove it, expressed in the indictment.

L. C. J. Levying of war is an overt-act.

Sol. Gen. The business of overt-acts is, where the compassing and imagining the king's death is a crime in question; and this must be discovered by overt-acts. But if treason be falsifying of the king's money, this is treason; but there can be no overt-act of that, for that is an overt-act itself; but there must be an overt-act to prove the compassing and imagining the death of the king, and in no other sort of treason.

L. C. J. Levying of war, that is an overt act; so is adhering to the king's enemies. Now compassing and imagining the death of the king is not an overt act in itself, but is a secret imagination in the mind, and a purpose in the heart; but there must be external acts to discover that imagination and purpose.

Mr. Phipps. What is the meaning of the new act, then, that there shall be no evidence of any overt act, but what is laid in the indictment?

L. C. J. What overt acts are there in clipping and coining?

Mr. Phipps. That is not within the new act of parliament.

L. C. J. That is most true; the one is excepted, the other is not comprehended: but the question is upon the statute of 25 Ed. 3, to which the late act doth refer. Now proving an adherence to the king's enemy is proving an overt act. Suppose it be the killing of the chancellor, or treasurer, or judge in the execution of his office, what overt acts will you have then? Adhering to the king's enemies, is a treason that consists in doing an overt act.

Mr. Phipps. Yes, my lord, I take it that it is; for the new act, by saying, 'that no evidence shall be admitted of any overt act that is not expressly laid in the indictment,' must be intended of such treasons, of which by law overt acts ought to be laid. Now the killing of the chancellor, or treasurer, or judge in the execution of his office, are not such treasons of which it was necessary to lay any overt acts in the indictment, and so not within the meaning of this new law. But levying war, and adhering to the king's enemies, which are the treasons in this indictment, must, by the express purview of 25 Ed. 3, be proved by overt acts, which are to be alledged in the indictment.

Sol. Gen. The new act does not alter the law in this particular; what was law before, is law now; it leaves the overt acts as they were before; and it says not that an overt act need to be expressed where it was not needful before. Now if a man be indicted for compassing the death of a private person, there ought to be some overt act to prove his design; but if there be an indictment for murder, there needs no other overt act to prove it, but the murder itself.

L. C. J. But the force of the objection lies in this, viz. to say a man levied war, or adhered to the king's enemies, is no good indictment; but it is necessary to alledge in what manner he levied war, or adhered to the king's enemies; as that he appeared in such a warlike

manner, or did adhere to and assist the king's enemies, by joining forces with them, or otherwise assisting them, or confederating with them; that must be specified. But if you indict a man generally for adhering to the king's enemies, and not say how and in what manner he did adhere to them, that is not a good indictment; therefore, if you particularize what enemies, and how and in what manner he adhered to them, no evidence can be given of any other kind of adherence, but that which is so specified in the indictment.*

Sol. Gen. Then we must put all our evidence into the indictment.

Mr. Phipps. So you must, as to the overt acts.

Sol. Gen. That will be the same thing as to put in all our evidence, if we must give evidence of no overt act but what is expressed in the indictment. But I do not take it, that the act requires all overt acts to be put in the indictment.

Mr. Phipps. The act says so. Suppose you had left out the overt act, would the indictment have been good?

Sol. Gen. We did not intend to put in all the overt acts, but only what related to that part of the treason.

Mr. Phipps. The treason must be proved by overt acts, and the overt acts that prove the treason must be mentioned in the indictment.

Sol. Gen. What! the overt acts of the treasons before mentioned, as counterfeiting the king's money, and the like, are all to be mentioned?

L. C. J. Consider, if you can make that a good indictment, to say, that the prisoner adhered to the king's enemies, without mentioning any overt acts to manifest such an adherence, then your answer to Mr. Phipps is full; but if it be not a good indictment, without alledging particular acts of adherence, then it necessarily follows, that if particulars are alledged, and you do not prove them as is alledged, you have failed in the indictment, and so his objection will lie hard upon you.

Sol. Gen. My lord, we framed our indictment according to the letter of the statute.

L. C. J. In compassing the death of the king, you must shew how that is manifested by the overt acts.

Sol. Gen. But compassing and imagining must be discovered by some overt acts.

L. C. J. Treby. This is a doubt I have often thought of: I thought it most natural that the word overt act should relate to the first article, viz. 'compassing and imagining of the king's death.' For overt act seems to be opposed to something of a contrary nature: act is opposed properly to thought, overt is properly opposed to secret. And that sort of treason consisting in secret thought and internal purpose, cannot be known, tried, and judged of, without being disclosed and manifested by some external open act: wherefore it is pertinent and reason-

able, in order to attain a man of such treason, that the indictment should charge and set forth the act, as well as the thought. And so it hath been used to be done.

But such order or manner doth not seem so natural or necessary, in framing indictments for other treasons, where the treason consists in visible or discernible facts, as levying war, &c.

Nevertheless, I think an overt act ought to be alledged in an indictment of treason for adhering to the king's enemies, giving them aid and comfort.* And the overt act or acts, in this case, ought to be the particular actions, means, or manner by which the aid and comfort was given.

My lord Coke declares his opinion to this purpose. His words (which I read out of his book here) are these: "The composition and connection of the words are to be observed," viz. [thereof be attained by overt deed.] "This," says he, "relates to the several and distinct treasons before expressed, and especially to the compassing and imagining of the death of the king, &c. for that it is secret in the heart, &c." Now the articles of treason before expressed in the statute of 25 Ed. 3, are four. 1. Compassing, &c. 2. Violating the queen, &c. 3. Levying war; and, 4. This of adhering, &c. (And yet it is hardly possible to set forth any overt act concerning the second, otherwise than the words of the statute, that article expressing so particular a fact).

I do observe also, that these words "being thereof attained by overt fact" do, in this statute, immediately follow this article of adhering, &c. And it would be a great violence to construe them to refer to the first article only, and not to this last, to which they are thus connected. If they are to be restrained to a single article, it were more agreeable to the strict rules of construing, to refer them to this of adhering only.

L. C. J. That which I insist on is this: whether the indictment would be good, without expressing the special overt act? if it be, then this is a surplusage, and we are not confined to it; but if it be not a good indictment without expressing it, then we are confined to it.

Mr. Phipps. I believe Mr. Solicitor never saw an indictment of this kind, without an overt act laid in it.

L. C. J. Can you prove the facts laid in the indictment? for certainly the indictment, without mentioning particular acts of adherence, would not be good.

Mr. Cowper. Yes, my lord; and as to the evidence before you, we would only offer this: whether in this case, if the indictment were laid generally, for adhering to the king's enemies in one place, and in another place levying of war, and nothing more particular, it would be good? I doubt it would not. But when there is laid a particular act of adhering, we may give in evidence matter to strengthen the direct proof of that particular act of adhering

* See East's Pl. C. c. 2, s. 54. 57.

* See Hawkins's Pl. C. c. 17, s. 29.

to the king's enemies, though that matter be not specially laid in the indictment: for the act goes only to this, that the prisoner shall not be convicted, unless you prove against him the overt acts specially laid in the indictment; but whether it shall not be heard, to make the other overt act which is laid, the more probable? Now we have laid a special overt act in the indictment; and we have produced evidence of it, and we would produce likewise collateral evidence, to induce a firmer belief of that special overt act, by shewing you that he hath made it his practice, during the war, to aid and assist the king's enemies: but if the jury do not find him guilty of the special overt acts laid in the indictment, they cannot find him guilty by the proof of any other overt act not laid in the indictment. But if we prove he has made this his practice, in other instances, during the war, whether that proof shall not be received?

Mr. Phipps. My lord, I desire the act may be read. It expressly contradicts what Mr. Cowper says; for it says, that no evidence shall be given in the overt-act, that is not expressly laid in the indictment.

The Act was read.

L. C. J. That is, you may give evidence of an overt-act that is not in the indictment, if it conduce to prove one that is in it. And if consulting to kill the king, or raise a rebellion, is laid in the indictment, you may give in evidence an acting in pursuance of a consult, that is, an evidence that they agreed to do it: though that doing of the thing is, of itself another overt-act, but it tends to prove the act laid in the indictment.*

Mr. Phipps. The overt-act laid in this indictment, is, his cruising in the Clencarty; and this overt-act you would prove, is no evidence of that, nor relates to it, but it is a distinct overt-act of itself.

L. C. J. You cannot give evidence of a distinct act that has no relation to the overt-act mentioned in the indictment, though it shall conduce to prove the same species of treason.†

Mr. Cowper. We would apply this proof to the overt-act laid in the indictment.

L. C. J. Any thing that has a direct tendency to it you may prove.

Mr. Cowper. We have laid the overt-act, that he did voluntarily put himself on board this vessel of the French king, the Loyal Clencarty, and did go to sea in her, and cruise, with a design to take the ships of the king of England, and his subjects. Now part of the overt-act is, his intention in the act of cruising; we do not charge him with taking one ship; so that his intention is a member of the overt-act; and it must be proved, to make his cruising criminal, that he designed to take the ships of the king of England. Now we think it a proper inten-

tion, to shew, that during this war, before and after the time of the treason laid in the indictment, he was a cruiser upon, and taker of, the king's ships; and this fortifies the direct proof given of the intention.

L. C. J. I cannot agree to that, because you go not about to prove what he did in the vessel called the Loyal Clencarty; but that he had an intention to commit depredation on the king's subjects: so he might, but in another ship. Now, because a man has a design to commit depredation on the king's subjects in one ship, does that prove he had an intention to do it in another?*

Mr. Phipps. He was cruising in the Clencarty; that is the overt-act laid in the indictment; and the overt-act you would produce is, his being in another vessel.

L. C. J. Go on, and shew what he did in the Clencarty. You the prisoner, will you ask this man any questions?

Mr. Phipps. Crouch, you said, that the prisoner did say he could not deny but he was an Irishman; how came you to talk about it?

Crouch. He said, I cannot deny but I am an Irishman.

L. C. J. Did he say he was an Irishman? What were the words he used?

Crouch. He told the lieutenant he was an Irishman.

Mr. Phipps. What discourse was there? How came he to say that?

Crouch. I went by only, and heard the words spoken to the lieutenant.

L. C. J. Did he speak English?

Crouch. Yes, my lord.

L. C. J. If he spoke English, that is some evidence he is an Englishman, though the contrary may be proved by him.

Vaughan. That would no more prove me an Englishman, than if an Englishman were in France, and could speak French, would prove him a Frenchman, because he could speak French.

L. C. J. You shall be heard by and bye to say what you will on your own behalf.

Mr. Phipps. Were there any Frenchmen on board the Clencarty?—Crouch. No, Sir.

Mr. Phipps. Mr. Vaughan, will you ask him any questions yourself?

Mr. Cowper. Call T. Noden.

Vaughan. How did you know that there were no Frenchmen aboard? Did I address myself to you when I came aboard?

Crouch. No, Sir.

Vaughan. Did I not address myself to the captain when I came aboard? How came I to tell you I was an Irishman?

Crouch. They were all Scotchmen, Englishmen, and Irishmen.

Mr. Phipps. Mr. Vaughan, you need not take up the time of the court about that matter.

* See East's P. C. c. 2, s. 57.

† See East's P. C. c. 2, s. 57.

* As to the Evidence applying to the overt-act laid in the Indictment, and to no other, see Hawkins's Pl. C. b. 2, c. 46, s. 186.

Mr. Cowper. You may go on.

Sol. Gen. Did the prisoner own that he acted by the French king's commission? Did you know any thing of his having a French commission?

Crouch. Yes, I heard he had one, but I did not see it; but I heard so by the company.

L. C. J. Were there any Frenchmen aboard?

Crouch. No, not that I know of. They were Dutchmen, and Englishmen, and Scotchmen and Irishmen.

Mr. Cowper. Call T. Noden. (Who appeared, and was sworn.) Do you give my lord and the jury an account of taking the vessel, called the two and-twenty-oar barge.

Noden. Last year, about June or July, to the best of my remembrance, I belonged to his majesty's ship the Coventry, and we took the two-and-twenty-oar barge.

L. C. J. How many Dutchmen were aboard?—Noden. I do not know of above one.

L. C. J. Treby. What were the rest? Were there any Frenchmen?

Noden. Yes, there were several Frenchmen aboard. I belonged to the Coventry; and as we were sailing by the Nore, and the Gunfleet, our captain spied a small vessel sailing by the sands, and he supposed her to be a French privateer, and he fired a gun to make them bring to, and they did not obey; and at last fired a gun, shot and all, and they would not come to. Then the captain ordered to man the boat, and row after them: so the barge, and pinnace, and long-boat were manned, and they came pretty near them. This barge we took, was aground also; and they got her afloat, and she run aground again: and as they were aground, most of them out of the boat, our long-boat struck aground, and waded after them near half a league; and when we came to the barge, there was this captain Vaughan, and two or three and twenty more; and there was two Dutchmen, and, as I apprehended, some Frenchmen. There was in her a blunderbuss and small arms, and a considerable quantity of hand-granadoes.

L. C. J. What vessel was you aboard?

Noden. The Coventry.

Sol. Gen. What countryman did captain Vaughan say he was?

Noden. I did not hear any thing of it. Our captain examined the Dutchmen what countryman the commander was, and he said he was an Irishman; but I did not hear it myself. When captain Vaughan was brought aboard the Coventry, I was put aboard the prize we had taken.

Mr. Cowper. Had you any discourse with captain Vaughan?—Noden. No.

L. C. J. Did they endeavour to take your ship?

Noden. No, but endeavoured to get away from us.

L. C. J. What guns or ammunition had they?

Noden. I cannot tell particularly; there was some canvass bags, every man had a car-

tridge bag, and there were some hand-granadoes.

Mr. Whitaker. What fire-arms had they?

Noden. I cannot say how many; but they had muskets, and pistols, and two blunderbusses.

Mr. Cowper. Did you understand whence this ship, the Loyal Clencarty came?

Noden. The Dutchmen said they came from Calais. As near as I can guess, we spied them about eleven o'clock, and we weighed anchor in the afternoon, on Sabbath-day, and they took us to be a light collier, and endeavoured to board us, as the Dutchman said; but when they knew what we were, they endeavoured to escape from us.

Mr. Cowper. Call Sam. Oldham. (Who appeared, and was sworn.) Mr. Oldham, was you aboard the Coventry when she took the ship called the Clencarty?—Oldham. Yes, I was.

Mr. Cowper. Pray give an account what you observed of the prisoner T. Vaughan then?

Oldham. We weighed our anchor first at the Buoy and Nore; so we saw a prize in the morning; the captain said it was a prize, and we made sail after him, and they ran on the Goodwin Sands: and the captain seeing the barge run aground, we fired at her to bring her to; we fired a second, and she would not come to, but ran aground again. When she was aground, by the captain's order we manned our boats, and out we went after her.

Mr. Cowper. Did you take her?

Oldham. We went, and our long-boat ran aground; I was in the long-boat, and we waded, I believe, a mile and half after her.

L. C. J. What Frenchmen were aboard?

Oldham. I cannot justly say whether there were any.

L. C. J. Were there any?

Oldham. I think one or two.

Mr. Cowper. Were there any Dunkirkers or Walloons aboard?

Oldham. There was a Dutchman, who they called a Fleming; and I discoursed him.

L. C. J. How many outlandish men were there aboard? Was there a dozen, or how many?—Oldham. I cannot say the quantity.

Mr. Cowper. Was there more than two or three?—Oldham. Yes, more than two or three.

L. C. J. What, foreigners?

Oldham. Yes. And there were two Englishmen.

Mr. Cowper. What did you observe of the prisoner at the bar, at the taking of the ship?

Oldham. I did not come aboard along with the prisoner, but with his man; and his man said he was an Irishman, and that he was commander of the boat.

Sol. Gen. What was their design in that ship Clencarty?—Oldham. I cannot tell that.

Mr. Cowper. Did they resist in their being taken?

Oldham. I cannot tell that; I saw no arms.

Mr. Cowper. You were in the action; was there any resistance made?

Oldham. I saw no resistance; they offered to run, they were aground once, and got off again.

Mr. Phipps. You say there were foreigners; what countrymen did you believe those foreigners to be?

Oldham. I cannot justly say, I believe Dutchmen.

L. C. J. How many Dutchmen were there?

Oldham. I cannot say.

Dr. Oldish. But you said there were some two or three Frenchmen, and that they spoke French; do you understand French?

Oldham. No, Sir.

Dr. Oldish. Then how do you know they were Frenchmen, and spoke French?

Oldham. They said they were; they did not speak English; several of the ship's company said they were French.

L. C. J. If they were all Dutchmen, and appear in a hostile manner against the king of England's subjects, they are enemies, though we are in league with Holland, and the rest of the seven provinces.

Mr. Phipps. The Indictment runs, That the French king, 'quandam Naviculam vocat, 'The Loyal Clencarty, cum quamplurimis Subditis Gallicis, Inimicis Dom. Regis nunc, ad 'numerus quindecim Personarum, replet' 'preparavit.'

L. C. J. Suppose it doth?

Mr. Phipps. It is 'Subditis Gallicis,' my lord.

L. C. J. They will be subjects in that matter, if they act under his commission: They are enemies to the king of England, and they have made themselves the French king's subjects by that act.

Mr. Phipps. It appears not that they are Frenchmen, my lord.

L. C. J. If Dutchmen turn rebels to the state, and take pay of the French king, they are under the French king's command, and so are his subjects. Will you make them pirates, when they act under the commission of a sovereign prince? They are then 'Subditi' to him, and so 'Inimici' to us.

Mr. Phipps. It does not take away their allegiance to their lawful prince. They may go to the French king, and serve him; yet that does not transfer their allegiance from their lawful prince to the French king, and make them his subjects. But however, to make them subjects within this indictment, they must be 'Gallici Subditi'; so they must be Frenchmen as well as subjects.

L. C. J. Acting by virtue of a commission from the French king, will excuse them from being pirates, though not from being traitors to their own state; but to all other princes and states against whom they do any acts of hostility, they are enemies: And their serving under the French king's commission, makes them his subjects as to all others but their own prince or state. And though they be not Frenchmen, yet they are 'Gallici Subditi;' for

it is the French subjection that makes them to be 'Gallici Subditi.'*

Mr. Phipps. Pray, my lord, suppose a subject of Spain should go over to the French, and fight against England; I take it, he may be termed an enemy of the king of England, though his prince be in league with our's; but, with submission, he cannot properly be said to be a subject of the French king: For suppose an indictment of treason against a foreigner, should say, 'that he being a subject, did commit treason'; if it be proved he is not a subject, with submission, he must be acquitted.

Mr. Cowper. There is a local allegiance while he is in the country, or fleets, or armies of the French king.

L. C. J. Dutchmen may be enemies, notwithstanding their state is in amity with us, if they act as enemies.

Mr. Cowper. Call R. Bub. (He was sworn.) Was you aboard the Coventry when she took the Clencarty?—*Bub.* Yes, Sir.

Mr. Cowper. Give an account what you know of the prisoner, Thomas Vaughan, at the taking of that ship.

Bub. We came aboard the Coventry, and were at the Nore at anchor; our pennant was taken down to be mended. So in the night captain Vaughan, with his two and twenty oar barge, rounded us two or three times. In the morning we weighed anchor, and fell down, in order to go to the Downs; and we came up with them, and fired at Captain Vaughan, and he would not bring to. With that, our captain ordered to have the barge, and pinnace, and long boat to be manned, to go after him. They followed him, and at last came up with him, and came up pretty near; but could not come so near with the long boat, but were fain to wade up to the middle a mile and a half. We hoisted our colours, in order to fight them, and bore down still upon them, and they would not fight our men: And we took them out; and when they came aboard, the Englishman that was a pilot was to have his freedom, to pilot them up the river. He confessed to the captain, that captain Vaughan intended to burn the ships in the harbour: And the next day after the pilot had confessed it, captain Vaughan himself confessed it on the deck, that he came over with that design.

Mr. Cowper. Who did he confess it to?

Bub. To the boatswain and gunner, as he was on the deck, on the larboard side; that he came on purpose to burn the shipping in the harbour.

L. C. J. Did he confess that himself?

Bub. Yes, my lord.

L. C. J. Whereabout was this, at the Buoy in the Nore?—*Bub.* In the Downs, my lord.

L. C. J. Where did the ships lie that were to be burned?—*Bub.* At Sheerness.

Sol. Gen. He owned himself to be an Irishman, did he not?—*Bub.* Yes.

Mr. Cowper. And that he came from Calais?

* See East's Pl. Cr. c. 17, s. 4.

Bub. Yes.

Mr. Cowper. Had you any discourse with him about a commission?

Bub. No. But our lieutenant and captain had, but it was not in my hearing; I will not speak further than I heard, and what I can justify.

Sol. Gen. Will you ask him any questions?

Mr. Phipps. No.

Sol. Gen. Then call Mr. J. Crittenden, marshal of Dover Castle. (Who was sworn.) Mr. Crittenden, Pray what did you hear the prisoner at the bar confess of his design in coming to England?

Crittenden. I did not hear him say any thing of his design.

Sol. Gen. What did he confess?

Crit. He confessed he was an Irishman.

Mr. Whitaker. Upon what occasion did he confess that?

Crit. When I entered him into my book, I asked him what countryman he was.

Mr. Cowper. What are you?

Crit. I am the marshal of Dover Castle.

Mr. Cowper. By what name did he order you to enter him?

Crit. Thomas Vaughan, an Irishman.

L. C. J. Upon what account did you enter him?—*Crit.* As a prisoner.

Mr. Cowper. Did he speak any thing of a commission?

Crit. I did not hear him say any thing of that.

Mr. Phipps. Have you your book here?

Crit. Yes, sir.

Dr. Oldish. Was he not in drink when he said so?

Crit. I believe he was not very sober, indeed.

Mr. Phipps. Did you ever after hear him say he was an Irishman?

Crit. The next day he denied it.

Mr. Cowper. When he had considered the danger of it.

Crit. The next day he was examined by some of the justices of the peace.

Sol. Gen. Was you by when he was examined by the justices?—*Crit.* Yes.

Sol. Gen. What did he then say?

Crit. Then he said he was of Martenico.

Sol. Gen. Set up Mr. Bullock. (Who was sworn.) Mr. Bullock, Do you know the prisoner at the bar?—*Bullock.* Yes.

Sol. Gen. Pray what have you heard him say of his design that he came into England for?

Bullock. He came to Dover about the 14th of July, 1695, as I remember: I went with several others, who were brought by the captain of the Coventry, and the lieutenant, and some others: and when we came thither, he there owned himself an Irishman; but when he went the next day to be examined, he said he was of Martenico. He told me he had that barge from the duke of Bulloign, and came on the coast, and was chased into the Flatts, where they took him.

L. C. J. Did you ever hear him say he had any commission from the French king?

Bullock. I know nothing of that; it was late, and we did not examine him then; but the next day, when he came to be examined, he said he was of Martenico.

Sol. Gen. What did he say his design was?

Bullock. He said, that seeing the boat at Bulloign, he bought it of the duke of Bulloign; and the duke asked him what he would do with her? And he said, he would fit her up, and go and take a ship at sea, that is upon our coasts.

Mr. Phipps. We are in your lordship's judgment, whether we need give any evidence; for we think they have not proved their indictment: for the indictment sets forth, 'That the French king fitted out the Loyal Clencarty, of which Thomas Vaughan was commander; and that very many Frenchmen, subjects of the French king, were put on board.' Now the first witness swears there were no Frenchmen; and another swears there was one or two; another that they were foreigners; but does not believe they were Frenchmen. So there is no proof of that part of the indictment; nor is there any proof that he was captain of the Loyal Clencarty: So that none can say, it is the same vessel mentioned in the indictment. Nor is any act of hostility proved; for all the witnesses say, that Vaughan never pretended to attack them, but run from them. So that all they depend on, to support the indictment, is to prove that he had a design to burn the ships at Sheerness; which will not serve their turn; for the words of the indictment are, 'ad prædandum super altum Mare.' Now Sheerness is not 'super altum Mare,' but 'infra Corpus Comitatus;' and then not within the indictment.

Mr. Cowper. The words ships at Sheerness, do not imply, that the ships lay within the town of Sheerness, but off of Sheerness, which is 'altum mare.'

Mr. Phipps. Then it is not in your indictment; for that says, at Sheerness.

Mr. Cowper. No, off of Sheerness.

Sol. Gen. It is no contradiction, to say the sea is within part of a county.

Mr. Phipps. The indictment says at Sheerness.

Sol. Gen. Off of Sheerness is the high sea.

Mr. Phipps. Sheerness is not the Buoy in the Nore. Then you must prove he was captain at this time: for the indictment says, 'Ad tunc fuit Capitaneus et Miles.'

L. C. J. One overt-act of adhering to the king's enemies is, that he put himself as a soldier on board the ship.

Mr. Phipps. You will make one part agree with another, That the French king did set out a ship, and gave him a commission to be captain of her.

L. C. J. The witnesses have proved he acted as a captain.

Mr. Phipps. He was taken; and sure, if he

was taken, he must have his commission with him.

Sol. Gen. Examine the marshal, he took an account of him: and by direction of Mr. Vaughan himself he entered him as captain; and he entered several men in the ship as Frenchmen, by their own direction. (Mr. Crittenden was called.) Mr. Crittenden, have you got your book in which you made the entry?—*Crit.* Yes, I have it.

Sol. Gen. By whose order did you enter them?

Crit. By the direction of captain Vaughan, the prisoner at the bar.

Mr. Cowper. How did you know he was a captain?

Crit. Because he told me he was captain, and I entered him as such in my book.

Sol. Gen. Captain of what?

Crit. The Loyal Clencarty.

Sol. Gen. Pray read your entry in your book.

Crit. Thomas Vaughan, captain, Irishman, the 14th of July, 1695; and so of all the rest of the ship's crew.

Just. Turton. Did you write these in the presence of captain Vaughan?

Crit. Yes, in the same room where he was.

Mr. Phipps. Did you write it by his direction?

Crit. For his own part, by his direction; and for the rest, by their direction.

L. C. J. Take all the circumstances together, it is great evidence, considering what they were about, and what vessel they had. Mr. Crittenden, can you tell how many Frenchmen were there?

Crit. I will tell you presently. (He counts them in his book.) There were thirteen.

Sol. Gen. Did captain Vaughan hear any of them bid you enter them as Frenchmen?

Crit. I cannot be positive in that, I suppose he did; he was in the same room.

L. C. J. Do you expect witnesses from France to testify where they were born and christened?

Mr. Phipps. One witness says, there was not one Frenchman there.

L. C. J. Not to his knowledge.

Sol. Gen. What do you know of his having a French commission?

Bullock. I did not see it.

Mr. Whitaker. Did he own his having any French commission?—*Bullock.* I cannot tell.

Just. Turton. He owned himself a captain.

Mr. Phipps. He might be a captain in another ship, but not in this ship; they ought to prove he was captain at that time, in that ship, by the French king's commission.

L. C. J. All the witnesses say he acted as a captain at that time.

Mr. Cowper. He owned himself the captain of the Loyal Clencarty.

Baron Powis. What can be plainer, than that he owned himself captain?

Dr. Oldish. This seems to me a very strange proof, to be built only upon the sayings of these persons, that they were Frenchmen:

and this to a man who had no authority to examine them, when it might have been easily proved in a regular way, in case they had been so; they might have been examined before a magistrate, and thereby it would have appeared whether they were French or no. And it was absolutely necessary in this case, because of the contrariety of the witnesses; for the first witness said, there were no Frenchmen aboard; the next said, there were two Frenchmen and a Dutchman; and Crittenden said there were thirteen. Now how can these be reconciled, unless there had been a legal examination of the parties? But the thing we would chiefly go on is this; I think they have failed in the foundation of the treason; that is, to prove the prisoner a subject of this crown; neither is there the least colour of proof thereof. At night he came to Mr. Crittenden, and is in drink; there he says he is an Irishman: the next morning, when he is examined before the justices, then he comes in a kind of judgment, and then such a confession would be of moment; but then he confesses himself to be a Frenchman of Martenico. Now, my lord, what credit is to be given to these confessions; when before the marshal he shall say, I am an Irishman; and the next day, when he is on examination, he declares himself a Frenchman; in one confession he is in drink, in the other sober? Now, my lord, I say, what proof is here? Here then the foundation of the treason fails: for the indictment is, 'That he being a subject of the king of England, levies war.' Now, my lord, if this quality be not proved, all the rest of the indictment falls to the ground: for it is impossible for him to commit treason, where he is not a subject; because there can be no violation of allegiance. So that if he be a Frenchman, as he declared before the justices, he cannot be guilty of treason. So that here they have failed in the foundation of all; that is, to prove him a subject of England. And because they affirm him to be so, it lies on those that affirm it to prove it. But perhaps, now they will say, that these little confessions of his will throw the burden of proof on him. By no means; when here is a stronger presumption on the other side, a mere extrajudicial saying to seamen, that he is an Irishman, cannot balance his confession examined before the justices, wherein he says he is a Frenchman; and so can never throw the burden of proof on him. Therefore it lies on them that assert this to prove it. But, my lord, though it doth not lie on him, yet we will prove him to be a Frenchman, and born at Martenico, by those that were at the christening of him, and have known him from time to time ever since. And because they say he can speak English, if you please to examine him, you shall hear him speak natural French; so that that cannot prove him to be a natural Irishman.

Mr. Phipps. Such a saying of a foreigner will be of no great weight; because, if a man go into a foreign country, he may say he is that countryman to get the more favour.

L. C. J. What, to hang himself?

Mr. Phipps. No, my lord; a man that comes into a strange country, may very well think he shall find better usage, by pretending to be of that country, than by owning himself to be a foreigner. But we will prove Vaughan to be a Frenchman. Call Robert French. (Then Robert French was sworn.) *Mr. French,* pray give the court and jury an account, whether you know *Mr. Vaughan* the prisoner at the bar, and how long you have known him, and what countryman you take him to be, and the reason why?

French. I have known him this fourteen years.

Mr. Phipps. Where did you see him then?

French. I saw him in Saint Christophers.

Mr. Phipps. Pray give an account how you came to know him.

French. About sixteen years ago I was at Mount-surat, and I came to St. Christophers, and there I chanced to come into English ground, among the factors; and so they brought me to the French ground; and coming there, I was in company with several others that night, and it happened I was told there was one *Mr. Vaughan* there; and I coming acquainted with him, he shewed me this youth (he was a youth then): he told me he was his son, and recommended him to me, because he looked on me to be a man in trust and business.

Mr. Phipps. From that time what has he been reputed?—*French.* A sea-faring man.

Mr. Phipps. But what countryman?

French. To be born in Martenico.

Mr. Phipps. In whose dominions is that?

French. In the French king's dominion.

Just. Turton. What occasion had you to discourse of the place of his birth?

French. Because his father was looked upon to be a Frenchman.

Just. Turton. His father was a Frenchman?

French. Yes, my lord, and lived at Martenico?

Mr. Cowper. How old might he be at that time?—*French.* About fifteen or sixteen.

Mr. Cowper. How came you to be talking of his birth, and with whom?

French. One that was talking with me told me his name was *Vaughan*, and that he was born there.

Mr. Cowper. What introduced this discourse? How came he to tell you this, that he was born in that place?

French. His father told me so.

Mr. Cowper. You were talking of one *Vaughan* of his name: how many were in company when there was this talk?

French. There were many of them.

Mr. Cowper. Name them.

French. It is so long ago I cannot remember them.

Mr. Cowper. Name as many as you can of them, as many as you do remember

French. One *Mr. Bodiken*, a factor.

Mr. Cowper. Who else?

French. Several others.

Mr. Cowper. You named one *Vaughan* before.—*French.* Yes, I did.

Mr. Cowper. But you had forgot him now.

French. No; there was one *Vaughan*.

L. C. J. Were there any more?

French. Yes, there was; I remember the company that went along with me.

L. C. J. Who were they?

French. There were several passengers that went over with me.

L. C. J. How came you to talk of this man's nativity?

French. Because his father said, he had not been out of the island in 20 years. (At which the people laughed.)

Mr. Cowper. What place was this discourse in?—*French.* At St. Christophers.

Mr. Cowper. How did his father's saying, he had not been out of that island in 20 years, prove his son was born there?

French. Because he recommended him to me as a sea-faring man.

Mr. Cowper. What is that a reason of? What is that to his being born at Martenico?

Justice Turton. What countryman are you?

French. I am an Irishman born.

L. C. J. His father acknowledged himself to be an Irishman born, did he not?

French. No, my lord, he did not say where he was born: I do not know.

Justice Turton. Have you continued any acquaintance with *Mr. Vaughan* since? How long did you stay at St. Christophers?

French. I staid but 24 hours, to take in water.

L. C. J. How long was it after this, before you saw this gentleman, captain *Vaughan*?

French. I never saw him since, till I saw him in London. (Then the people laughed.)

L. C. J. Pray, gentlemen, have patience. How do you know now, that this is the same man that you saw 14 years ago? for there must be a great alteration in a man in 14 years time, from what was at that time, being but 15 years of age.

French. I believe in my conscience this is the man.

L. C. J. Can you take it upon your oath he is the man?

Bar. Powis. In what language had you the discourse?

L. C. J. How long were you in company with him and his father?

French. I believe five or six hours.

Bar. Powis. In what language was this discourse with his father?

French. My lord, he spoke English, a sort of broken English.

L. C. J. Where do you live yourself?

French. I live in Ireland.

L. C. J. How long have you lived there?

French. Nine or ten years.

L. C. J. Whereabout in Ireland?

French. In Connaught.

L. C. J. Nine or ten years?

French. Yes, my Lord.

Dr. Littleton. Did not captain *Vaughan*,

nor his father, speak Irish to you in that six hours?—*French*. No, my lord.

Just. Turton. How long have you been in England?—*French*. Not above two months.

Just. Turton. Did you hear of captain Vaughan being to be tried?

French. No, my lord.

Just. Turton. How did he come to hear of you, then?—*French*. I heard he was in town.

L. C. J. It is a strange thing; you have a most admirable memory, and captain Vaughan has as good a memory as you; that you should never have any intercourse for 14 years, and yet should remember one another after so long a time. It is a wonderful thing too, that when he could not know you were in town, yet he should call you a witness on his behalf; sure he must have the spirit of prophecy.

French. He did not send to me at all.

L. C. J. How did you come to be here, then?

French. I will tell you. It was my custom always to go and see prisoners; and I heard there were prisoners in Newgate; so I went to Newgate, and I met with one Dwall; and I asked him of another gentleman that was there; and I went to the other side by chance, and I met with captain Vaughan.

L. C. J. What was thy design? Why didst thou visit Newgate?

French. Because it was my custom, because it was an act of charity.

L. C. J. Did you go to Newgate out of charity?

French. I went to see my friend, and carried a letter to him. I went out of charity.

Mr. Phipps. You were in the West-Indies, upon the French ground; do not they speak English on the French ground, and French on the English ground?—*French*. Yes.

Mr. Cowper. So they do here. Did you ever see captain Vaughan before that time?

French. No.

Mr. Whitaker. Did you visit lately any other prisoners in Newgate, besides captain Vaughan?—*French*. Yes.

Mr. Whitaker. Give their names.

French. I have visited Mr. Noland, and another gentleman that is with him; and I went into the house, and drank with him there.

Mr. Whitaker. What is that other gentleman's name?

French. I do not remember his name at present; but he is a companion of Mr. Noland's.

Mr. Whitaker. Do you know him if you see him?—*French*. I, I would.

L. C. J. Treby. How long have you been in England?

French. But two months.

L. C. J. Treby. Have you usually visited prisoners in former years?

French. My lord, wherever I have been it was my custom to do so.

L. C. J. Treby. But how doth it consist that you, who are an Irishman, should come hither to visit prisoners in Newgate?

French. I can prove under my lord mayor of Dublin's hand, that I came here upon business; and I went to the prison to visit the prisoners for charity-sake, and did bestow it according as I was able.

L. C. J. You had best stay there, and not go away; for we may have occasion to ask you some questions.

Mr. Cowper. Do you not use, out of charity, to be evidence for them?

French. No, never before in my life.

Mr. Whitaker. What other prisons have you visited besides Newgate?

French. I did visit none.

L. C. J. Treby. Had you no charity for other prisons?

Bar. Powis. When you so visit prisons, on what account is it? Is it to give ghostly advice?

French. Upon a charitable account, my lord.

L. C. J. Ghostly advice and charity.

Mr. Phipps. Where is Mr. Lefleur? (He did not appear.) Call Mr. Gold. (Who appeared.)

Cl. of Arr. That man is attainted, but pardoned.

Mr. Phipps. Mr. Gold, how long have you known captain Vaughan?

Mr. Gold. I never knew Mr. Vaughan, before I saw him in the Marshalsea.

Mr. Phipps. Is Monsieur Lefleur here? Is Mr. Deherty here?

(Mr. Deherty appeared, and was sworn.)

Mr. Phipps. Do you know [Mr. Vaughan, the prisoner at the bar?—*Deherty*. Yes.

Mr. Phipps. How long have you known him?

Deherty. Five years.

Mr. Phipps. What has he been reputed all along, since you have known him.

Deherty. A Frenchman.

Mr. Phipps. Did you know him in France?

Deherty. Yes; and he was reputed a Frenchman there.

Just. Turton. What occasion had you to enquire into that, the place of his nativity?

Deherty. I did not enquire at all; but one that was his servant was my comrade a great while.

Mr. Phipps. Now we will prove where he was christened, by one that was at his christening, Mr. Dascine. (He appeared and stood up, being sworn, and spoke in French to the court, pretending he could not speak English.)

L. C. J. If he cannot speak English, there must be an interpreter.

Sol. Gen. They must find an interpreter, he is their witness.

[Then a person in court stood up, and told the court he could speak English as well as he; that he had been a Bailiff's follower for several years.]

L. C. J. You can speak English, can you not?

Dascine. I will speak as well as I can.

King's Messenger. I am a messenger to the king, do you know me?—*Dascine*. Yes.

L. C. J. Prithee speak English.

Dascine. As well as I can, my lord, I will speak.

Mr. Phipps. Are you sworn?

Dascine. Yes, my lord.

Mr. Phipps. Do you know captain Vaughan?

Dascine. In 1669 I was in St. Christophers? I went from Roan, and from thence I went with hats and cloth to Crebeck, and had a letter to one Thomas Williams, a factor in Martenico. And after I had done, as I was coming away, Mr. Williams desired me to go to a christening, a mile and a half from Port-Royal. He told me there was one Mr. Vaughan had a plantation there, and desired him to be godfather. And about two days after, I went from Port-Royal to St. Christophers again, and I came to Roan again in a ship called St. Joseph. So in 1677, I went to St. Christophers again, and from thence to Martenico, to Mr. Williams; I asked him, What is become of that young man we were at the christening? and so he shewed me him that is here (pointing to the prisoner).

L. C. J. That was in 1677?

Dascine. In 1677. So I came from Port-Royal; I went to St. Christophers, and so took sail, and came to France again. And 13 years ago I went to St. Christophers again, and to Mountserat and Martenico; and so when I was at Martenico, and asked Mr. Williams of this young man, that I was at his christening, and he said, he is at such an house, and I saw him there.

L. C. J. Thirteen years ago.

Dascine. And we went and drank punch together, and I came back for Roan.

L. C. J. When did you see him since that?

Dascine. Never till I saw him here a prisoner.

L. C. J. How do you know he is the man?

Dascine. He has a bruise in his side.

Mr. Phipps. What was the gentleman's name, at the christening of whose child you were?—*Dascine.* Thomas Vaughan.

Mr. Phipps. What was the child's name?

Dascine. Thomas Vaughan.

Mr. Phipps. When you went the next time to Martenico, did Mr. Williams, you speak of, that was the godfather, present this person, captain Vaughan, to you, as the man who was then christened?

Dascine. Yes, the next time.

Mr. Phipps. Now, is captain Vaughan that stands at the bar, that very gentleman?

Dascine. I am sure it is he.

L. C. J. You say this meeting was about 1669?—*Dascine.* Yes.

Sol. Gen. Pray what was the reason you were so inquisitive to know what became of that person that was christened when you was there?

Dascine. Because I being at the christening, I asked him how the child did.

L. C. J. How came you to take such extraordinary observation of that child? Was he such a remarkable child?

Dr. Newton. Where were you born?

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Dascine. In France.

Mr. Whitaker. What are you?

Dascine. A barber by trade.

L. C. J. What employment have you?

Dascine. An officer in the Marshal's court sometimes.

Justice Turton. What was this man's father, what sort of man was he?

Dascine. A tall man.

Baron Powis. What was his father's name?

Dascine. Thomas Vaughan.

Justice Turton. Was his father living when you was there the second time?

Dascine. The last time I was there I did not see his father, but I saw his father the second time.

Justice Turton. But you saw Mr. Williams his godfather.—*Dascine.* Yes.

Mr. Phipps. Call Simon Danneaun.

Vaughan. My lord, he is sick, and not able to come out of his bed.

Mr. Phipps. Call Francis Harvey. (Who was sworn.)

Mr. Phipps. Do you know captain Vaughan?

Harvey. Sir, in the year 1693, I was in France with one captain Bontee, who was taken prisoner in August the same year; and my captain he had the liberty to go up to Paris with a guard, for his pleasure, and to learn the speech. And, as it happened, we came to lodge in a street, called Dolphin street, at the sign of the Crown; and there was some gentlemen that were there to learn the speech, that were my countrymen; and there was a young man there, and he was acquainted over the way, where this gentleman, captain Vaughan, lodged; he lodged at his aunt's that sold silks; her name was madam Wotton; I saw this gentleman there; I am sure it is he; and with that I came acquainted with him, as well as the rest.

Mr. Phipps. What was he reputed there?

Harvey. A captain of a ship.

Mr. Phipps. What did he go for there? A Frenchman, or an Englishman, or an Irishman?

Harvey. He went for a Frenchman, as I heard; one time his aunt, she said, that he was born in the West Indies, at Martenico, and that he was her sister's son, that lived in Martenico.

Sol. Gen. You say he was a captain of a ship? what ship?

Harvey. That I cannot tell.

Sol. Gen. When was that?

Harvey. In 1693.

Mr. Phipps. Is Mr. Lefleur here?

Cl. of Ar. He is a prisoner in the Savoy; he was taken in the same ship with Mr. Vaughan.

Mr. Phipps. It is reasonable he should have been here, to give an account of the prisoner.

L. C. J. Then they should have taken care to have had him here. Have you any more witnesses?

Sol. Gen. I think we have given sufficient evidence that he is an Irishman: But now we shall shew you, that all your witnesses have

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given a very extravagant evidence to prove that he is a Frenchman. All he hoped for was, that the prosecutors for the king could not be able to prove him an Irishman; he believed there were but three men could prove him so; that was David Creagh, and two more; and so he writes to David Creagh, and tells him, That his life was in his power, and he hoped he and the other two would not discover it. This David Creagh was his neighbour in Ireland; we will call him to prove that captain Vaughan was born at Galloway in Ireland.

Mr. Whitaker. And here is his letter under his hand. Bring David Creagh. (Who was sworn.)

Mr. Cowper. I desire, before he give his evidence, he may look upon those that have given evidence about the prisoner, one by one. (Then he looked upon Robert French.) Mr. Creagh, do you know him.

Creagh. No. (Then he looked upon the rest.)

Mr. Cowper. Have you had any of these men come to you on a message?

Creagh. No, Sir.

Sol. Gen. Do you know Thomas Vaughan, the prisoner at the bar?—Creagh. Yes, I do.

Sol. Gen. How long have you known him?

Creagh. About two years.

Sol. Gen. Was that your first acquaintance with him?—Creagh. Yes.

Sol. Gen. What place was he born at, as you have heard?

Creagh. At Galloway in Ireland.

Sol. Gen. From whom did you hear it?

Creagh. From all persons that I have heard speak of him.

Sol. Gen. Did he ever own to you that he was born there?

Creagh. Yes, oftentimes in my company.

Sol. Gen. Did you ever receive a letter from him about your giving evidence in this matter?

Creagh. Yes, Sir.

Sol. Gen. Do you know this letter? (Which was shewn him.)—Creagh. Yes, Sir.

Sol. Gen. Do you know his hand?

Creagh. Yes, I partly know it.

Mr. Whitaker. Did you ever see him write?

Creagh. This is the letter I received from him.

L. C. J. Read it. Do you think it is his hand?

Creagh. I cannot swear it; but I believe it is his hand.

Mr. Phipps. Have you seen him write?

Creagh. I have seen him write several times.

L. C. J. Do you believe it is his hand?

Creagh. Yes, my lord, but I cannot swear it.

[Then the Letter was read.]

To Mr. David Creagh, in Newgate, These.

“Mr. Creagh;

“I have some assurance that Mr. Whitaker has no witness to prove me a subject of England, but you, and two more, which I am glad of with all my heart: I hope I may have none

against me that wish me worse than you and captain Etherington. If Mr. Whitaker has not sworn you yet, I hope you will not appear against me. I declare, if I had more than my life, I would lay it in your hand. I am like to be sent to Newgate this day, and it is like you and some more will be sent here, that we may not talk together. The Dutch dogs took from me eleven hundred dollars in money, which certainly troubles me more than the thoughts of death, which I value not a straw; but I hope in four or five days to be supplied. I fear they will keep me close. I have all the liberty imaginable here to write, and my friends suffered to see me. I can say nothing that is comfortable, but that I am very well in health, and nothing concerned, if my money come in time.
T. VAUGHAN.”

Friday morning.

Mr. Phipps. Is that letter proved? That is not to the purpose; nor of any weight, considering who proves it.

L. C. J. No, that none could prove him a subject, but he and two more?

Sol. Gen. We will produce only one witness more. Call Mr. J. Rivet.—[The court being informed by some gentlemen then on the bench, that there was a gentleman then in court, one Mr. Rivet, who being of Galloway, could probably give some account of the prisoner; he was immediately called, and required to depose what he knew.]

Rivet. My lord, I am sorry I am called where life is concerned, when I came hither only out of curiosity; but the service I owe to this government, obliges me to speak what I know, now I am called to it. [Then he was sworn.]

Sol. Gen. Do you know the prisoner at the bar? What countryman is he?

Rivet. I have known him a great many years; we were children together in the same town; we lived in Galloway in Ireland. I knew his father, and mother, and brothers, and sisters; and I remember him a child, as long as I can remember any thing, I cannot determine to a certain number of years; and I remember him not only a school boy, but also an apprentice to one Mr. Coleman. And I wonder very much at what Mr. French says, for by the name and place of his birth, he must have sworn what he knows to be otherwise; for the Frenches are a family in Galloway; his father was an honest gentleman, and went over into Ireland in the rebellion, in 1641; and he there married a woman, a native of Galloway, and had several children, one of which, in the latter end of king Charles's reign, turned Papist, and I believe the grief for it hastened his father's death. I own part of the evidence may be true, about his being in the West Indies; but his mother, I believe, was never out of Ireland in her life.

Dr. Oldish. What was his father's name?

Rivet. John.

L. C. J. You say, you knew this very gen-

tleman an apprentice to one Thomas Coleman at Galloway.

Rivet. I did so, my lord.

L. C. J. How long is it since you saw him?

Rivet. I cannot be positive, I think at the reduction of Galloway in 1691. I cannot say whether at or after; but I saw him about that time, and knew him, and have known him from a child; I knew him a school boy, and knew his brothers.

Justice Turton. What year did you know him first?

Rivet. I dare not be positive; I remember him particularly well.

L. C. J. Are you sure this is the man?

Rivet. I know him as well as any face I ever saw. I came accidentally into court out of curiosity; and one that knew me, that was of Galloway, gave an account to the king's counsel, and so I am called to give evidence.

L. C. J. Do you know this Robert French?

Rivet. I cannot say I know him, for I see him but in the dark; if I saw him in a better light, it may be I may. (Then Robert French was set up for Mr. Rivet to see him.) I think I recollect the face, I am not certain.

L. C. J. Do you know this gentleman?

French. No, my lord.

L. C. J. Where did you live?

French. In Connaught.

L. C. J. Did you know John Vaughan of Galloway?

French. I have heard of him, my lord.

Baron Powis. What trade was the prisoner's father?

Rivet. He had the market several years; he lived very well, and kept a public house in the town.

Mr. Phipps. Did you know any other Thomas Vaughan but this?

French. No, not in Galloway.

Rivet. This may be a confirmation of what I say: if it be the same gentleman, his hair is reddish.

L. C. J. Pull off his peruke. (Which was done.)

Vaughan. My hair is not red.

L. C. J. How are his eye brows?

Vaughan. A dark brown, my lord, the same as my wig.

Baron Powis. Let somebody look on it more particularly. (Then an officer took a candle, and looked on his head, but it was shaved so close the colour could not be discerned.)

Mr. Phipps. We can give an answer to this, my lord; we shall prove that there was one John Vaughan at Galloway, and he had a son Thomas, that died ten years ago. As for Mr. Rivet, he is a mere stranger to us, we know nothing of him; and, by what I can perceive, he comes in as a volunteer, not subpoena'd by either side. And for Mr. Creagh, we shall shew he is not to be credited in any thing; for we shall prove him guilty of felony, and that he swore, that if his brother would not supply him with money, he would swear treason against him, and shop him in Newgate,

and that he should not come out till he came upon a sledge; and if so, there is nobody surely can believe he will stick at perjury or forgery, or any thing else which may be for his advantage. Call Mr. Chistopher Creagh.

[Who was sworn.]

Mr. Phipps. Pray do you know David Creagh?—*C. Creagh.* Yes.

Mr. Phipps. Is he any relation to you?

C. Creagh. Yes, he is my brother.

Mr. Phipps. Give the court and the jury an account what you know of your brother?

C. Creagh. It is an unnatural thing to come on this occasion, and I am sorry I am called upon this account.

D. Creagh. Speak what you have to say?

Mr. Phipps. What do you know of your brother, whether you have not found him guilty of stealing any thing?

C. Creagh. My lord, I am upon my oath; I have known something of it, he has stolen some gold from me.

L. C. J. You pretend to be so very nice; you are to answer to what you know of his reputation in general, and of his way of living.

C. Creagh. His reputation has been but very slender, I am very sorry for it; several in the court can give account of it, as well as I. He served a relation of his at Newcastle; he served there some time, and came to town, and came to me, and depended upon me, and I subsisted him; and he took an opportunity one day, when I and my wife were gone abroad, and nobody at home but the maid, and went up stairs, where my wife's room is, and there being a sash window, he opens it, and took out of my wife's closet several pieces of gold.

L. C. J. How did you know that he did it?

C. Creagh. I found it out afterwards; he was my brother, and therefore I did not prosecute him. I did not know he had it, till afterwards that I found to whom he had disposed of the gold. I inquired who was in the house, and thought the maid had it: and she said none had been there but my brother; and he at last owned the fact, and I had it again.

L. C. J. Have you any more to say of your brother?

Mr. Phipps. Did he ever threaten to swear against you?—*Vaughan.* Or me?

C. Creagh. He has been confined in Newgate 18 months, and I subsisted him in charity; I allowed him all along; and he has been sending to me by several messages, that if I snhsisted him not with more money than I did allow him, he would swear me into a plot.

L. C. J. Did he tell you so?

C. Creagh. No, but he sent me word so.

L. C. J. Is the man here that he sent this word by?

C. Creagh. Yes, the man is here.

Mr. Phipps. Let him stand up.

L. C. J. Where do you live?

C. Creagh. In Watling-street; I am a merchant; I declare it is not in favour or affection, but only in conscience, that I declare this.

D. Creagh. This is only to hinder me from giving my evidence against a merchant that I have taken up.

Vaughan. What character had he in Spain? [Then David Creagh spoke, but was not heard.]

L. C. J. What do you say of the gold?

C. Creagh. He had it, my lord.

D. Creagh. Why did you not prosecute me then, if I had it?

L. C. J. You are not sure he took the gold.

C. Creagh. I was so sure he had it, because I had it from him again by another hand.

L. C. J. Did he tell you so, that he had it?

C. Creagh. No; but I had a letter about it.

L. C. J. Where is that letter?

C. Creagh. I have it not here.

L. C. J. Give not an evidence of a letter, without the letter were here; it ought to have been produced.

Mr. Phipps. Call Christopher Heyden. [He was sworn.] Do you give the court an account what David Creagh has said to you of swearing against any body.

Heyden. Several times, when my master has sent me to him, to pay him 5s. a week, or 5s. 6d. a-week, to subsist him.

Dr. Oldish. Who are you servant to?

C. Creagh. He is my servant.

Heyden. This David Creagh has often told me, that I should tell his brother, that if he would not supply him with more money he would swear against him. When I came to the Sessions-house, when the pirates were tried the first time, I was going through the bail-dock, where this David Creagh called to me; and I asked him what he did there? He said he was to be evidence against captain Vaughan. No certainly, said I, you do not know him, do you? Says he, Here is the thing, it had been better for me that I had been an evidence against him before this; and I am forced to be an evidence against him, to save myself: and he bid me tell his brother, God damn his soul to all eternity, if he did not send him supply that day, he would have him in Newgate, and that he should not come out again till he came out upon a sledge?

L. C. J. Did he say so?

Heyden. Yes, my lord.

C. Creagh. How long is it ago, Mr. Heyden?

Heyden. It was the day the pirates were tried; more than that, here was Mr. Wroth's man was with me at the same time; and because he should not hear what you said, you took me to the door.

Mr. Phipps. Is Daniel Bryan here?

[He appeared, and was sworn.]

Bryan. I was subpoena'd here for I know not what; for I know not captain Vaughan.

Mr. Phipps. Give me leave to ask you a question: Do you know, or have you heard of David Creagh?—*Bryan.* Yes, Sir.

Mr. Phipps. Will you give an account of what he has said of swearing against any body?

Bryan. He has threatened his brother se-

veral times, that if he would not send him relief, he would bring him in for something, and would inform against him.

Mr. Phipps. Did he say he would swear against him?

Bryan. He did say he would inform against him.

Mr. Phipps. What did you hear him say of swearing against any one?

Bryan. He said he had rather others should perish, than himself.

Mr. Whitaker. This man was condemned for the same crime.

Mr. Phipps. Mr. Vaughan, have you any other witnesses? Call Creighton. (Who was sworn.) What countryman are you?

Creighton. A Connaught man, I was born in Galloway; I believe Mr. Rivet knows me.

Mr. Phipps. Did you know one John Vaughan, that lived at Galloway?

Creighton. I know him very well.

Mr. Phipps. Do you know the prisoner at the bar?—*Creighton.* No.

Mr. Phipps. Do you remember that that John Vaughan had a son Thomas, and what became of him?

Creighton. Yes, he had a son Thomas; but I understood that he went somewhere into the country, and there died; and it was spread all about the town.

Mr. Phipps. Do you know what he died of?—*Creighton.* I cannot tell.

L. C. J. How long ago did he die?

Creighton. About ten years ago. I knew all the brothers.

Mr. Phipps. Did you know that Thomas Vaughan?

Creighton. I knew him very well.

Mr. Phipps. Is that gentleman, the prisoner, he?—*Creighton.* No.

Mr. Phipps. Do you believe that is not the man?—*Creighton.* I believe not.

Mr. Phipps. Did you ever know any other Thomas Vaughan?—*Creighton.* No.

Justice Turton. Had not John Vaughan a son apprentice at Galloway to one Thomas Coleman?—*Creighton.* No, as I know of.

Justice Turton. How old was that son, Thomas Vaughan, when you knew him?

Creighton. I was born at the next door to that Thomas Vaughan that was reputed to be dead.

Justice Turton. Was not that Thomas Vaughan apprentice to Mr. Coleman?

Creighton. I cannot certainly tell.

Justice Turton. How old was that Thomas Vaughan when he went away from Galloway?

Creighton. I cannot tell.

Justice Turton. What is your own age?

Creighton. My age is about five-and-twenty.

L. C. J. You have not seen him in ten years?—*Creighton.* No, my lord.

L. C. J. Can you take it upon your oath this is not the man you saw ten years ago, that Thomas Vaughan you knew?

Creighton. Yes, my lord.

L. C. J. How old was he when you were acquainted with him?

Creighton. I cannot tell certainly ; I believe he might be about fifteen.

L. C. J. How long is that since ?

Creighton. Ten years.

L. C. J. What is your name ?

Creighton. Creighton.

Mr. Cowper. You say you knew him ten years ago ; pray what sort of person was he, and how did he differ from this man ?

Creighton. He was better set, and not quite so tall as this man, and full of the small-pox ; he was the quarrelsome boy in the whole town.

Sol. Gen. You say he was not quite so tall as this man ?

Creighton. No, he was not quite so tall.

Sol. Gen. Do you think he might not grow since ? This was ten years ago, when he was but fifteen years old.

Mr. Cowper. You knew him at fifteen ; how long had you known him ?

Creighton. From my infancy, till he departed the town.

Mr. Cowper. During all that time, what employment was he in ? Tell some circumstances.

Creighton. I think this Vaughan went to one Mr. Russel's school.

Mr. Cowper. What to do ?

Creighton. To learn to write and read.

Mr. Cowper. And was he not an apprentice in that time ?—*Creighton.* I cannot tell.

Mr. Cowper. Were you acquainted with him ?—*Creighton.* Yes.

L. C. J. You lived next door to him ; sure you must be acquainted with him ?

Creighton. He was a fighting boy ; for I remember he did once thrash my coat soundly.

L. C. J. Where do you live now ?

Creighton. At the Castle and Falcon in Aldersgate-street.

L. C. J. What trade are you ?

Creighton. A shoemaker.

Baron Powis. How long have you lived here ?—*Creighton.* This ten years.

Baron Powis. What did that Thomas Vaughan die of, that you say was dead before you came away, as it was reported up and down ?—*Creighton.* I cannot tell.

Mr. Cowper. Just now you said he went away from Galloway, and it was reported there that he was dead ten years ago ; now you say you have been in England ten years.

Creighton. I came into England about ten years ago.

Mr. Cowper. Did you hear it at Galloway before you came away ?

Creighton. I heard it at Galloway before I came to London ; and there are many can testify that there was a report that he was dead.

Justice Turton. How long was he gone from Galloway before you came away ?

Creighton. I cannot say to an hour ; I heard he was dead.

L. C. J. Well, well, he went away from Galloway.

Justice Turton. Have you not been here twelve years ?

Creighton. I think not ; I came a little before the Revolution.

Justice Turton. That is eight years ago : just now you said you had been here ten years.

Mr. Phipps. Call John Kine. (Who was sworn.) John Kine, did you know one John Vaughan in Galloway ?

Kine. Yes, I lived with him.

Mr. Phipps. What children had he ?

Kine. Four sons.

Mr. Phipps. Had he any of those sons that was named Thomas ?

Kine. Not of those four.

Mr. Phipps. Had he a son Thomas ?

Kine. Yes, he had ; he died about ten or eleven years old of the small-pox.

Mr. Phipps. You say you lived with this John Vaughan ; look upon the prisoner at the bar, is he any of those sons ?

Kine. No, sir, I never saw this man till now.

Mr. Phipps. How long did you live with him ?—*Kine.* About eight or nine years.

Mr. Phipps. But how long have you been come away from him ?

Kine. About ten years.

Justice Turton. How well do these two witnesses agree together ? The other said he died at fifteen, and was pitted with the small-pox ; this man says he died at ten, and of the small-pox.

L. C. J. Where do you live now ?

Kine. I live in the city.

L. C. J. How long have you lived there ?

Kine. Twelve years.

L. C. J. How long was this Thomas Vaughan dead before you came hither ?

Kine. Really I cannot be positive, I believe about eight or nine years.

L. C. J. Did Thomas Vaughan die of the small-pox ?—*Kine.* Yes.

L. C. J. That you are sure of ?

Kine. I am sure that was the disease he died of.

L. C. J. You knew him well, I believe ?

Kine. Yes, my lord.

L. C. J. How old was he when he died ?

Kine. About ten years.

L. C. J. Where was he buried ?

Kine. At Galloway.

Just. Turton. Why does not the officer take care ? There is one talking with the witness. Can you now reconcile your evidence ? (To the prisoner's counsel.)

L. C. J. Have you any more witnesses ?

Mr. Phipps. No, my lord.

Just. Turton. What were the names of all the sons ?

Kine. The eldest was John Vaughan, the other William Vaughan, another Edward Vaughan, and another James Vaughan ; that was all that he had alive.

Mr. Whitaker. There is never a Thomas Vaughan among these.

Mr. Cowper. Thomas died up and down in several places.

Mr. Phipps. Mr. Rivet, do you know the sons of that John Vaughan ?

Rivet. He had all these sons, John, William, Thomas, and James. He speaks of a son Edward; I cannot exactly remember whether there was such a son or no; though I have a rude idea of it, but am not certain. I knew this Thomas, I went to school with him, and I saw him in the year 1691, about the surrender of Galloway.

Juryman. Is that man at the bar the same Thomas Vaughan?

Rivet. I am positive of that.

L. C. J. You saw him at the surrender of Galloway?

Rivet. I did; it was about that time.

Vaughan. I am a subject of the most christian king; and I desire, though I speak English, that I may be examined in French, in a matter that touches me so near. And you may see by my commission, my lord, that I am a Frenchman; which I desire may be read.

L. C. J. We shall not trouble you with that.

Vaughan. I can shew you my commission, wherein the king, my master, declares me to be a subject of France.

Dr. Oldish. Mr. Vaughan, I think, you need not trouble the court to read the commission; the commission is the same as for all other subjects of the French king, wherein he is looked upon as a natural-born subject of France; and so he owns himself upon his examination before the judge of the admiralty.

L. C. J. Have you any more to say? As to the examination, who can prove that?

Mr. Cawley. I can prove that, my lord. (Mr. Cawley was sworn.)

L. C. J. Is that Thomas Vaughan's examination.

Mr. Cawley. Yes, my lord, it is signed by him, and taken before sir Charles Hedges the 25th of July, 1695.

L. C. J. Read it. (Then Mr. Cawley read the Examination of Thomas Vaughan.)

The 27th of July, 1695.

Officium Domini contra THOMAS VAUGHAN, Capuam' Navicule, The LOYAL CLENCARTY.

The Examination of Thomas Vaughan, late Commander of the ship the Loyal Clencarty, aged 26 years, taken before the Right Worshipful Sir Charles Hedges, kt. Judge of the High Court of Admiralty of England.

"This examine saith, That he was born at Martenico within the dominions of the French king, and is his subject; but refuses to answer of what parents he was born: that he came last from thence about four years ago as commander of a ship called the Hare, which had been before taken from the English, and came in her to Nantz in France, and hath ever since been in France, or cruising in French ships: That he hath been a commander ever since he was 16 years of age, and hath commanded several French privateers,

and was commander of a privateer of St. Malo, called the Grenada, of 36 guns, which about two years ago took the Diamond; and the examine was never till now taken. Being asked, whether he ever lived in England, or in Ireland? he refuses to answer. Being asked, whether he knew any thing of the taking and carrying off a Custom-house boat from the Downs to Bulloigne? Or, whether he was then in London, or did give directions to any persons, or knew of her being carried off? he answered nothing; but said, that if any person would prove it against him, he was present to answer it: but saith, that in France he heard of her being brought to Bulloigne; and he the examine bought her at Bulloigne of the men that carried her away, and that she cost him 900 and odd livres, and was then called the Elizabeth and Anne, or Michael and Anne, but which doth not remember: that he the examine still hath the said vessel at Bulloigne: that he cannot tell the names of the persons he bought her of, and that took her away, but believes they had a commission: that something above three weeks ago the examine went with a commission from the French king on board a two and twenty oar barge, called the Loyal Clencarty, then at Bulloigne, as commander thereof: and on Monday last was a fortnight was taken by the Coventry man of war, at the Buoy in the Gunfleet; and that the commander of the Coventry took away this examine's commission. Being asked, upon what design he came out with the barge? replied, that it was not to take the air; that the barge formerly belonged to the lord Danby, and was taken by a French privateer about a year ago; that before he came out, he met with two English seamen upon the court of guards at Bulloigne, who told the examine, that they had been taken prisoners, and the examine took them in upon charity; and afterwards met another Englishman, who told the examine, that he had been taken in land service, and believes it was before Fort Kenoque; and the said person sitting upon a stone at Bulloigne, and not knowing what to do with himself, the examine took him on board for charity, and designed to put the said three persons ashore in England. Being asked, whether he did not put in a claim for the said Custom house boat, by reason of her captain? Or, whether the persons that took her had any commission from him? he the examine answered, that they that took her, must answer for what they did, and he must answer for his actions only.

Eodem die Capt' coram me,

C. HEDGES. THOMAS VAUGHAN."

L. C. J. Mr. Vaughan, have you any more to say?

Vaughan. It is very hard circumstances I am under; if an Englishman was in France, under the straights that I am here, it would be very hard for him to prove himself an Englishman.

L. C. J. You have had a very fair trial, and

you shall have justice, be it for you, or against you.

Vaughan. I hope your lordship will do me right.

L. C. J. Gentlemen of the jury, the prisoner at the bar, Thomas Vaughan, stands indicted for high treason, for adhering to the king's enemies, viz. That he put himself as a soldier in the service of the French king, in a vessel called the *Loyal Clencarty*, with divers other persons on board her, that were subjects to the French king, and enemies to the king of England, with a design to burn the king's, and his subjects' ships: and for that purpose went in that ship. That the prisoner was on board the ship, and with such a design, is proved, without all contradiction, by several witnesses that have been produced; that is, that the two and twenty oar barge, which is the same called the *Loyal Clencarty*, lay hovering about the Buoy in the Nore; those men in the Coventry imagined they had some design of mischief to the ships, and they made after him with the Coventry. It was apprehended by captain Vaughan and his crew, that the Coventry would be too hard for them, and so they did submit, and were taken. And being examined on what account he came on our coasts, it is confessed by him, That he came with a design to burn our ships. You may observe what sort of men were aboard. You have heard it proved to you, that Crittenden, the marshal of Dover, entered those persons taken aboard the French vessel, of what nation, and what quality they were; and there were about a dozen of these Frenchmen, for they were entered as such. Now, for a subject of England to join with the king's enemies, in pursuit of a design to burn or take any of the king's, or his subjects' ships, that is an adherence to the king's enemies. But it appears, not only that captain Vaughan was in their company, but that he was their commander; which commanding the vessel, on board which were French subjects, enemies of the king and the kingdom of England, is high treason, and the particular fact of treason for which he is indicted. And it appears that he had a commission from the French king to command this vessel, the *Loyal Clencarty*.

Now the prisoner having this commission to be commander of this vessel, though they who served under him were not native Frenchmen, but other foreigners, yet their subjecting themselves to him, acting by virtue or colour of that commission, makes them to be the French king's subjects, during their continuance in that service; for otherwise all prizes, which they should take, would make them to be pirates; which none will pretend to maintain, when they acted by a commission from a sovereign prince, that was an enemy. And if they shall cruize upon our coasts with a design to take, or destroy any of the king's, or his subjects ships, they are enemies, though they were the subjects of a prince or state in amity with the king of England. But at this time there is no

necessity of entering upon this question, because it is proved that divers, who were on board this vessel, were Frenchmen; the joining with whom, in prosecution of such a design, is that kind of high-treason, of adhering to the king's enemies. So that if captain Vaughan was a subject of England, he is proved guilty of high-treason, if you believe the evidence.

But now it is insisted on by Mr. Vaughan and his counsel, that though he was exercising hostility against the king of England, and designing mischief to his subjects; yet, says he, I was not a subject of England, I was born a subject to the French king. If that be true, then he is not guilty of high-treason; he is an enemy, but not a traitor: and that is the point you are now to consider of, whether he be a subject of England or France?

Now as to that, he being taken under such circumstances, and speaking English, it is reasonable to be presumed that he is a subject of England, unless he proves the contrary. But then you have heard by several of the witnesses, that when he was at first taken, he acknowledged himself to be an Irishman; and he did not only acknowledge it to them that assisted in apprehending him, but being carried to Dover, when the marshal entered him in his book as a prisoner, he entered him not as a Frenchman, but he declared at that time he was an Irishman. It may be, he did not consider the consequence of it; for the next day he was carried before the mayor of Dover, and then having considered better of it, that it was not for his interest to acknowledge himself an Irishman, he said he was born a subject to the French king, and at Martenico. There were Scotchmen and Irishmen taken at the same time, and they were entered as of the nation they belonged to, and so were divers entered Frenchmen. So that unless he hath given sufficient evidence to the contrary, this is sufficient to induce you to believe him an Irishman born.

But he has endeavoured to take off this evidence that hath been given. First, he says, it was when he was in drink, that he did confess himself to be an Irishman; but when he was sober, he said he was a Frenchman. And besides that, he calls a witness, whose name is Robert French, to give an account of him. And French says, that about fourteen years ago he was at St. Christophers, on French ground, and he did then see this Thomas Vaughan; he did take him then to be about the age of fifteen. He says he stayed there about four and-twenty hours, and that he was in the company of this Vaughan and his father about five or six hours. He says, his father told him at that time, that this young man who was then about fifteen years of age, was born at Martenico. He says farther, that his father did recommend this son to him to be a sea-faring man, being the employment he intended him for; and he is sure this is the man. This Robert French was asked, whether he ever saw this Vaughan from the time he first saw

him at St. Christophers until this time: he says he never saw him since that time, till about two months ago. He gives you this account how he came to meet with him: he says he came to town; and being a charitable man, he used to visit the prisons; and he came to Newgate to one Noland; and there he saw captain Vaughan; and though he had not seen him for fourteen years before, yet he knew him again, and is positive that he is the same person.

Another swears he knew the prisoner about five years, and he was reputed a Frenchman.

There has been another witness produced, which is that Dascine, who came up as a Frenchman, and talked French, pretending he could not speak English; but on examination it was discovered that he had an employment in England, and was a bailiff's follower; and it appears he can speak English very well; and notwithstanding his pretence, has given his evidence in English. And he tells you, That he, about the year 1669, did go to St. Christophers, and afterwards to Martenico; and there he went to one Williams, who had a friend whose name was Vaughan, at whose house there was a christening to be of his son, to whom Williams was to be godfather; and this witness was carried thither, and the child was christened Thomas. He tells you he went over again to St. Christophers, and to Martenico, in the year 1677, and that then he enquired for this child, and did see him. Then he says, after that he went over again to St. Christophers, and to Martenico about thirteen years ago, and then saw him again; and, I think, never saw him since until very lately; and this prisoner, he undertakes to tell you, is the very person.

But then one Harvey tells you he saw him in France, in the year 1693, and there he was taken to be a Frenchman, and he lived with a woman that sold silk, that said he was her nephew, her sister's son; and that he was born at Martenico. This is the evidence he gives you to induce you to believe he is a Frenchman.

Now, in the first place, before I open the evidence in answer to it, I desire you to observe the weight and import of this evidence that hath been produced by the prisoner. First, for this French, that says he saw captain Vaughan fourteen years ago, when he was about fifteen years of age; he had no former acquaintance with him; stayed in his company but six hours; and came away within four-and twenty hours after his arrival; and never saw him again in fourteen years: it is a strange thing that he should know him again so well as to be positive that he is the same person; for in fourteen years there is a great alteration in a man: for a man that has known one at the age of fifteen, and not seen him in fourteen years after, though before he was very well acquainted with him, cannot so easily know him again. But however he is positive, upon his oath, that he is the same person that he saw at Martenico.

Then as for Dascine, you may consider him,

that he should take notice of a little child that he saw christened several years before; and that he should now remember him when he had not seen him in 13 years; sure he had a great liking to this child, that when he went to Martenico, many years after, he should be so inquisitive after him: I must leave these things to you to consider of: that he might have an aunt in France, that is very possible too.

But now consider how this evidence hath been endeavoured to be answered: two witnesses have been produced to contradict that which they have sworn. The first is David Creagh, who tells you he has known the prisoner for two years; and says he was always reputed to be an Irishman, and born in Galloway: he has often discoursed with him about his country, and he told him that he was an Irishman, and born at Galloway. Then you hear what a letter is produced, writ to Creagh, when he was to come upon his trial; he mentions what his defence was, and that it was impossible that any could do him any harm but he and two more. Creagh swears it is his hand; that he hath seen him write, and he believes it is his hand.

Then there is a gentlemen, Mr. Rivet, that came here by chance, who is a Galloway man; he saith he knew the prisoner's father, who was reputed to come thither about the time of the rebellion in Ireland, in 1641, and lived at Galloway; and that this prisoner, Mr. Vaughan, was his son, and he knew him of a child; was well acquainted with him; lived hard by him; remembers him an apprentice in Galloway, and tells you to whom; and says he is sure this is the very man; and that he saw the prisoner in 1691, about the time of the reduction of Galloway; and he is confident that the prisoner is the son of John Vaughan, at Galloway; and he gives you a particular account of him and his family, viz. of the reputation and manner of living of his father; and what other brothers he had: so that there is no objection against his credit; and it is hard to believe, since he is so positive and circumstantial, that he can be mistaken.

But the prisoner and his counsel have endeavoured to answer all this evidence; and first they have called Creagh's brother to prove that he is an ill man; for that he came into this town where his brother lives, who subsisted him and took him into his house; and one day, when he and his wife went abroad, he made bold with some of his money; but they thought the maid had it, and he charged her with it; but to his satisfaction, it did afterwards appear that David had it.

Then there is another, Christopher Heyden, Christopher Creagh's servant, who says, he heard D. Creagh say he was forced to be an evidence against Vaughan to save himself; and that he used to threaten his brother, that if he would not give him more money, he would swear against him. Bryan saith much to the same purpose. These are produced to take off the credit of D. Creagh's testimony.

But then, gentlemen, as to the place of the prisoner's birth; two other witnesses are produced to give you satisfaction that this captain Vaughan was not the son of that Mr. Vaughan of Galloway, whose evidence I will open to you, and then will see how coherent they are in their testimony. The first is Creighton, a shoemaker; he says he knew Thomas Vaughan, the son of John Vaughan of Galloway, about ten years since; he was a Galloway man bred, and lived the next door to John Vaughan that had a son Thomas. He says he has been here about ten years in England. He says he thinks that Thomas Vaughan, the son of John Vaughan, was about the age of 15 years; but that this prisoner is not he; for that Thomas Vaughan was disfigured with the small-pox; he remembered him well; he had reason for it, for he once basted him soundly; and that he went away from Galloway when he was about 15 years of age, and was reported to be dead; and if it were so, this prisoner cannot be the person.

The other witness is as positive as Creighton; for he saith, he knew this John Vaughan of Galloway, and his son Thomas; and that Thomas Vaughan, son of John Vaughan, died about 10 years since of the small-pox. So that they have found two Thomas Vaughans: one tells you of one that was 15 years old, and was disfigured with the small-pox; and the other tells you of Thomas Vaughan, who died of the small-pox when he was 10 years of age.

You are therefore to consider the evidence on both sides. The question principally is, Whether the prisoner be a subject of the king of England. If you are satisfied that he is not an English subject, but a Frenchman, then he is not guilty of this high-treason; but if you are satisfied, by the series of the whole evidence, that he is an Irishman, and that he had a commission from the French king, and that he cruized upon our English coasts, in company with the king's enemies, with a design to take, burn, or destroy any of the king's or his subjects ships, you are to find him guilty of the high-treason whereof he stands indicted; otherwise you are to acquit him.

Cl. of Ar. Swear an officer to keep the jury. [Which was done.]

[After a short stay, the Jury returned into Court, and gave in their verdict.]

Cl. of Ar. Gentlemen, answer to your names. E. Leeds.

Mr. Leeds. Here.

Cryer. Vous Avez, and so of the rest.

Cl. of Ar. Gentlemen, are you all agreed of your verdict?—*Jury.* Yes.

Cl. of Ar. Who shall say for you?

Jury. Our foreman.

Cl. of Ar. Thomas Vaughan, hold up thy hand. (Which he did.) Look upon the prisoner. How say you, is he guilty of the high-treason whereof he stands indicted, or not guilty?—*Foreman.* Guilty.

Cl. of Ar. What goods or chattels, lands or

tenements had he at the time of the treason committed?

Foreman. None to our knowledge.

Cl. of Ar. Then hearken to your verdict as the court hath recorded it: You say that Thomas Vaughan is guilty of the high-treason whereof he stands indicted; but that he had no goods or chattels, lands or tenements at the time of the high-treason committed, or at any time since, to your knowledge; and so you say all.—*Jury.* Yes.

Vaughan. My lord, let me beg one favour, that I may be used like a gentleman; that I may be sent to a chamber, and not to a dungeon; and that my friends may come to me.

L. C. J. Capt. Vaughan, they say you once made an escape, and therefore the keeper must keep with humanity, but with all security.

Vaughan. I desire I may be kept like a Christian.

L. C. J. The keeper must do his duty.

Cl. of Ar. Thomas Vaughan, hold up thy hand. (Which he did.) Thou standest convicted of high-treason against our sovereign lord the king; What hast thou to say for thyself why judgment shall not pass against thee to die according to the law?

Vaughan. I am altogether a stranger to the law, my lord: I refer myself to my counsel.

L. C. J. Well, then, you refer yourself to your counsel. You have had a fair trial, and have no reason to complain of it: If your counsel have any thing to say in arrest of judgment, they shall be heard.

Mr. Phipps. My lord, the indictment has two sorts of treason laid in it the one for adhering to the king's enemies, the other levying of war; and with submission, I take it, that the first is not well laid; for it says that the prisoner did adhere to the king's enemies, but says not against the king. Now every body knows that the French king is in war, not only with England, but Holland and Spain, and the emperor: But if a man join with the French against any of them, he adheres to the king's enemies; and yet it cannot be said to be against the king; therefore they ought to have laid it, that he did adhere to the king's enemies 'contra Dominum Regem;' it must be aiding and comforting them against the king that makes the treason.

L. C. J. It does say so.

Mr. Phipps. No, my lord: it only says that captain Vaughan did adhere to the king's enemies, and does not say it was against the king; and if that be treason, is what we desire to know.

L. C. J. If he adhere to the king's enemies, it must be against the king, though he assist them only against the king's allies;* for there-

* East's P. C. c. 2, s. 21. Fost. 220. But as to this Blackstone says: "By the statute 2 Hen. 5, c. 6, any subject committing acts of hostility upon any nation in league with the king was declared to be guilty of high treason, and, though that act was repealed by the sta-

by the king's enemies may be more encouraged and enabled to do mischief or damage to the king. Suppose you assist the French king against the king of Spain, that is now in alliance and league with the king of England, and the French in actual enmity; that is to adhere to the king's enemies against the king.

Mr. Phipps. Would that be treason, my lord?

L. C. J. Yes, certainly; though that is not a point in this case, and so not necessary to be determined now; for the act of parliament of 25 of E. 3. defines treason in adhering to the king's enemies, and expresses the overt-act in giving them aid or comfort; it is sufficient to alledge the treason in the words of the statute, adhering to the king's enemies. An overt-act alledged, shews it to be against the king; and in pursuance of that adherence, he did so and so: He was a captain and soldier in the ship; did join with the king's enemies, &c. with a design to destroy the king's and his subjects ships: surely that is most manifestly an adherence to the king's enemies against the king.†

Mr. Phipps. The overt-act, if it were alledged sufficiently, would not help it; for if there can be an adhering to the king's enemies, that is not treason; they ought to alledge such adhering as is treason; and if the treason itself is not well alledged, the overt act will not help it.

L. C. J. There is an overt act to shew it to be against the king. It is said all along, he being in this vessel *Clencarty*, "*cum diversis subditis*."

Mr. Phipps. But then that overt-act is not well alledged; for it is said only he went a-cruising; whereas they ought to have alledged that he did commit some acts of hostility, and attempted to take some of the king's ships; for cruising alone cannot be an overt-act; for he might be cruising to secure the French merchant-ships from being taken, or for many other purposes, which will not be an overt-act of treason.

L. C. J. I beg your pardon. Suppose the French king, with forces, should come to *Dunkirk* with a design to invade England; if any one should send him victuals, or give him intelligence, or by any other way contribute to their assistance, it would be high-treason in adhering to the king's enemies.†

Mr. Phipps. If the French king had designed an invasion upon England, and captain Vaughan had assisted in his vessel in forwarding the invasion, it would have been trea-

fute 20 Hen. 6, c. 11, so far as relates to the making this offence high treason, yet still it remains a very great offence against the law of nations, and punishable by our laws either capitally or otherwise according to the circumstances of the case." 1 Blackst. Comm. 252, 253.

* East's P. C. c. 2, s. 21.

† East's P. C. c. 2, s. 21.

son; but here is nothing mentioned but cruising.

L. C. J. Cruising about the coasts of England with a design to destroy the king's ships.

Mr. Phipps. That design ought to be made appear by some act of hostility; for in the case of *Burton* and *Bradshaw*, and others, which my lord Coke cites, the agreeing to rise and pull down inclosures, and meeting and providing arms for that purpose, is agreed not to be levying of war; and they were indicted for conspiring to levy war, upon the statute of queen Elizabeth. And in this case, here being only a conspiring, and nothing attempted, it can be no more treason than it was in that case.

L. C. J. When men form themselves into a body, and march rank and file with weapons offensive and defensive,* this is levying of war with open force, if the design be public. Do you think when a ship is armed with guns, &c. doth appear on the coast, watching an opportunity to burn the king's ships in the harbour; and their design be known, and one goes to them, and aids and assists them, that this is not an adhering to the king's enemies? Here are two indictments, one for levying war, and the other for adhering to the king's enemies; but the adhering to the king's enemies is principally insisted on; and there must be an actual war proved upon the person indicted in the one, yet need not be proved in the other case.

Mr. Phipps. The same certainly is necessary in one as well as the other; for barely adhering to the king's enemies is not treason; but there must be an actual aiding and comforting them; and a mere intention to assist the king's enemies, is not an adherence within the statute of 25 Ed. 3.

L. C. J. If there be not high-treason in the act alledged; that is, if it do not make out an adherence to the king's enemies, then your objection would hold good.

Mr. Phipps. The going to cruise, my lord, does not make out an adherence to the king's enemies; for his cruising might be for other purposes as well as to take the king's ships; and your lordship will intend the best in favour of life.

Mr. Whitaker. To burn the king's ships.

L. C. J. Treby. The indictment is laid for adhering to, and comforting and aiding the king's enemies. You would take that to be capable to be construed adhering to the king's enemies in other respects; but I take it to be a reasonable construction of the indictment, to be adhering to the king's enemies in their enmity. What is the duty of every subject? It is to fight with, subdue, and weaken the king's enemies: and contrary to this, if he confederate with, and strengthen the king's enemies, he expressly contradicts this duty of his allegiance, and is guilty of this treason of adhering to them. But then you say here is no aiding unless there were something done, some act of hostility. Now here is going aboard

* East's P. C. c. 2, s. 12, 59.

with an intention to do such acts ; and is not that comforting and aiding ? Certainly it is. Is not the French king comforted and aided, when he has got so many English subjects to go a cruising upon our ships ? Suppose they man his whole fleet, or a considerable part of it ; is not that aiding ? If they go and enter themselves into a regiment, list themselves and march, though they do not come to a battle, this is helping and encouraging ; such things give the enemy heart and courage to go on with the war ; or else it may be, the French king would come to good terms of peace. It is certainly aiding and comforting of them to go and accept a commission, and enter into their ships of war, and list themselves, and go out in order to destroy their fellow subjects, and ruin the king's ships ; these are actings of an hostile nature. And if this be not adhering, &c. it may as well be said, that if the same persons had made an attack upon our ships, and miscarried in it, that had not been so pei-ther ; because that in an unprosperous attempt there is nothing done that gives aid or comfort to the enemy. And after this kind of reasoning they will not be guilty, till they have success ; and if they have success enough, it will be too late to question them.

Mr. *Phipps*. Intending to levy war is not treason, unless a war be actually levied.

L. C. J. *Treby*. Is it not actually levying of war, if they actually provide arms, and levy men, and in a warlike manner set out and cruize, and come with a design to destroy our ships ?

Mr. *Phipps*. It would not be an actual levying of war, unless they commit some act of hostility.

L. C. J. Yes, indeed, the going on board, and being in a posture to attack the king's ships. As to the fault you find with the indictment, there is a fault, but not in point of law ; they might have laid it more generally, so as to have given more evidence.

Baron *Powis*. However it is well enough. But for you to say because they did not actually fight it is not levying a war ; it is not plain what they did intend. That they came with that intention, that they came in that posture, that they came armed, and had guns and blunderbusses, and surrounded the ship twice ; they came with an armed force ; that is a strong evidence of the design.

L. C. J. You would make no act to be aiding and assisting but fighting.

Mr. *Phipps*. Then next I am in your lordship's judgment, whether the statute of 28 of Hen. 8, by which captain Vaughan is tried, is in force, and be not repealed by the 1st and 2nd of Philip and Mary, which saith, that all trials, in cases of treason, shall be at the common law. Now by the common law, before the statute 28 Hen. 8, treason done upon the sea was tried before the admiral, or his lieutenant ; and my lord Coke, in the 12 Rep. in the case of the admiralty, saith, the jurisdiction of the admiralty is by the common law. By the statute 33 Hen. 8, treason confessed be-

fore three of the privy-council might be tried in a foreign county, but that statute is repealed by the statute 1 and 2 of Philip and Mary ; for by the statute 33 Hen. 8, c. 4, treason committed in Wales, might be tried in what county the king would assign ; but since the statute of Philip and Mary, it must be in the proper county ; so that we are in your lordship's judgment, whether the statute of 28 Hen. 8 be in force ; and whether, since the statute of 1 and 2 Philip and Mary, treasons done upon the sea, ought not to be tried before the admirals or anciently at the common law ? *

L. C. J. This is treason by the common law, and the trial is by the method of the common law.

Mr. *Phipps*. It is true that my lord Coke, and other authorities say, that the statute 35 Hen. 8, for trying treasons committed beyond sea, is not repealed by the statute of 1 and 2 Philip and Mary ; but they do not say that this statute is not repealed by the statute of Philip and Mary ; and the books being silent in this, is the reason why I propose this question for your lordships' judgment.

L. C. J. It is no more a question than the trials of foreign treason, and then the determination of the trials upon the 35th determines the question upon this.

Dr. *Oldish*. We must have two witnesses by the rules of the civil law ; an extrajudicial saying of a party may be retracted by them at any time, that is the civil law, and so there can be but one witness.

L. C. J. That is not the law of England.

Dr. *Oldish*. I do humbly conceive that the civil law is not taken away in this case ; for though the statute prescribes the form of proceedings according to the rules of the common law, yet as to the crimes and proofs, the civil law is still in force ; and then the party may retract his confession in judgment, much more any extrajudicial saying.

Mr. *Whitaker*. You are arraigning the verdict.

L. C. J. That you should have taken notice of before the verdict was given. But we think there is no danger in hearing this objection, because it is so easily answered. How many witnesses were to the confession ?

Sir *Ch. Hedges*. We are not in a court that proceeds according to the strict rules of the civil law ; but if we were, that law is not so absurd as to allow that a party may retract his confession at any time, so as to make it have no effect.

Dr. *Oldish*. There must be two witnesses at any time.

Sir *Ch. Hedges*. So there are here to the confession ; but you mistake, if you think that every particular is to be proved strictly as the civil law requires ; for the end of the statute which directs the proceedings of this court, was to facilitate the method of making proofs, that being found difficult by the course of the civil

* East's P. C. c. 2, s. 40.

law ; and therefore was that statute made, as plainly appears by the preamble thereof.

Dr. *Oldish*. There is a new statute that revives that statute again, and that requires two witnesses ; whereby it is reduced to the rules of the civil law again.

L. C. J. Two witnesses there must be ; but then consider it is not necessary to have two to every individual overt-act : for suppose there be two overt-acts laid in the indictments, for one species of treason, compassing and imagining the death of the king ; if there be one witness that he bought a dagger, and said he would kill the king, and he is seen, it may be, going to the king's bed-chamber with the dagger, another witness says, he said he would kill the king with a pistol, and bought a pistol, and he stood waiting to kill the king as he came by ; that is an overt-act of the same treason. If one witness prove one, and another witness prove the other, that is sufficient proof with us.

Dr. *Oldish*. It is another question, whether he be a subject ?

L. C. J. That is not an overt-act ; if there be one witness to that, it is enough, there needs not two witnesses to prove him a subject ;* but upon the trial there were above two witnesses to prove it, that was Crittenden the marshal of Dover, Creagh, and Rivet. I must tell you as the doctrine of the civil law, it is not universally received in all countries ; it is received in several countries as they find it convenient, and not as obligatory in itself.

Dr. *Oldish*. Yes, in all places, as to proof ; for it is the law of God and nations, ' ex ore duorum, vel trium, ' &c. and one witness is no witness.

Sir Ch. *Hedges*. Two witnesses may be necessary to convict a man of any capital crime, but then it doth not follow that there must be two witnesses to prove every particular fact and circumstance. In this point, touching the place of nativity of Thomas Vaughan, was there not sufficient in his own confession, together with the other proofs on the king's behalf, to throw the burden of proof upon the prisoner ? You yourselves seem to have been of that opinion, you undertook to prove it, and it is you that have failed in that particular.

L. C. J. Our trials by juries are of such consideration in our law, that we allow their determination to be best, and most advantageous to the subject ; and therefore less evidence is required than by the civil law. So said Fortescue in his commendation of the laws of England.

Dr. *Oldish*. Because the jury are witnesses in reality, according to the laws of England, being presumed to be ' ex vicineto ; ' but when it is on the high and open seas, they are not then presumed to be ' ex vicineto, ' and so must be instructed according to the rules of the civil law by witnesses.

Baron *Powis*. This is not a trial by the

civil law ; for that statute was made to avoid the niceties of your law.

Just. *Eyre*. He is tried with like evidence as in other cases of high treason.

Dr. *Oldish*. No, the late act requires two witnesses.

Cl. of Ar. Make proclamation of silence.

Cryer. All manner of persons are commanded to keep silence, while judgment is giving, upon pain of imprisonment.

And then Judgment was given, according as the law directs in cases of High Treason.

The COMMISSION of Captain THOMAS VAUGHAN, which he had by Order of the French King.

" Lewis Alexander of Bourbon, earl of Toulouse, duke of Amville, commander of the king's orders, governor and lieutenant-general for his majesty in the Province of Britany, peer and admiral of France : to all those who shall see these present letters, greeting. The king having declared war against his Catholic majesty, the favourers of the of the crowns of England and Scotland, and the estates of the United Provinces, for the reasons contained in the declarations published by his majesty throughout the extent of his kingdom, countries, lands, and lordships under his obedience : and his majesty having commanded us to take care that the said declaration be observed, in what doth depend upon the power and authority which his majesty hath been pleased to commit to our said charge of admiral ; we have, according to the express orders of his said majesty, given leave, power and permission to Thomas Vaughan, living at Bulloigne, to arm and set forth in warlike manner a bark, called the Loyal Clencarty, of the burthen of ten tons, or thereabouts, which is at present in the port of Bulloigne, with such number of men, cannons, bullets, powder, shot, and other ammunitions of war, and provisions which are necessary to set her out to sea, in a condition to sail and cruize upon the pirates, and others without commission, as also upon the subjects of his Catholic majesty, the estates of the United Provinces, the favourers of the of the crowns of England and Scotland, and other enemies of this estate, in what places soever he can meet them, whether it be upon the coasts of their country, in their ports, or rivers ; also upon their shores, or places where the said captain Thomas Vaughan shall think fit to land to annoy the said enemies ; and there to make use of all the means and arts permitted and used by the laws of war, to take them and bring them prisoners, with their ships, arms, and other things in their possession.

" Provided the said Vaughan shall keep, and cause those of his crew to keep the maritime orders, and that shall he carry, during his voyage, the flag and ensign of the King's Arms, and of ours, and cause the present commission to be registered in the registry of the

* East's Pl. Cr. c. 2, s. 65.

nearest admiralty where he shall be equipped, and leave there a roll signed and certified by him, containing the names and surnames, the births and residence of his crew; and make his return to the said place, or some other port of France, and make his report before the officers of the Admiralty, and no others, of what shall have happened during his voyage, and give us advice thereof, and send his said report to the secretary-general of the marine, with the papers justifying the same, that we may give such orders thereupon as may be necessary.

“And we pray and require all kings, princes, potentates, sovereigns, estates, republics, friends and allies of this crown, and all others to whom it shall appertain, to give to the said Vaughan all favour, aid, assistance and succour in their ports, with his said vessel, company and prizes, which he shall take during his voyage, without doing, or suffering to be done to him any trouble or hindrance; offering to do the like when we shall be by them thereunto required.

“And we do command and require all marine officers, and others to whom it shall appertain, to let him safely and freely pass with his said vessel, arms and company, and the prizes which he shall take, without doing, or suffering to be done to him any trouble or hindrance;

but on the contrary, to give him all succour and assistance that shall be necessary. These presents to be of no force after one year, from the day of the date hereof.

“In witness whereof we have signed these presents, and caused them to be sealed with the seal of our arms, and counter-signed by the secretary-general of the marine, at Versailles, the 10th day of the month of July, 1696.

L. A. DE BOURBON.”

“By my lord de Vallencour.” (L. S.)

“The present Commission was registered in the admiralty of Bulloigne, after having been seen by us James Abbot de la Cocherine, the king’s counsellor, deputed to the intendency of Bulloigne, exercising the charge of lieutenant-general of the admiralty, in the presence of the king’s proctor, at the request of the said captain Vaughan, being present, whom we have permitted to sail and cruise upon the enemies of the estate. Done at Bulloigne the 14th of July, 1696.

MAGINON.

“Versionem hanc Anglicanam in omnibus, cum suo originali Gallio convenire testor,

“WILHELMUS ROCKE, Not. Pub.”

He was afterwards executed according to his Sentence.

394. Proceedings in Parliament against Sir JOHN FENWICK, bart.
upon a Bill of Attainder for High Treason: 8 WILLIAM III.
A. D. 1696.*

PROCEEDINGS IN THE HOUSE OF COMMONS.

November 6th, 1696.

ADMIRAL RUSSELL acquainted the House of Commons, that his majesty had given leave to lay before the House, several papers in the nature of informations of sir John

* “There was indeed reason to apprehend tumults; for now, after the queen’s death, the Jacobites began to think, that the government had lost the half of its strength, and that things could not be kept quiet at home, when the king should be beyond sea. Some pretended, they were for putting the princess in her sister’s place; but that was only a pretence, to which she gave no sort of encouragement: king James lay at bottom. They fancied, an invasion in the king’s absence would be an easy attempt, which would meet with little resistance: so they sent some over to France, in particular one Charnock, a fellow of Magdalen college, who in king James’s time had turned Papist, and was a hot and active agent among them: they undertook to bring a body of 2,000 horse, to meet such an army as should be sent over; but Charnock came back with a cold account, that nothing could be done at that time; upon which it was thought necessary

Fenwick, in which he and several other persons of quality were named; and desired that they might be brought up to the table and read; and that he might have an opportunity to justify himself, or if he did not that he might fall under the censure of the House. And Mr. Secretary Trumbull being present, did say,

to send over a man of quality, who should press the matter with some more authority: so the earl of Ailesbury was prevailed on to go: he was admitted to a secret conversation with the French king: and this gave rise to a design, which was very near being executed the following winter.

“But if sir John Fenwick did not slander king James, they at this time proposed a shorter and more infallible way, by assassinating the king; for he said, that some came over from France about this time, who assured their party, and himself in particular, that a commission was coming over, signed by king James, which they affirmed they had seen, warranting them to attack the king’s person. This, it is true, was not yet arrived; but some affirmed, they had seen it, and that it was trusted to one, who was on his way hither; therefore, since the king was so near going over to Holland, that he would probably be

that he had his majesty's leave to lay those papers before the House; and if the House pleased, he would bring them up to the table.

And accordingly (the House shewing a general inclination for it) they were brought up to the table and read (being the account he gave of the last plot under his own hand, and his examination taken by Mr. Vernon, afterwards upon his trial produced); and after the same was read, the House ordered, that sir John Fenwick should be brought immediately before them; and that no person should in the mean time speak with him, or give or receive any paper from him. And the House further ordered that the, lord Cutts, sir Henry Hobart, and Mr. Norris, three of their members, should see their order executed, and in the mean time adjourned to the afternoon.

About five o'clock in the afternoon, sir John Fenwick was brought with a strong guard (which the lord Cutts had taken care for) to the House; and being brought to the bar, Mr. Speaker spake to him thus:

Mr. Speaker. Sir John Fenwick, the House understands that you have shewed some inclinations to make a discovery of the designs and practices of the enemies of the government; you have now an opportunity to do it; and the House require it from you, that you make a full and ample discovery of all you know of that matter.

Sir John Fenwick. Mr. Speaker, I suppose the House is not ignorant of my circumstances. I am indicted of high-treason, and have been arraigned: what I have done to serve the king and nation his majesty knows; it hath been communicated to him by his privy council. I do not know but what I say may hurt myself; and therefore I desire that I may have some security for myself, and I am willing to tell the full of all I know.

Mr. Speaker. Sir, if you please to withdraw

gone before the commission could be in England; it was debated among the Jacobites, whether they ought not to take the first opportunity to execute this commission, even though they had it not in their hands: It was resolved to do it; and a day was set for it; but as Fenwick said, he broke the design; and sent them word, that he would discover it, if they would not promise to give over the thoughts of it; and upon this reason, he believed, he was not let into the secret the following winter. This his lady told me from him, as an article of merit to obtain his pardon: but he had trusted their word very easily, it seems, since he gave the king no warning to be on his guard; and the two witnesses, whom he said he could produce to vouch this, were then under prosecution, and outlawed: so that the proof was not at hand, and the warning had not been given, as it ought to have been. But of all this the government knew nothing, and suspected nothing at this time." Burnet.

for the present, the House will send you their pleasure.

[Sir John Fenwick withdrew, and was called in again.]

Mr. Speaker (Mr. Paul Foley). Sir John Fenwick, since you withdrew, the House have considered of what you said at the bar. They do not think what you said is an answer to what they require; they do expect a full and candid confession from you of what you know; and they think that the best way for you to obtain the favour of the House is to deal ingenuously with them.

Sir John Fenwick. Sir, I am in the hands of the law, and I would not do any thing that his majesty might be angry with; for I do not know it is with his majesty's consent: I have acquainted him fully with all I know of the matter; this is all the account I can give you at this time. It is a dangerous point that I am under; I know not but I may come to my trial in a few days: and what I may say, may rise up against me in a court of judicature: I humbly propose it to the house, if they do not think it a hard case for me to make any confession here, when his majesty hath all I know, I shall be very ready to do what this honourable House pleases to command me; but I desire this House will consider my circumstances. I would not offend the king, nor offend this House.

Thereupon, Mr. Speaker again spoke to him to withdraw: and being withdrawn, the House debated, whether they should acquaint him with their having those Papers of Information. But they did not think fit to do it for this reason, because they thought these Papers were a contrivance, and made by others for him; and that the best way to get the truth out of him, would be for him to tell his own story. Besides, if the House should let him know they had those Papers, he would only refer to those Papers, as he had lately done, when he was examined by the king and council.

It was also debated, whether there should be any threatening words used towards him; but they thought that not proper; for his confession ought to be free and natural. It was also debated, whether they should take notice of his majesty's consent; but that was not thought fit, being thought derogatory to the privileges of the House. So the House ordered him to be called in again; and Mr. Speaker delivered the sense of the House to him in these words:

[Sir John Fenwick at the Bar.]

Mr. Speaker. Sir John Fenwick, the House has considered of what you have said, to excuse your making a discovery of your knowledge of the designs and practices of the enemies of the government; and they think what you stand upon is only an excuse; they think you have no reason to apprehend the king should be angry with you for making any discovery to this House, this being the proper place to enquire of all things that do relate to the king

and government, especially his majesty's safety; and you ought to discover to them what you know. As to what you stand upon, that you should not be prejudiced by what you discover here, I am commanded to tell you, they do take notice by what you have said here, that you have already, notwithstanding what you say, discovered it to the king and council: and they command me to tell you, that you have no reason at all to apprehend, that you shall suffer any thing if you make a full and free discovery here; no man that ever did so, and dealt candidly with this House, ever did: it is in your power to deserve the favour of the House; it is required by the House, that you make a discovery; and this is the last time that you are like to be asked to do it.

Sir J. Fenwick. Mr. Speaker, I know not what answer to make to this House; I would not willingly offend it; what I have informed the king of is a great deal; and a man would have some little time to recollect himself; and I have been kept a very close prisoner, and had no conveniency of pen, ink, and paper; it is hard to remember just of a sudden; and I would willingly be secure his majesty will not be angry with me. I was in hopes that his majesty would have informed the House himself; he hath all that I know; my circumstances are hard, I am in danger every day to be tried, and I desire to be secured, that what I say shall not rise up in judgment against me; it is hard to make me accuse myself under these circumstances, and very hard to put me on it now.

Mr. Speaker. As to what you say relating to the fear of his majesty's displeasure, and the other excuse, you have had your answer already. As to what you say relating to time, if you will now declare what you know and remember, the House will take it into consideration, whether they will give you farther time to make up the rest.

Sir J. Fenwick. Sir, his majesty hath all exactly; it is impossible for me to inform you of it without accusing myself: I do not really know what to ask but a little time, if they would please to give it me.

Mr. Speaker. Sir, you know already what the House requires of you.

Sir J. Fenwick. I do: but it is no excuse that I have made: what I have told is truth, to the best of my knowledge: I am not very good at speaking; and if I might have a little time, I shall do what they please to command me.

Mr. Speaker. If that be all you have to say, if you please to withdraw, you shall know the pleasure of the House.

(*Sir John Fenwick withdraws. Is called in again.*)

Mr. Speaker. Sir John Fenwick, this House have considered what you stood upon when you were here last, that your memory was bad, and that you desired time; but the House think it a matter of great moment to the king and the whole nation, that those that are their enemies

should be discovered as soon as possible; and this being a matter within your knowledge, the House do not think fit to give you time; but if they find, by your discovery, that you deal candidly and ingenuously with them, and have told them as much as you know upon your memory, they will consider of your request of giving you time for the rest.

Sir J. Fenwick. When first I spake to the privy-counsellor, I proposed it to him, whether I might have a pardon without being an evidence against any man; and in that case I would serve the king so as to tell him all that I knew. It was upon honour that I did it to him, and he took the words in writing from me, and sent them to the king in Flanders. The king's answer was, That he made no objection as to my being an evidence, nor his giving me a pardon; but that I could expect no pardon, till he knew what I could say: upon that I was encouraged to do what I did for his majesty's service; and have found in all my business since, whatever I do or say, the answer is, it is not satisfactory; and I am where I was. When this was done, there was a message sent to me from the lords justices, That this was not satisfactory, and I must tell all I know: now, when a man hath told all he knows, and this must still be the answer, it is very hard. The king's answer was, That I should more fully make good what I had said. Sir, I did afterwards explain what I had informed that honourable person, and still it was not satisfactory. I hope I shall not find this from this honourable House: I am upon my life, and I hope this House will consider of it: I know this House is good security if I had it; but till I have it, I am under these circumstances, and I may at last be told all is not satisfactory: I desire the House will please to consider of it.

Mr. Speaker. Sir, you know the pleasure of the House; you know what they require of you.

Sir J. Fenwick. I am very unwilling to offend the House; but these are very hard circumstances, to be told, when I have done all I can, it is not satisfactory.

Mr. Speaker. Sir, you know what the House does expect; you must either give them satisfaction in it, or withdraw. (Accordingly he withdrew.) And a motion was made for leave to bring in a Bill to attaint sir John Fenwick of high-treason; and after a debate thereupon, the House divided. Yeas, 179. Noes, 61. So it passed in the affirmative.

November 9. The Bill was presented to the House; and after a long debate, the question was put for the second reading of it; whereupon the House divided. Yeas, 196. Noes, 104. So it passed in the affirmative, and Friday morning was appointed for it. The same day the House ordered, That sir John Fenwick should have a copy of the Order for reading the Bill the second time, and a copy of the Bill; and that he should be allowed pen, ink,

and paper. And further ordered, That Mr. Attorney General and Mr. Solicitor General should prepare and produce the evidence against him on Friday morning.

And Mr. Speaker this day acquainted the House, that he had received a letter from Mr. Fuller, which he thought fit to acquaint the House with; but upon a question for reading of it, it passed by a very great majority in the negative; so that there was no division upon that matter, but the letter was writ in the words following:

"Sir;

"I presume that no person whatever, in the interest of the present government, hath been more actually engaged with sir John Fenwick than myself, it being my fortune several times to bring letters to him from the late king and queen at St. Germain's, and to carry his answers: I have also been with him at private consultations of the late king's adherents, as my Informations assert; so that if I may be serviceable to the detecting his treasons, I shall be very ready to serve the government, and to demonstrate my integrity. I am, Sir, &c.

"W. FULLER."

November 10. Sir John Fenwick sent the Speaker a Letter in these words:

"Sir;

Newgate, Nov. 10.

"I would have addressed myself in the humblest manner I could to the honourable House of Commons, from whom I received a copy of a Bill against me with their order; but my keeper will not carry any paper from me but to yourself, to whom I durst not presume to send a petition to deliver for me. Therefore I beg the favour you will please to acquaint the House, that it is my humble petition to them, That they would give leave for my counsel, sir Francis Pemberton, sir Thomas Powis, and sir Bartholomew Shower, to come to me with my solicitor, Christopher Dighton, to advise with alone. The keeper will not so much as let me send the copy of the bill and order to my solicitor, so it is of no use to me: I humbly beg they will please to give order, that I may have all assistance that is necessary for me, and that you will pardon this trouble from,

"Sir, your's, &c.

"JOHN FENWICK."

Upon this Letter they did readily order that he should be allowed two counsel to make his defence, and that they might be alone with him; and after some debate, did give leave that he might have the solicitor he desired, though it was said, his solicitor was a very great Jacobite; and it was insinuated, that he was suspected to be concerned in the escape of Goodman; but it was also said, that he had been made use of as his solicitor to prepare for his Trial, and before that, in other matters; and so that it might not be thought that there was any hardship upon him, in that respect, the House thought fit to allow Mr. Dighton to be his solicitor.

November 12. A Petition was presented from sir John Fenwick, as follows:

To the Hon. the Knights, Citizens, and Burgeses in Parliament assembled: The humble Petition of Sir John Fenwick, bart.

"Sheweth,

"That there being a Bill of Attainder brought into this House for the attainting of your petitioner of High-Treason, and your petitioner is advised, that there are many weighty reasons to be offered against the said bill: Your petitioner therefore most humbly prays, that your honours will be pleased to hear him by his counsel against the passing of the said bill at the bar of this honourable House; and to appoint such time for the same, as to your honours shall seem meet. And your petitioner shall ever pray, &c. "J. FENWICK."

Which prayer of his Petition was granted.

Nov. 13. Sir John Fenwick was brought to the House, by order, from the prison of Newgate; and there being a very great company of strangers, both in the Lobby and Speaker's Chamber; and the House being full of members, to prevent the inconvenience that such a number of people crowding in might occasion, the Lobby was ordered to be cleared of all persons that were not concerned, and also the Speaker's Chamber, and that the back-door of the same should be locked, and the key laid upon the table: but it having been said, that the Lords did admit the members of this House to hear their debates, there was private intimation given the serjeant to let them remain in the Speaker's Chamber, when others were removed.

Then sir John Fenwick was ordered to be brought to the bar: but it being a proceeding of that nature, that none of the ancientest members could give a precedent, it was necessary to settle some preliminaries; and the first question that was moved, was, Whether the Mace ought to lie upon the table when sir J. F. was in the House, or whether the serjeant ought not to stand by him with it at the bar?

Mr. Smith. Sir John Fenwick being a prisoner, the mace ought to be at the bar, and then no member can speak.

Mr. Boyle. This hearing, of any thing I can think of, is most like the hearing of an election; and then the mace is upon the table, and every one has liberty to speak and ask questions.

Chancellor of the Exchequer. (Mr. Charles Montague.) The Mace ought not to be upon the table, because he is a prisoner: the sheriffs of London can't have him in custody here, and so they deliver him into custody of the serjeant.

Mr. J. Howe. That argument would be good, if he could not be in custody of the serjeant unless he had the mace in his hand.

Mr. Brotherton. The mace ought to be upon the table, because the bill is to be read.

Mr. Chr. Musgrave. The mace ought to be

upon the table. Never any bill was read but the mace was upon the table.

Col. Granville. If the mace be upon the table it would be a great hardship to the members that they cannot speak, and a great hardship upon the prisoner that he cannot ask any questions. My lord Torrington was brought prisoner from the Tower, and upon account of his quality the house did not let him go to the bar: but while he was in the house, the mace was upon the table, and he gave an account of the whole campaign; and every body was at liberty to ask what questions they pleased.

Attorney General. (Sir Thomas Trevor.) The matter is very new: and I think it is necessary you resolve upon the method before you call in the counsel, that you may acquaint the counsel with it; I think it not proper that the mace should be upon the table, because he is a prisoner; though it may not be necessary that the serjeant should have it upon his shoulders all the time, but he may ease himself. I believe you will ask sir J. F. what he has to say, but no questions to make him accuse himself: and I humbly propose it to you, that after the counsel is called in, they may open the nature of the evidence against sir J. F.; and then, whether you will permit them to go on, or they shall withdraw, and the house will consider what questions shall be asked.

Col. Mordaunt. I hope the questions will be taken down upon a paper by the Speaker, and then read to us, that we may see if they be right, and so asked by the Speaker.

Sir W. Williams. If the mace is not upon the table, our mouths are muzzled: we are in the nature of judges; and shall we pass a vote that the judges shall not ask any questions?

Sir Tho. Dyke. I cannot be informed without asking of questions: I know not whether you are a House without it, without having the mace upon the table. And will you act in your highest capacity without being a House? I do not know how it was when the lord Torrington was here; but when the duke of Leeds was here, the mace was upon the table.

Mr. Boyle. I wish you had appointed a committee to have settled the preliminaries, and that the bill had not been brought in at all; what they labour, as a matter to avoid delay, may occasion more. For though, when you carry the mace to the table, no member should have the liberty to speak, yet any member hath liberty to desire that the counsel may withdraw, and they must withdraw, and the mace must be brought upon the table.

Chanc. of Excheq. That gentleman is certainly in the right: but I think the mace must not be upon the table till when the prisoner is here; and I think the questions must be asked by the chair. The longest examinations that I remember was of the admiralty, and then the questions were asked by the chair. For the instance of my lord Torrington, it is true, he had not the mace with him, but he came at his own request, he came to give you an account of his proceedings; and in that case not a

question was asked by any member; any member hath liberty to propose any question, but it must be asked by the chair.

Afterwards the question was put, and it passed, That sir John Fenwick should stand with the mace at the bar.

Then a question arose about reading of the Bill: some gentlemen said, it could not be read when the counsel was present, for the mace would be off the table; (and they seemed to be under a difficulty by having passed the last question;) others said, it was not necessary to read it whilst sir J. F. was present, he having had a copy of it; but at last it was thought reasonable, it being in the nature of a charge upon him, that it should be read to him when present with his counsel; and it was said, it was done so in the case of indictments, though copies were delivered to them: but it should be read only as a matter of form, as a charge to which he was to answer; but it could not be reckoned a second reading, according to the rules of the House, the mace being off the table; and therefore it should be read again when the counsel and he was withdrawn. And it was said, that the Journals did take notice, that in some cases, as in the case of an adjourned debate, some bills had been read four times; and so it was agreed, and that difficulty was solved.

And the serjeant took the mace, and brought sir John Fenwick to the bar; and Counsel was admitted for him, and for the bill, viz. Mr. Serjeant Gould, king's serjeant, and Mr. Recorder Lovel, likewise king's serjeant. And sir Thomas Powis, and sir Bartholomew Shower, for sir John Fenwick.

And Mr. Speaker opened the matter thus:

Mr. Speaker. Sir John Fenwick, the house have received Information that you have been in a horrid conspiracy against the life of his majesty, and for bringing in a French force to invade this kingdom, that you have been indicted thereof; and they have considered the nature of the crime with which you stand charged, and how destructive it would have been (if it had succeeded) to the very being of this kingdom; and therefore, that you may not go unpunished, if you are guilty, have ordered a bill to be brought into this house to attain you for high-treason, which hath been once read, and will be now read to you at the bar; and then you will hear the evidence against you, and have liberty to make your defence: and though you cannot claim any right thereto, this house (to shew how ready they are to favour you, in giving you any reasonable help to make your defence) do allow you counsel to assist you therein; and having granted you this their favour, they do expect that you will make a good use of it. I am likewise to acquaint those that are your counsel, that this house do reckon their own prudence will so guide them, as not to give any just offence to this house; and that they will not be allowed to question

the power of parliaments to pass bills of attainder, when they judge it requisite; of which this house is more proper to judge than any private person, and therefore they will not allow you to debate that point. Let the Bill be read.*

[Clerk of the House of Commons reads.]

'Whereas sir John Fenwick, bart. was, upon the oaths of George Porter, esq. and Cordel Goodman, gent. at the Sessions of Oyer and Terminer held for the city of London, on the 28th day of May, 1696, indicted of High Treason, in compassing and imagining the death and destruction of his majesty, and adhering to his enemies, by consulting and agreeing with several persons (whereof some have been already attainted, and others not yet brought to their trial for the said treason) at several meetings, to send Robert Charnock, since attainted and executed for High Treason, in conspiring to assassinate his majesty's

* It is the statute 8 Will. 3, c. 4. The next act in the statute book is, "An Act to attain such of the persons concerned in the late horrid Conspiracy to assassinate his majesty's royal person, who are fled from justice, unless they render themselves to justice, and for continuing several others of the said conspirators in custody." By which it was enacted, That if sir George Barclay, knt. — Johnson, alias Harrison, — Durant, alias Durance, Michael Hare, major George Holmes, Philip Hanford, alias Browne, Richard Richardson, John Maxwell, — Bryerly, — Plowden, — Hungate, shall not on or before the 25th day of March A. D. 1697, render themselves to the Chief Justice of the King's Bench, or one of the Secretaries of State in order to their trials for treason then such of them as shall not so render him or themselves, as aforesaid, shall stand and be convicted and attainted, and are hereby convicted and attainted of high treason, and shall suffer the pains of death, and incur all forfeitures, penalties and disabilities, as traitors convicted and attainted of high treason. And it was farther enacted, That Counter, John Bernardi, Robert Cassels, Robert Meldrum, James Chambers, and Robert Blackbourne, who had been committed, and were in custody in Newgate for the said conspiracy and treason: and such other persons who shall hereafter render themselves, or shall be apprehended, and against whom there shall be evidence upon oath of their being concerned in the said barbarous and bloody conspiracy of assassinating the person of his sacred majesty, shall be detained and kept in custody without bail or mainprize, until the 1st day of January, which shall be in the year of our Lord, one thousand six hundred ninety seven, unless they shall be sooner bailed by order of council, signed by six of his majesty's most honourable privy council. See the next Case.

See Observations on the forms of Bills of Attainder cited, vol. 11, p. 1040.

'sacred person (whom God long preserve) to the late king James in France, to invite and encourage the French king to invade this kingdom with an armed force, by promising to join with and assist him with men and arms upon such invasion. And whereas the said sir John Fenwick did obtain his majesty's favour to have his trial delayed from time to time, upon his repeated promises of making an ingenuous and full confession of his knowledge of any design or conspiracy against his majesty's person or government, and of the persons therein concerned. And whereas he has so far abused his majesty's great clemency and indulgence therein, that, instead of making such confession he hath contrived and formed false and scandalous papers as his informations, reflecting on the fidelity of several noble peers, divers members of the House of Commons, and others, only by hearsay; and contriving therein to undermine the government, and create jealousies between the king and his subjects, and to stifle the real conspiracy. And whereas Cordel Goodman, one of the witnesses against the said sir John Fenwick, to prove the said treason, lately and since the several times appointed for the trial of the said sir John Fenwick, at one of which times the said sir John Fenwick had been accordingly tried, had it not been for the expectation of the said discoveries so often promised, is withdrawn; so that the said Cordel Goodman cannot be had to give evidence upon any trial. Be it enacted by the king's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this parliament assembled, and by the authority of the same, That the said sir John Fenwick is hereby convicted and attainted of High Treason, and shall suffer the pains of death, and incur all forfeitures as a person attainted of High Treason.'

Mr. Speaker. Mr. Serjeant Gould, the house expects from you, and Mr. Serjeant Lovel, that you open the evidence you have to prove the suggestions of the Bill.

Serj. Gould. Mr. Speaker, we are here, in obedience to your commands, to give an account of the charge, and likewise of the evidence of the fact, that is against this gentleman, sir John Fenwick. The charge against sir J. F. is for high treason, and high treason of the highest degree; it is no less than a design of deposing the king, and subverting the government, and subjecting it to a French, arbitrary, and slavish power. It further charges, that in prosecution of this conspiracy, he hath met, together with several others, who have consulted, consented, and agreed together to bring in a French army upon us; and in order to that, as a particular overt act, it is charged, that they contrived to send one to the late king James to bring in a French power upon us. It is charged likewise, that he conspired to levy war upon us, and for that purpose did pro-

vide pistols, and other warlike arms. This I take to be the substance of the charge, as laid in the indictment.—Now, may it please you, Mr. Speaker, as for the evidence of the fact charged and alledged in this indictment: It is no secret certainly to any at this time of day (after so many trials, so many convictions, so many attainders), that for some years last past there hath been a wicked conspiracy to bring in a French power upon us, to subvert this good government, and to depose the king; but God Almighty, by special providence, hath always prevented and disappointed them. We know, ever since the business of La Hogue (in which, even by a miracle, God disappointed them) they have been still restless, and have been industrious to set up again this design; and for this have plotted to bring in a French power, and have not had any regard to the king's mercy shewed to them, and that in passing several acts of parliament, but have still persisted in the same designs.—As to the charge upon this gentleman at the bar, we shall shew you that in time: in the year 1694, for several months there was a conspiracy carried on, but did not take effect; afterwards, in time, I think the beginning of June, or latter end of May, there were several consults, or meetings, at the King's Head tavern at the upper end of Leadenhall street, where this gentleman that now stands charged at the bar was present; there were several gentlemen, and among the rest (as it hath and will appear upon evidence) there was sir J. F. my lord Montgomery, and several others, whereof captain Porter and Goodman were there likewise present: It was then proposed, that one Charnock (since executed, and agreed upon by all to be present) should go over into France to the late king James, to communicate to him their resolution and sincerity in being serviceable to him in levying war here to depose the king, and subvert the government; who was to intercede with the French king, so that there might be forces sent from France. But after this, Charnock (present still this gentleman) comes and proposes this thing again, and tried whether they were sincere and real in their former resolutions. To which they all replied, and did agree and assent, that it should be done, and they were very zealous in the matter, and the forces were at that time proposed. And what was that? Why, truly, no less than 8,000 foot, and 2,000 dragoons of French, with an assurance of 2,000 horse from this country. Charnock did go into France, and did communicate this matter; and after he had communicated this matter he came back, and brought answer, that king James had endeavoured to answer their expectations, but at that time the French king could not spare his forces; but however, returned his thanks to them.

This passed on till towards Christmas last; then comes over sir George Barclay upon this expedition, and there was a commission prepared for that purpose: and as to one part, he brought along with him a detachment of some

of king James's guards, who was to assassinate the king. The next part was for raising a rebellion; now that fell to sir John Fenwick's part. As to the assassinating part, you have had several examples made already. This we have evidence to prove; and if we prove this matter as we have opened it, then I think there is no person whatsoever, but will agree that this is high-treason in the highest degree. Now, Sir, here stands our matter: Here was an indictment found according to the law you made last sessions of parliament, by two witnesses to one species of treason against sir J. F.; we have one of these witnesses here *viva voce*: But sir J. F. hath protracted his trial by frequent assurances of making a discovery, which hath terminated in what you have already mentioned in your bill; by means of which, sir J. F. hath not been tried; whereas he had been tried in course, without these applications, and found guilty: but now he hath had all this time, that Goodman is withdrawn is plain, and we think (but that we must leave to the judgment of this honourable House) may be reasonably supposed, by contrivance, to take off this prosecution of sir John Fenwick. For why? The inference is from a fact that we shall prove to this honourable house: there hath been the like attempt upon captain Porter, but captain Porter hath been more stedfast; he has been so resolved, that he stood his ground; and, to speak the truth, notwithstanding he hath been highly attempted: for we shall prove to you, that one Clancy comes to captain Porter, and tempts him to withdraw into France with assurance of a pardon, and he hath 300*l.* paid him in hand, and 300*l.* more he was to be paid when he should come into France, to be remitted by bills of exchange: besides, he was to have 300*l.* a year; 100*l.* from my lord Aylesbury, 100*l.* from my lord Montgomery, and the other 100*l.* a year from sir John Fenwick, and this to be an annuity during his life: and thus far we suspect sir John Fenwick may be concerned; for his lady came (he did not come personally, but his lady did) and gave her honour and assurance, that it should be all performed, and much more if he would withdraw himself. Captain Porter presently made a discovery of this, and takes the 300*l.* which was paid down; upon this it hath been so far proceeded, that Clancy hath been indicted for it, and convicted, and hath received judgment, and I suppose there hath been execution: we have the record of all these proceedings.

We have this circumstance farther in the case, (which it is my duty to open to this House) to shew what labour there hath been to stifle the truth of the fact, upon taking of sir John Fenwick: there was one Webber taken with him, and he slid a letter into one Fowl's hand, and this was to be sent to my lady Fenwick: and what is the import of this letter? the import of it is (they could not prevail with Porter as I opened just now, therefore), you must influence the jury, get two or three stout jurymen to starve the rest, for we have nothing

else to depend upon: these things we shall humbly offer to prove, according to our duty, and according to the order of this House, and then leave sir J. F. to make his defence.

Mr. Recorder. Sir, in what I say, I shall endeavour, as I ought to do, to pursue the method of this bill: and first I will take notice, that it is the pleasure and direction of this House, that we should attend this House this day, to produce the evidence against sir John Fenwick.

The crime for which he stands indicted is high-treason: I presume the learned gentlemen on the other side will not deny, but that the compassing and conspiring the death and destruction of the king is high-treason; and that to endeavour it, or shew it by an overt-act, to cause a foreign power to invade the realm, or to hold correspondence, or adhere to the king's enemies, is likewise high-treason; and therefore I shall not trouble the House to say any thing to it one way or another, because I believe they will not deny it.

In the next place, the bill does take notice that sir J. F. hath been indicted at the Old-Bailey, in May 1696. Sir, by the law of this House of Parliament made last sessions, no man ought to be indicted of high treason without two witnessess; pursuant to that law, sir J. F. hath been indicted upon the oaths of two witnesses, captain Porter (whom we have here) and Goodman (whom we then had, and he did swear), and upon the evidence of these two witnesses the jury found the bill.

We have this farther matter: for before the time the bill was presented to the Grand-jury; there was an examination taken both of Porter and Goodman in writing, and I think it was before a worthy member of this House, to whom I appeal in this case, and in those informations (if I mistake not,) the same informations they gave against sir John Fenwick as they gave against Mr. Cook; and upon the trial of Cook they were sworn, and did justify and verify the informations they gave before: and then, if you please, we shall call witnesses to prove, that upon the trial of Cook, Porter and Goodman gave that evidence that did equally affect sir John Fenwick (for he was then withdrawn, and could not be taken); and the evidence was, That Cook, sir John Fenwick, with my lord Aylesbury, my lord Montgomery, sir William Parkyns, sir John Friend, Charnock, Goodman and Porter, were all together at a consult especially appointed for the carrying on these traitorous purposes; they gave the court a great deal of trouble, whether Goodman was there at that time, and they did call some servants of the house that did prevaricate, but the court was thoroughly satisfied; and it hath appeared more plainly since, that they did abuse the justice of the court, for that Goodman was undoubtedly there. Sir, Cook upon the trial was convicted, and had judgment of death. And, Sir, he is attainted; but it does not become me to say, why he is not executed: his Majesty, no doubt, hath great reason for it. But this I

may say, being present at the trial, nothing was made more plain; and sir J. F. appeared to be equally concerned.

To shew Sir John Fenwick is guilty, I crave leave to add this, he did withdraw himself, and fled, and was enquired after with diligence; and at last he was found. We shall make good all we have begun with, by evidence (we hope) to the satisfaction of this House.

Serj. Gould. If you please, Mr. Baker, that is solicitor for the king in this case, does attend at the door with all his papers; we desire that he may be let in.

Mr. Speaker. Serjeant, call in Mr. Baker. [Which was done.]

Mr. Speaker. What do you call Mr. Baker for?

Serj. Gould. To give an account of this indictment, for we have a true copy from the record.

Sir Thomas Powis. Mr. Speaker, since I am here assigned counsel for the prisoner, by the allowance of this honourable house, upon his application, without my privity, I crave leave humbly to acquaint you, in behalf of my client: I take it for granted, that he is, I am sure we that are counsel for him are, a little surprised in what the king's counsel are going about; for in truth, we were not aware, nor do we find that any notice was given to the gentleman at the bar, that there would be any proceeding against him by examining of witnesses, or giving of evidence; he had (it seems) the vote of the house sent to him, and likewise a copy of the bill; but I could not understand that the house had given notice that he should be prepared by witnesses, if he had any, or be at liberty to produce them. Nor was there the least notice to him, that there would be a proceeding against him by way of giving evidence. He did, as I find, humbly apply himself, by petition, that he might be heard by counsel against the passing of the bill; and I shall very carefully observe those directions you gave us, which I hope we should not have stood in need of, but have behaved ourselves as becomes us, and not have drawn in question the power of parliaments: I never had a thought to do such a thing; but this I humbly lay before you for your consideration, whether, without any sort of notice, that I perceive, he had from this house, to make his defence to any evidence, and consequently there could be no need of witnesses on his behalf: whether you will so proceed, unless he had had forewarning to provide himself otherwise than by the printed votes, which (I suppose) he had no opportunity of seeing; and whether, within the words you are pleased to acquaint us with, we may be heard as to the reasonableness of this proceeding, that by and bye we must crave leave to speak unto.

Mr. Speaker. Sir John Fenwick did petition, it is true, that he might be heard by counsel at the bar against passing the bill; but he likewise petitioned for counsel and a solicitor; and

the answer from the house was, that he should be allowed counsel to make his defence.

Sir Thomas Powis. Yes, Sir, I have seen the order of the house; and truly there did not any thing occur from it to me, that it should be expected that he should produce witnesses; for he praying that he might be heard against passing of the bill, and the order of the house being that he might have counsel for making his defence, I did not apprehend that it impowered us so to be prepared as to bring witnesses, especially there being no notice given to him to bring witnesses, nor no way for him to compel them to come here.

Sir Bart. Shower. Mr. Speaker, we do acknowledge that we are so far ready as to offer some considerations against the reasonableness of the bill, not against such bill in general, but against sir John Fenwick in particular, and upon those suggestions in the bill; but in respect of his making his defence against matter of fact, and to answer the charge of the bar, we are not ready. The first time we had notice that sir John Fenwick should attend, or be brought to the bar, was last night at nine or ten o'clock at night; [Note, This order was made the day before at the rising of the House.] it is true, the order said the king's counsel should produce evidence for the bill upon this day; but it was not ordered that there should be evidence produced for sir John Fenwick, or at that time that he should be personally present: we are ready, with submission, to offer what we have to say against the passing of this bill, upon the suggestions made in the bill, as sir John Fenwick's case is there represented; but to answer them in respect of truth or falsehood, that we are not prepared to do: whether you will hear them to that, before you have heard us, in the other particular, that we submit to you.

Mr. Speaker. Sir, you had notice on Wednesday last, that sir John Fenwick should have liberty to make his defence by counsel; and if you had doubted whether he should be admitted to do it by witnesses, you might have applied to have known the pleasure of the House: but if that be what you stand upon, if you will withdraw, you shall know the pleasure of the House.

Serj. Gould. I must confess we depended on it, and expected no other thing than the bar evidence. This was our order, and I apprehended that the petition meant the same thing: for, as I remember, it was an order likewise that the king's counsel should produce the king's evidence: what reason was there for that evidence, unless sir John was to apply himself to answer it?

Mr. Recorder. I beg your leave to observe with what reason the counsel on the other side make this objection; when it is the import of this bill, that sir John Fenwick is guilty of high-treason: and your order says, they are to be heard against the bill, that is to say, they are to be heard against the high-treason charged upon him by this bill. Therefore the House did direct us to produce the evidence against

sir John Fenwick, to verify the suggestions of this bill: and so I cannot apprehend what can be more proper at this time, but to prove the fact against sir John Fenwick; and it is their business to defend it as well as they can.

Sir Thomas Powis. What was said by the learned gentleman on the other side, I hope, will be some reason why we might be of opinion, that we should not have occasion to produce witnesses: and the truth is, this bill does no where so much as say, sir John Fenwick is guilty of high treason; and therefore Mr. Recorder was under some mistake, when he said the bill charged that he was guilty. The bill does not any where make such an allegation; there is nothing but a recital that he was indicted for such a treason: and then it recites, that whereas he had protracted his trial by such means, and Goodman had withdrawn himself; (but it does not say with his privity;) and then follows the enacting part; Be it enacted, &c. So that there is no such thing as any allegation that he is guilty, whereby we could imagine that that was the fact or question between us. We now offer these things humbly to you, and shall readily submit to what you think fit to do in it.

Mr. Recorder. Sir Thomas Powis says, that sir John Fenwick is not charged with his doing any act, or being guilty of high-treason; but the bill takes notice that he stands indicted for it: then it will be enough for us to prove that he stands indicted, unless the House think fit to let us go into the evidence of his being guilty.

Sir B. Shower. We do not oppose the producing evidence to prove the suggestions of the bill, and the recitals of the bill specified: but if they attempt to prove him actually guilty, by living witnesses, as they have opened it here, that we humbly beg leave to oppose. But if they think fit to prove the suggestions of the bill, that there was an indictment, that there were witnesses sworn, and one is withdrawn, and the promises of making confession, and his prevaricating in that matter, we are ready to make our defence to that.

Mr. Speaker. Gentlemen, you must withdraw before you have the directions of the House.

Accordingly sir John Fenwick, and the Counsel of both sides, withdraw. And being withdrawn,

Mr. Speaker. Gentlemen, you have heard what is stood upon by the Counsel for sir John Fenwick: they say if you call only Evidence to prove the suggestions of the Bill, they are ready to answer them; but if you call any evidence to prove sir John Fenwick guilty of a Conspiracy, by living witnesses, they pretend they are not ready, and say, They did not know they should be allowed liberty to produce any Witnesses.

Sir T. Littleton. The Counsel could not think that the Bill should set forth that sir J. F. was indicted, but that the house would know by what means; and that Goodman was gone

away, and we should not enquire by what means. What are the objections by the counsel against the Bill? Say they, we are ready to give reasons against the bill; they do not say down-right against your jurisdiction: but, say they, we are ready to shew it is not reasonable in this case, as stand circumstances, to pass this Bill; Sir John's Petition was to be heard down-right against the Bill. If that was your intention to hear him to that and to that only, I conceive you would not have worded your Answer as you did: you ordered him Counsel to make his Defence: and at the same time ordered the king's counsel to produce the Evidence: How could they understand it, but to make Defence to the Evidence? It may be they have a mind to have another fee: Whether you will think fit, in the circumstances you stand, to give them further time, I do not know; But the circumstances of the kingdom, and the king's life, must be considered as well as sir J. F. What is the meaning that they are not prepared? I suppose it is to have further time; but I think your order is so plainly worded, that they could not ignorantly mistake it.

Lord Norryes. I rise up to the matter of fact: that gentleman tells you your order is plainly worded; it is so, if they had timely notice of it: but the counsel at the bar tell you, they had no notice of this order till ten o'clock last night.

Mr. Speaker. That noble lord does mistake; for that which they say they had no notice of till last night, was, that sir J. F. should be brought hither; but the notice that he should be heard by his counsel for his Defence was sent him the day before.

Lord Norryes. This very order, for his majesty's counsel to produce the Evidence, was made but upon Thursday.

Mr. Speaker. Then I mistake. But the order that was made upon his Petition, I sent away immediately: but the order they mean, I suppose, is that for the bringing him hither.

Mr. Cooper. Say the counsel for sir J. F. We come prepared to make Defence to every thing charged in the preamble of the Bill, but what is not charged, we do not come prepared to make defence to. Now, they conceive the fact of High-Treason is not charged upon him by the Bill; and if true, it is of great weight; but as it is, it is none: for first, it is plain the preamble recites, that he was indicted for high-treason by the grand jury; that is a charge of high-treason within the bill; for it says, he was charged by the oaths of his country upon the oaths of two witnesses; and there is the very overt-act recited in the preamble of the bill. Now, allowing this its due weight, can any one think, that sits here as a private judge, that the high-treason thus recited, as found by the grand jury, was no part of his charge? The very nature of the bill speaks; for could any one think, that you would ground a Bill of Attainder upon a suggestion, that he being indicted of high-treason, had spirited away one of the king's evidence, or for giving false in-

formation? So that this is trifling with the house, with submission.

Sir R. Temple. Can any body say any thing of the intention of the house, when it is reduced into a Bill? Is it not the bill that he is to make his defence to? and the gentleman that spake, says that nobody could think otherwise: Why, sir, nobody is to think otherwise than the Bill states it. Now the thing before you is, Whether upon the suggestions of this Bill it is fit for you to pass it? The case of Mortimer was, That he made his escape, being under an Indictment of High-Treason; and it came before the house, Whether, upon the statute of 25 E. 3rd, it was High-Treason? But they did not debate the fact. Now you have brought a bill here, and all the ground is, that he was indicted for high-treason, had thus and thus prevaricated, and delayed his Trial upon promises of confession; and in conclusion, one of the witnesses is withdrawn: Sir, no man is to make his Defence but to what is in the bill; nor can you examine to any thing but what is suggested in the bill. If you had put the issue upon the guilt of sir J. F., he must have a fair trial in some place, and that he cannot have here upon oath; for upon all Bills of Attainders they have had a fair trial above.

Mr. Smith. I always thought when a Bill of Attainder was to pass through this house, that every man was concerned to hear what Evidence he could, to make it appear whether the person was guilty of the facts that were alledged against him to condemn him for; and I take it, the principal thing to be considered is, whether he be guilty of such a crime as deserves such a punishment; so that, I take it, the question now is, Whether sir J. F. hath had that notice to produce his evidence, as is convenient? For I think we should lose time to let counsel ramble upon the reasonableness of our proceedings; the question is, Whether he is guilty of the fact? Sir, I can never think the counsel could understand your order, when it says, to make his Defence, but it must be to the fact upon which he is to be condemned. You have already determined that point, as to his prevaricating, but that is not the matter that shall make me find him guilty: but the Evidence that will weigh with me is the evidence of high-treason, and how far they can answer it.

Mr. Hooper. The question is, Whether or no there be a sufficient guilt laid to this man's charge? For in all courts of judicature this is a certain rule, You must proceed 'secundum al-legata et probata;' and you shall not go about to prove a thing unless it be alledged. Now the question is, Whether this thing be alledged in the whole Bill, that sir J. F. is guilty of high-treason? And if not, you will go about to prove what is not alledged. It is true it hath been alledged that a Bill hath been found; but several have been indicted who have been acquitted. It is possible the prisoner may be guilty; but I think we must observe that method here, that is observed every where else,

and that is, not to go about to prove any thing that is not alledged.

Mr. Clerk. The learned gentleman hath made an objection that perhaps would hold very well in Westminster-Hall: but I suppose he may remember this Bill must have a second reading before you, as a house; and then perhaps the allegations may be different from what they are now. But the principal matter before you is, Whether this gentleman be guilty of high-treason, or no? And if they did not prepare to that part, I think they were negligent to their client; for it appears to be that part that is most sensibly like to affect him.

Mr. Howe. The more I hear the matter debated, the more it seems strange to me. I have heard the Bill read, and took notice of the heads of it: I always understood the preamble of the Bill to be the inducement to the end of it: I was mightily surprised to hear the king's counsel attempt to make good—I think they did not speak materially to one point of the allegations in the Bill, so that the allegations do signify nothing: or else, if they intended these allegations should signify any thing, we must have these allegations proved before we pass our judgment upon the Bill; whereas the counsel, instead of endeavouring to prove that he was indicted for high-treason, (though hinted at) would prove him guilty of high-treason; instead of proving that he had prevaricated, they say not one word about it; instead of proving that he has forged papers, in order to alienate the minds of the king's subjects, they say nothing to it, though in the Bill it is alledged as high-treason.—We must not go here upon private fancies and opinions; no man that heard my lord Delamere's trial but believed him to be guilty of the fact; yet he was acquitted, because there was no evidence sufficient against him. I think you must stick to one of these points; if you stick to this, to prove him guilty of high-treason, you must alter the Bill; and then that must be proved out of the mouths of two witnesses. If you please to stick to the bill, then I hope the king's counsel will go on to prove the allegations of it, or let us know why they do not: I shall no more give my vote to hang him, because he is indicted of high-treason, than I shall because he hath been in Newgate.

Mr. Sloane. I think a great deal of your time in debating this matter may be saved; though I will allow the Bill might have been drawn better, and that a bar-indictment is not a sufficient ground of itself for a final decision of this matter: but when at the time of finding the Indictment there were two witnesses, and one of them is withdrawn, and as is supposed, by his means; if the Bill seems imperfect for any thing before you now, you will not stay all the proceedings upon it; but if you see it imperfect, and it may be amended, you will amend it at the committee. I think the favour you have given is abused, and that it is perfect trifling from the bar. In one breath they say, they could not get ready, for they had no no-

tice till last night; and in the next place they say, they will go on to every thing but his being guilty; and I believe they never will be prepared for that.

Mr. Attorney General. I am very unwilling to speak any thing in this matter; because, sir, by the place I have the honour to serve his majesty in, as one of his counsel, if it was in the course below, I must prosecute on behalf of the king: but I am very sensible while I am in this house, I am in another capacity; I am to vote here as a judge, and not as a party. That which I do now trouble you about, is in relation to the matter that hath been objected; That the Bill does not expressly affirm, that sir J. F. was guilty of high-treason, but only that he was indicted for it. Truly I thought, and do still, with humble submission to the house, that that matter of affirming him to be guilty of high-treason was not to be inserted in the bill; for that will be the consequence of your judgment and opinion, upon hearing of the evidence. That worthy member that spake last, said, the Bill might be better drawn; I am sorry we had not his assistance in it: But with submission to his understanding, I think that had been too much presumption, till you are satisfied whether he was guilty or no. We could only go so far as to set forth the faults that we knew; as, that he was indicted, that we can verify, and cannot take this to be like the case of an indictment; for there you must affirm such and such things that cannot be altered afterwards. But a bill in parliament hath many steps; you read it several times, and commit it; so that you alter the suggestions of the bill, as the case appears to you to be verified; and if you be of opinion that he is not guilty, you will not condemn him because he is indicted: however, that is not unmaterial, but proper to be set forth for a ground of your proceedings, that there was a probability of his being guilty from that accusation. Therefore, sir, I confess, I cannot think that those gentlemen that are counsel for sir J. F. could think, that you did intend to proceed otherwise than to hear counsel as to the fact: they could not think that upon proof of his being indicted, that that would be ground enough for you to proceed to pass the Bill: for how could any body think, but you would come to examine the fact? I cannot see how they should come to mistake, unless it was wilfully.

Mr. Price. The matter now debated, is, What method shall be followed, or what evidence shall be given upon this Bill? or whether evidence shall be given of any other matter than is suggested in the Bill? I must confess, making a false step at first setting out, hath put us out of the way hitherto; for in the case of my lord Strafford, witnesses were examined, and adjudication that he was guilty before any order for a Bill of Attainder. But since you are in this way, consider whether the counsel against the Bill have gone according to their order: the order was, that counsel should

be heard to prove the suggestions of the Bill : and the counsel for sir J. F. do not oppose that : but the counsel for the Bill open more things than are comprehended in the suggestions of the Bill : for the suggestion is only a recital, and hath no positive averment. And though the Bill and an indictment is not the same, yet they must be the same in this, to put a charge upon the person. If the preamble is not to any purpose, what need they have made any, but have said only, Let him be attainted? To what purpose does sir J. F. come to the bar? If it is to any purpose, it is to answer the charge of the Bill. That learned person says, to suggest that he is guilty till the matter is proved, then there must be an amendment in that point, and that will make it a new Bill, and then he must have another day to answer the new charge : but they might as well have said he was guilty of high-treason, as to say in the enacting part, that he should be attainted. Therefore, if the gentlemen for the Bill will proceed and prove the preamble of the Bill, let them ; otherwise let there be another day for sir John Fenwick to attend, and let them do all together.

Sir Christ. Musgrave. I think, as to that learned person, nothing is to be laid to his charge, for I think they have drawn the Bill pursuant to the directions ; and I am sure if they had drawn it otherwise, before they had known the sense of the house, I think they had been guilty of a crime. That which seems to be before you, is what was opened by the king's counsel, and that was to prove the treason. Now, sir, I would be glad to know of any person, whether any thing is to be admitted to be proved at your bar but what is in your bill. For let us have a little regard to the proceeding in Westminster-hall : can any person, upon an Indictment of high-treason, offer evidence of any treason but what is expressed in the Indictment? And I think this is the same in effect ; for here you draw a bill of attainder against sir J. F. and in justice you send him a copy of it, and, with great favour too, you allow him counsel to defend himself to that, as to the suggestions that are in the Bill ; otherwise, to what end did you send him the copy of the Bill? Now, if you will admit of any thing to be proved but what is in your Bill, I know not of what dangerous consequence it may be, for it is impossible to be prepared for it.

Mr. Solicitor General. If the counsel against the Bill could be any way mistaken, or think the Bill defective, I am for giving them longer time to make their best defence ; but think neither one nor the other of them true ; but your order was to draw a bill for attainting sir J. F. of high-treason ; and I think if the Bill had gone no farther, but enacted that he should be attainted of high-treason, we had strictly pursued your order ; for the preamble is no necessary part of the Bill. A Bill and an Indictment are of quite different natures ; there is a form for an indictment, but no precedent for an act of parliament. As to the

Preamble, the debate, when it was ordered, went no farther than that he was accused of high-treason, and was like to have been brought to his trial : and to delay it, he pretended to make an ingenuous confession ; and instead of that, there was produced a paper which you have censured, as you thought fit, and upon that you voted a Bill to be brought in to attaint him of high-treason : what then could be expected more for the inducement, but the debate upon which it was ordered?—If this house had thought fit to examine witnesses before, as now, no doubt but the Bill would have suggested that he was guilty of high-treason ; but it is time enough for you to suggest that, after you have heard what witnesses there are. If the counsel did not know this, notwithstanding all that I have said, I am for giving them time ; but, with submission, it was impossible for them to mistake it : If the Bill had went no farther than, 'Be it enacted, that he should be attainted of high-treason,' then they had some colour to say there were different species of high-treason, and they could not tell to what particular facts they must apply themselves : But when the Indictment is recited, which charges him with particular facts, and tells him by what witnesses the Bill was found, it was impossible not to know that this was the high-treason you did intend to enact that he should be attainted for ; but when they say they are not ready, truly there may be some reason for it ; for I believe they never will be ready : sometimes men will be wilfully mistaken, and sometimes it is their misfortune to be so. They say they are mistaken ; which of these are true, I know not, but we have seen already the time when he hath trifled with the courts of justice ; he hath delayed his trial till one witness is withdrawn ; if you give him longer time, he may have the good fortune to have the other gone too. I see no reason for you to forbear hearing of the evidence.

Mr. John Montague. I am not surprized to hear sir J. F. desire time : for giving him time is giving him life ; nor for his counsel to tell you his witnesses are not ready ; it is a common excuse ; I hardly ever knew a person brought upon his trial, but that was his excuse ; and yet I have seldom known it allowed as a good excuse : But it is objected you must go 'secundum allegat' et probat' ; and nothing being in this bill like what the counsel for the bill did open, it is not fit to hear them call witnesses to what is not alledged in the bill. I grant that ; and yet I think they ought to be allowed to call witnesses to prove every thing they have opened to you : it is agreed they ought not to have brought in a bill, to say in point blank terms, he is guilty of high-treason ; but they say, you should have charged with what treason he is accused of, and then they should have been admitted to prove it. With submission, the bill does that thing ; for the bill does recite, that he is indicted of high-treason in compassing, &c. This is the treason that is charged upon him by this very bill : now sure

you will permit them to prove what is alledged in the bill. What did the counsel for the bill open? That at several meetings they met to consult of the matter that this bill takes notice of. Did not he tell you when Charnock came first there for that purpose, and when Charnock met them again for their assurance? Now this being so plainly set forth in the bill here, which recites, that this matter was proved by two witnesses, upon the credit of whose testimony this matter was found, and that one of them is gone away; and, say they now, we are ready to prove the matter then sworn: Is not that proper to satisfy gentlemen's consciences that will not convict this man without evidence?

Sir Fr. Winnington. I humbly conceive the question is not now, Whether sir J. F. is guilty, or no? But, whether the objections the counsel for him have made, be so strong as you will grant what they move to you? They tell you, if counsel will proceed upon nothing but what is suggested in the bill, according to your order, we are ready to make our defence. It was said the king's counsel was ordered to give their evidence; that can have no interpretation but as to the matters in the bill.—Says the king's counsel, We will prove him guilty: Says the counsel on the other side, I hope the house will give us time to encounter them in that, for you have no such thing in the bill; the sending them the copy of the bill was as much as to say, You need not prove any thing but what is therein asserted. It was said by the learned gent. there, that there might have been an act of parliament which might have said only, 'Be it enacted, that such a man be attainted,' without giving any reason. I cannot deny but it might be so without any reason, but I don't believe it will be so. And another learned person was for mending of the bill. Says he, When you have the matter of fact proved before you, it may lead you to the amending of the bill, and inserting what you please, and enacting of it; but does not answer what the counsel said on the other side: Would you have us answer what we did not know that you would stand upon? The question is not, Whether he be guilty or no? But, Whether the objections that are made be good to give them time?

Col. Granville. Sir, the counsel, by what I observed from them, have started two difficulties, and really, to me, both seem very material; the first is, Whether the king's counsel shall be at liberty to prove any thing that is not suggested in the bill? The other is, Whether sir J. F. had due notice to make his defence?—The first is a matter of very great moment: You are proceeding upon a bill where not only the life of sir J. F. but the life of every man in England is in some measure concerned: When a precedent is made in this case, nobody knows who may be affected or hurt by it; and therefore I desire you will settle that matter, and have the judgment of the house, whether they will admit the counsel to prove any thing that is not suggested in the

bill? If you will, I do not see how any man that stands at the bar of your house, can be prepared to make his defence. For there shall be one crime alledged in the bill, and when he comes to the bar, the counsel that are to prosecute, shall go quite off from that which is laid in the bill, and produce you evidence to a new crime; and he stares and looks round him, and you had as good allow him no counsel, or copy of the bill. This you thought so necessary for every man that was to come upon his trial for his life for treason, that you altered that trial, and declared no man should have any treason proved against him that is not alledged against him in the Indictment.—We have had great complaints of Westminster hall; and if the parliament should proceed in this manner, may have the same again. If they are too rash in their proceedings, they will be countenanced mightily in them, if you should proceed against a man, and condemn him for one thing, when he is accused of another. I desire to know, how we can proceed in a bill upon which sir J. F. is to be proved guilty, and he hath no opportunity to answer it? I take it, as this bill is drawn, sir J. F.'s guilt is no way concerned in it: For whereas the worthy gentlemen tell you the treason is specified, there is no treason specified, otherwise than he is indicted for it.

Mr. George Rodney Bridges. Sir, I think the proper question before you is, Whether you will allow sir J. Fenwick time to produce such witnesses as he shall desire for his justification? It is a little strange to me, that the gentlemen that are of sir J. F.'s counsel should insist upon those things, to desire farther time for his preparation, when (I think) it is very plain, they were told what they were to prepare for by the bill; which was, they were to justify sir J. F. against those things he stands indicted for; and the matter of the indictment is the thing to be proved before you, and the witnesses to make it good are likewise mentioned; one of them is gone, but his testimony remains upon oath, not only to the grand jury, but in another place, that I am told of: I do not think you will think it reasonable, after the king's counsel have made out their evidence, to give him time to make their observations upon the charge; so you will consider before you hear the king's counsel, whether you will allow him farther time, or no.

Sir Jos. Williamson. The gentleman that spoke last states the case to be, Whether you will think it reasonable to allow sir J. F. farther time to produce his witnesses? You may, sir, make that the question; but that will depend upon another, which is, Whether you think that sir J. F. had not notice enough to prepare to defend himself against the charge contained in the preamble of the bill? And I add this further, Whether the manner and way of expressing that particular charge in the bill, is not so worded, so charged, as here expressly to become a charge that he is to answer for, and not only as a matter of fact historically related,

now to come in proof here: For if it proves to be well charged in the preamble, it is a particular fact of treason he is to answer for in this house; and then he hath had time enough; so that now you are to judge of your own way of expressing yourselves. I believe every gentleman knows it was the sense and meaning of the house, that those are the particular treasons mentioned in the indictment with which he should be charged at the bar, and have time and liberty to defend himself; and not only to the allegations, that he had been indicted, &c. Now, sir, if you shall allow these gentlemen to except against your way of expressing yourselves, that I submit to you: But it is clear to me, that this was a very good and proper way of expressing yourselves, to charge him with the facts, and to give him liberty to disprove it. If he and his counsel understood it otherwise, the question is, Whether their differing with you in the way of expressing it, shall be allowed to them, without taking a reasonable exception to it? You are tied here to the strict rules of justice; but as to the forms of proceeding below, I do not think you are. Our meaning was, most certain (though he was indicted, that it was nothing to us), that they should bring their proof to our bar to prove him guilty; and if you should give him two or three days time, you must mend your bill to their way of expression, and to their sense.

Mr. Brotherton. I take the question to be now, Whether the king's counsel should give evidence of any other matter than what is alleged in the bill? As to that, I must observe to you, that this bill does not set forth any particular charge against him; it does not say, that he such a day did such a fact, whereby he can make his defence; it is only the recital of an indictment; and it does not say the particular time and place where the fact was done. Now as to what that gentleman says, if it had been said generally, that he should be attainted, it had been sufficient. 22 H. 8, the statute for attainting one for putting poison into a pot, &c. there is the day and year when the fact was committed; and so he might make his defence. Then the king's counsel offer to prove, that this Goodman was conveyed away by sir J. F. and there is no such charge in the bill; for the bill only says, that he is withdrawn; and I am of opinion they ought to give evidence of nothing but what is in the bill.

Mr. Whitaker. As to the exceptions made by the counsel to the insufficiency of the bill, by which they pretend sir J. F. was led into an error, so that he had no due notice, I must needs say, if they were in Westminster Hall they would be in the right: but this house is not bound to those forms: for I believe the enacting clause would do the business of sir J. F. well enough, if all the rest were laid aside; and I will consider it with as much tenderness and conscience for the prisoner at the bar, as any that brings arguments from Westminster Hall. I would consider, whether such a defence as they have made, that from the bill (as

to what is laid in it) he had not notice enough to prepare to make his answer: They say, a recital is no direct affirmation in civil matters: It is an affirmation; for to say, 'Whereas such a one is bound,' is good in a declaration upon a bond. Now I would know, whether this be not enough, to say, That he is indicted, without any allegation that he is guilty? Had the bill no recital at all, it had been an objection; but it may be, it had been such an objection, that they ought to have done something of their parts, as to have desired the opinion of the house to what they should have answered: for suppose there had been no recital at all (and you may make what recital you think fit) what should sir J. F. have done? There are some instances at common law: A man is indicted for being a common barrater, and there are no instances given in the indictment; why then he comes and prays the court, that they may declare what instances they will give, and that they may give no other words in evidence: therefore I question not but that should have come on his part; he is to be heard as to the enacting part of the bill; and under favour, you could do no otherwise. Now if they do offer to give evidence of any treason that is not specified in the recital of the bill, and the counsel make an objection to it, I shall agree with them.

Sir Ed. Seymour. My lords,* and you Mr. Speaker, what hath been said to you by that worthy person that spake last, no doubt, is true; that if there had been no more than the enacting clause, it would have done sir J. F.'s business with a witness, or rather without a witness: But that is not the question we are disputing here; but the question is, Whether you will give sir J. F. longer time to make his defence to that part he insists on, that is not contained in the bill? You are well satisfied that you cannot go through with the suggestions to night, [past 3 o'clock,] and the debates, and what relates to it; and I find no person against putting it off, but because it would be a delay; and if it be no delay, that reason is out of doors.—They tell you, the counsel could not but take notice of the matters suggested in the indictment: I cannot think that is reasonably argued; because they do know the practice and method is such, that they can take notice of nothing but what is specified and contained in the bill. And therefore, there being no guilt charged upon sir J. F. in the bill, is it reasonable they should come and accuse themselves here, or make a defence to what is not charged? No; but, say they, it is implied: This is an untrodden path, and you ought to walk as securely in it as you can. It is extraordinary that you bring sir J. F. here to answer for treason, when it is allowed in the suggestions of the bill, you have but one witness to that treason; and when you take these extraordinary steps, you should comply with him as much as you can in the forms. For if treason be not treason un-

* Because many lords were in the gallery.

less it be proved by two witnesses, and you will give him liberty to make his defence, I think it no loss of time; for you cannot go through the bill to night, to see whether sir J. F. be guilty of what is contained in the indictment. And I will give you one reason why he could not be prepared to make his defence in so short a time; for he could not produce his evidence if he had any; and if you give him longer time, I suppose you will think fit that sir J. F. should give an account of what witnesses he shall make use of for his defence; and you will give an order for those witnesses.*

Mr. *Harcourt*. If sir J. F.'s business must be done, I hope we shall do it like rational men, and what we enact, be able to give a reasonable account of it in the preamble of the bill. As to the question proposed, your debates have run several ways: The first is, Whether sir J. F. shall be allowed further time? And in this case, whoever I differ with, it is of that nature that I must desire the liberty of speaking my mind. I must confess, I see no room for enlarging the time; and I shall humbly submit my opinion to other gentlemen, whether he should have further time to prepare his witnesses? And for that, pray consider the nature of the matter before you.—Sir, there is nothing certain that is alledged in the Bill; and should you allow him further time to answer that which is not alledged, I cannot imagine what effect you would have of it. It is said indeed, he stands indicted; but it is no where suggested, that he is guilty of that indictment. This general charge seems a great hardship: There is no one thing that so many have been unjustly taken off by, as the uncertainty of alledging general facts in indictments of high-treason; nor has any thing been complained of in such trials for a greater grievance. What have you done in the bill for regulating of trials in cases of high-treason? In that bill you have reformed that abuse, and taken care, that whatever treason a man might be guilty of, yet he shall never, upon his indictment, answer to any fact, unless the particular overt-act be expressly laid and affirmed in his Indictment.—That which seems most reasonable in this case to be done, is, not to enlarge the time; but when you think fitting to proceed, proceed upon what is before you. Here are some matters expressly alledged; let them go over the recital, see whether they can prove that; but I cannot imagine to what purpose you should give the prisoner further time to

answer nothing; for that which is not charged is so.

Mr. *Finch*. Sir, this is a question, in my opinion, of very great consequence: You are very well told from below, that this is an untrodden path; and I am the more confirmed it is so from this debate. We are told, that sir J. F. or his counsel, could not be ignorant of what they were to prepare themselves for. For this was our meaning, says one gentleman, though I find the path is so untrod, we are very unfortunate in expressing of it, for we have not said it at all in this bill; we have said, Sir J. F. was indicted, &c. sir J. F. hath had a copy of this bill sent him, counsel allowed him, and upon a second-reading he comes to make his defence. We are told, the proceeding upon this bill is not to be resembled to the proceeding in Westminster-hall; and this is sufficient in a bill, though in an indictment it would not, without alledging that sir J. F. is guilty. But one would think, that if sir J. F. is guilty, every allegation in the bill, that is, the inducement to the bill, which is for attainting him, should be a good and just ground for the attainder; and then, this gentleman, that hath had a copy of the bill to prepare for his defence, and shew you reasons why the bill should not pass, though our proceedings are not to be resembled to the ordinary proceedings, yet we are to expect from him such a defence as the ordinary proceedings in Westminster-hall would require: But I think this is hardly to be expected; one might have thought, and reasonably enough, that it might have come into his imagination, that if there had been ground to attaint him, by the ordinary proceedings and methods of justice, the parliament would not have taken an extraordinary course to come at it: For I can never think it a good reason to proceed this way, that is, for the saving of time; and if there be extraordinary ground they must guess at that out of the bill: Now that is grounded upon those suggestions that I have cited; and then I should have imagined, that whereas he had been indicted upon the oaths of two witnesses, as the law requires, and one of them was withdrawn; that you had rather intended to have charged him with some contrivance to elude justice, whereby you had reason to exert your extraordinary authority to proceed against him by way of the legislative; and I do not find we have any precedent to warrant this proceeding, though in our debates we have endeavoured to find one: yet I cannot but observe the consequence of this hereafter: For whether we can find a precedent to warrant this proceeding in former ages, or not, we are making a precedent for our posterity. And consider the consequence of this precedent you are making; I think all the bills in parliament are grounded by the most serious ways of deliberation, before you come to judgment: And bills of attainder ought much more, sure, to require the seriousness of your debates; but I cannot but observe the steps now made; I am afraid there

* According to some accounts, sir Edward closed his speech thus: "I am of the same opinion with the Roman, who, in the case of Catiline, declared, he had rather ten guilty persons should escape, than one innocent should suffer." To which lieutenant general Mor-dant is said to have replied as follows: "The worthy member who spoke last seems to have forgot, that the Roman who made that declaration was suspected of being a conspirator himself."

was a wrong step at first; I was not here the first day: but I recollect some things from the bill itself; the tenderness of those things upon which this enacting clause does stand. Here was no evidence given to induce the house to bring in this bill of attainder; when this bill is brought in the house, and the preamble that suggests that which is the ground of the enacting part considered in the house; and the house did not think it reasonable to proceed to the reading of it a second time: I remember we were told, Won't you read it a second time, when you may have an opportunity of having those suggestions proved to you? This was the ground why this bill was read a second time. For consider, otherwise a gentleman may, in any other case as well as this, desire leave to bring in a bill for attainting such a one; and tell you, you shall have a good reason given to you for it afterwards; and though the reasons suggested in the bill are not sufficient, you may have reasons out of the bill that are sufficient. What a precedent will this be! Why, sir, length of time gives a sanction to those precedents which the age that makes them think not of; and they become good examples to posterity, that were even very heinous precedents to the present times. Now if this shall stand, as now in the bill, I would ask, What man in England is secure, when a parliament shall arise that hath a mind to attaint him? Why then, sir, if you do amend the bill, consider the method of your proceedings; you do yourselves, in effect, declare, that for bringing in of the bill, for twice reading of the bill, you had no ground at all; for otherwise you had good grounds recited in the bill, and that must be a sufficient ground to attaint him; and if you declare it no sufficient ground to attaint him, you declare you have brought in a bill, and read it twice, without any ground. Whether you will allow liberty to offer at your bar any suggestions otherwise than in the bill, that I must submit to you; and for giving time, since that is a question of a very extraordinary nature: but have humbly offered my thoughts, whether any thing shall be offered otherwise than is suggested in the preamble of the bill? I hope you will not, for the precedent sake you are now making; which if you do, I am afraid bills of attainder may become now as frequent as Bills of Attainder were in Rd. 2's time; which I hope never shall be.

Lord Norreys. Mr. Speaker, I will not pretend to tell you, that you are bound by other rules than rules of justice; but what is justice in Westminster-Hall is so here, and every where. And last year you thought it justice, that no man should be brought to a trial, but he should know what were the particular facts that were alledged against him.

Lord Cutts. I think it, in some measure, a misfortune, that a matter of this nature, as is your present debate, hath held you so long; and conceive it a thing to be wished, that every gentleman that speaks upon this occasion, would apply himself more closely to reality,

and less to forms; I mean, to forms, considered merely as forms; for it ought to be true reason that is convincing to you: and you ought not to tie yourselves to any forms upon this occasion, but such as are grounded upon reason; and really I have not heard any thing that fell from any gentleman, that shews his doubt of the nature and aggravating circumstances of the crime of the prisoner? but it hath consisted with the great candour and justice of this house, to shew this favour to the prisoner before you. The counsel say, they are unprepared; if they mean they should prepare themselves for more grounds of difference and chicanery, I would not give them farther time; I cannot perceive there is any reality of argument in it; and there is in reasoning, as in religion, sometimes a form without a power.

Sir Tho. Dyke. Sir, you have now two or three questions before you; I desire you will confine our debates to one point: I think, whatever opinion gentlemen may be of concerning the proof, I think the point under your consideration, if you will make a right judgment, is the preamble of your bill, which I take to be the foundation of it, and the cause for which you attaint this gentleman: now the preamble does not recite, and say, he is guilty, but only indicted; nor set forth any time; nay, it does not say, he was arraigned. So that these things are very uncertain, and yet you must attaint him for the things recited in your bill. And you know these acts of attainder are extraordinary methods in cases of treason; and if you put it upon this point, that the act attaints him for one thing, and the counsel shall prove another, it makes it more uncertain than it is, and no man can be safe; and therefore I hope you will confine the counsel to proofs of the matter contained in the bill.

Mr. J. Howe. Sir, I think, if you please to go on upon the matter suggested in the bill, they are allegations which must be proved before the bill is committed; and that will not hinder sir J. F. from being examined to the treason likewise. Therefore all that is alledged in this bill, I suppose, being thought necessary to be proved, I desire he may be called in, and the counsel may go on to prove what is alledged in the bill, and afterwards sir J. F. may answer them.

Lord Coningsby. If the question was, whether you should grant this gentleman time or no to make his Defence, I should not have troubled you. But the question now seems to be, Whether the Bill does depend upon the bare suggestions of the bill, or upon the guilt of sir J. F.? And therefore if gentlemen do insist upon it, that he should have longer time to defend himself, as to his being innocent or guilty, I shall not oppose it; but if you think fit to put it off, as if the fate of the bill did depend upon the suggestions of it, I cannot agree to that matter; therefore I desire a short time may be given him to answer the matter of his guilt.

Mr. *Harley*. I find all gentlemen that speak of this subject, to say this matter is of a very extraordinary nature, and you have entered into it by very extraordinary methods: but I must only observe, that this being the first bill of this kind that hath been brought into the House, before any proof, gentlemen must be excused if they are cautious what steps they do take; and when the wisdom of the House has thought fit to take quite different methods, as to the preliminaries, it is not to be wondered if they meet with difficulties in their proceedings. Some gentlemen press for more time to be given to sir John Fenwick to be prepared; and others urge, that you should declare, whether the counsel should be heard to any thing but what is suggested in the bill. And I think you must give a determination to the last question, though the whole House agreed to give him longer time: for if you give him longer time, it will after come to the same debate, whether they shall be heard to any thing but what is suggested in the bill? If you should think fit to add any thing, then it will be reasonable that he also should be heard to that; for in the case of the death of a man, let him deserve never so much, yet he does not deserve to die unjustly by your hands.—It seems a very plain proposition, that when a man is accused, he should not answer to what he is not charged with; and to charge it with innuendos and implications is so uncertain, that as I always have seen it denied in this house, so I hope I shall not see so great an assembly give any countenance to it. They did tell you, they were prepared to speak to the reasonableness of the bill; but this matter not being suggested in the bill, they are not prepared to speak to it.

Sir *Tho. Littleton*. I see now where your debates have led you: I thought the regular subject of our debates had been the point upon which the counsel withdrew; and that was for time. For what? Why to prepare themselves to answer any evidence that might be given against them; because they perceived you did expect the counsel for the bill should produce their evidence. But they made an objection: say they, we did not understand your order was, that we should come prepared to oppose any testimony *viva voce* to be given against us, but only prepared to speak to the reasonableness of the bill. Now, gentlemen, after five or six hours debates, have been willing to accommodate the matter (that nobody might think that any one pressed a matter unreasonable), that they might have time: but some gentlemen will not be satisfied with granting what the counsel desired, but they desire more. And what is that? Why, that is to know the opinion of the house, whether you will admit any one thing to be proved that is not suggested in the bill? And I do take this to be within the suggestions of the bill, as fully as can be expressed. For what does the bill say? The bill does say he was indicted of high treason, and that one of the witnesses is gone: and gentle-

men come to the conclusion, and skip over the immediate part of the bill; for the bill does say, that he did incite and consult, &c. And the objection of the counsel was not against the evidence; but they said, they were not prepared at that time to answer it, and there they leave it; and thereupon the House go on upon the debates. What can we expect that they intended? They might think, either we shall gain our point, and the house will give us time; or otherwise, if they go on and hear this evidence, then we say we wanted time. And that will be only evidence *ex parte*, and not carry so much weight with it, though we have nothing to say to it; or they might think it may have this effect, that the house will not go on, and hear any evidence at all: in either of these cases, we have the fairest advantage that we can have, on the second reading of the bill, in defence of our client; all they desired was, that they might have time; and I hope that which satisfied them that are most concerned, may satisfy any gentleman of the house.

Mr. *J. Howe*. The question is not, what they asked, but what is reasonable for us to grant? I was in the beginning against any delay, and I think there is no occasion of delay: all I desire is, sir, that the king's counsel may be desired to prove the suggestions of the bill *ex toto*.

Mr. *Solicitor General*. Most that have spoke of this matter have said, that the matter is very generally laid in this bill, and the counsel could not very well know to what to apply themselves: that it speaks of high treason in general, and of aiding the king's enemies, which is very general: it recites that indeed; but the indictment is legal, according to the late act of parliament. It is not only said, that he designed the death of the king, but for that purpose he and others met together, and agreed to send Charnock to France, to go to king James, to induce the French king with an armed power to invade England. Now how can any thing be more particularly charged? And the indictment is so charged in your bill. I think therefore the counsel could not be ignorant to what they ought to apply themselves; but by what I perceive, gentlemen are very well contented to give him further time. I remember, when the bill was first brought in, there was a long debate for a second reading; and some gentlemen thought it hard to be tried by so great an assembly, and said, they had rather be tried by a fewer number: but I shall observe, that you have sent the copy of the bill to sir J. F. beforehand, and you sent him notice that he should provide himself. But I remember a much better man than sir J. F. who had the misfortune to be under an accusation of high treason, had his indictment one hour, and was tried the next: and though he pleaded to have his trial put off till the afternoon, he could not prevail with the court of justice to do it: sir John Fenwick hath had a copy of his

bill for two or three days, but he never had any copy till he had pleaded.

Mr. Waller. I stand up only for my information; that which I would know is, whether the counsel did not ask you the question, whether they should be bound to answer any thing that is not in the bill? If they asked that, then the gentleman that spoke here is answered; and the gentlemen of the house do not insist upon what sir J. F.'s counsel did not insist on. And I do think the king's serjeant, who opened the proceedings, after he had opened what had been before the grand jury, seemed to make it a charge, as if sir J. F. had been condescending to the withdrawing of Goodman.

Now that seemed as if they designed to make that a part of the evidence.

Sir Rd. Temple. The counsel did not insist upon it, only to answer the suggestions of the Bill: every body knows, they objected to the others going on with the evidence they opened, because it was not in the bill; and the king's counsel could not so much as alledge, that it was in the bill: and they would have gone on to have proved the indictment. There is another thing; it is told you, as if the preamble had suggested something of this kind, that there was a meeting. Now the gentleman that spake last but one, has cleared it, that it only recites, he was indicted for these things; and this brings nothing in issue, whether he be guilty or no. Now I think the present question, and only question before you, is upon the suggestions of the bill; for you can bring nothing in issue here, but what is in the bill; and nobody can insist, by the rules of reason or justice, that any man should be heard to any matter of fact but what is in the bill. And therefore I think there is nothing before you, but that you should give direction to hear them to what is suggested in the bill.

Mr. Methwen. Sir, I speak to the method of your debates: your debates arise upon an objection that was made by sir J. F.'s counsel, against the counsel for the bill going on with their evidence to prove sir J. F. guilty of high treason. I must beg leave to differ, as to what the counsel did say, from some of the gentlemen that spake last: the force of their objection was, that they should not now go on, for they were not prepared to answer them; and the reason they gave was, that they had not formal notice; and the other afterwards spake to the shortness of the time: your debates for a long time went pursuant to this, whether you should allow them further time or not? But the length of your debates hath raised a new matter: though I think that doubt, though it was not made by the counsel, may be very properly made by any worthy member that hath that doubt, whether, as the bill is brought in, the king's counsel might at any time speak to that point, though sir J. F. be acquainted with it? And I must always agree, that doubt ought to be resolved, before you come to resolve, whether farther time shall be allowed him or not; and therefore I propose it, that

this question may be put, whether the house will hear, at the bar of the house, the evidence there is to prove sir J. F. guilty of the high-treason whereof he was indicted?

Col. Wharton. You have three or four questions upon your paper; and now, after so long a debate as we have had, I hope gentlemen will not think fit to start new ones; and I hope you will take care that gentlemen shall not rise up three or four times to speak to this matter. You have another rule of the house, that when a question is moved, and seconded, though another question is moved afterwards, yet that must be the first question that is to be put; and I hope you will keep us to these rules.—I wonder at some objections: it is told you, that this is such a proceeding that never any thing of this kind was before; and that you are here going to read a bill of attainder, before you have had any manner of evidence upon which you should ground the bringing in of this bill. Gentlemen must remember, or should have informed themselves; for it is very certain that you had very good grounds to vote this bill to be brought in: I see the gentleman that brought in his own accusation; you had his own discovery read, and Mr. Attorney did inform you what was against him, and how he stood indicted. And another gentleman by me, told you, he was with him, and there was a treaty for his pardon; this was evidence for reasonable men to go upon. And to tell you that these precedents will endanger your liberty! Under favour, this is the ground of all your liberty. It is by this power of proceeding, when you have not that evidence that Westminster-Hall requires, by which you will keep great men in awe.—Now, give me leave to speak to the question that I think you ought to put: it is told you by the counsel for the prisoner, that they are not apprised what the sense of the house was, and upon that account they desired further time: I confess, when you allowed counsel, I was of opinion it was a favour; and now since they have made this objection, though I do not believe you are obliged to allow them further time, yet I had rather err on that than the other side; and therefore I think the fairest thing is to allow them some further time.

Mr. Secretary Trumbal. Mr. Speaker, I have attended all this day to your debates, which are now in my opinion of a very extraordinary nature; for a great deal of your time hath been spent upon motion of the counsel for the prisoner at the bar, whether you should allow them further time or no; and now, by what I recollect from the sense of several gentlemen, the house seems willing to allow them further time; even that is opposed at this time of day.—Sir, the king's counsel have opened the matter of fact, upon which they did intend to produce their evidence; and when they had opened the several heads, the whole objection that I heard made by the other side, was, They did not think the king's counsel could have proceeded to examine witnesses upon those facts;

and that they were not prepared to bring witnesses on the side of the prisoner, and therefore prayed for further time: truly, whether that be reasonable or no, or whether upon one favour, the house think fit to grant another; I cannot tell what might appear, if it had come to a question; since the life of a man is concerned, we ought to be tender of it, and I shall be as tender as another; therefore I am of opinion, that a reasonable time should be allowed. To do what? Why, upon the evidence the king's counsel should produce, they shall bring their witnesses on the other side to answer them. Whether the king's counsel will produce evidence that is foreign to the bill, that will be in judgment of the house; but it was a good motion made below, which I close withal, that a short time may be allowed them to make their defence, and bring their witnesses.

Mr. Speaker. Gentlemen, you have had a long debate: I do not remember any formal question that was proposed at first, till such time as I read to you what I thought was the question upon the debate; when I read you the question for further time, there were several members stood up, and said, that was not the question; and took exceptions to it, and proposed that the counsel should be confined to produce evidence only to the matters suggested in the bill; so that now I have two questions upon my paper, which I will read to you, and put which you will. One question is, "That they be confined to make their proof to what is suggested in the bill." The second question is, "That sir J. F. be allowed further time," &c.

Sir C. Musgrave. A gentleman said, the second question upon your paper was but lately started; but I remember, a little after the counsel was withdrawn, it was moved, Whether you would give them further time? And I presently after, in the debate, did take the freedom to ask, Whether it was intended they should answer to any thing but what was contained in the Bill? And, I remember, there was a gentleman of the long robe said, That there was nothing offered by the king's counsel, but what was within the suggestions of the bill. Another gentleman said, When they may have longer time, they did not seem so fond of it; it is indifferent to me, provided he be prepared to answer. But I cannot but observe, that the conclusion of that honourable person was, that at last you must come to determine the question. You are likewise told by an honourable person nearer the bar, why do you dispute this now you have ordered the king's counsel to produce the evidence; and so you have concluded yourselves? But for myself, I must confess, I did never think the evidence was to be heard otherwise than as to the suggestions of the bill. And if that point be to be determined, why will not you determine it now, rather than to have another debate upon it?

Mr. Boscawen. That which is pressed by some gentlemen, is begging of the question. What have we here brought sir J. F. for? Was it not to satisfy ourselves, whether sir J. F. was

guilty of high-treason? Now that is supposed, by some gentlemen, not to be within the bill: if it be not within the bill, I desire you would throw out the bill. But the thing is, we must not examine to those things that will make sir J. F. guilty. Sir, this is a very nice thing, and very curiously woven. The great thing, say some gentlemen, we must take care of, is the blood of a man: does any one say he is innocent? No: but we must have some way or another that he must not be brought to his trial. I desire, as Englishmen, you will not only take care of the life of one man, but of the life of the king; of the lives of our wives and children, and all our families. What will they say without doors? You are afraid to meddle with sir J. F.; and therefore you will slide it away upon another point; that his being guilty of high treason is not within the bill. I am not for taking the advantage of time; I desire, as it was moved before, that you will give him time, and try whether he be guilty of this treason or no; or otherwise do nothing in it at all.

[Then the Order was made for Candles to be brought in.]

Sir T. Littleton. Now you have candles brought in, it will be fit for you to return to the question: for my part, I am willing to put both: but I think the last question that you have upon the paper, properly speaking, is to be put first; and that is, That the house will proceed to examine witnesses to the treason in the bill for which he stands indicted.

Mr. J. Howe. I think the question ought to be, that his counsel be directed to bring witnesses to the allegations in this bill.

Sir T. Littleton. I propose it to you thus; that the house will proceed to examine witnesses at the bar, to the treasons mentioned in the bill for which he was indicted.

Mr. J. Howe. I think that gentleman might very well have moved the question without that limitation; for that is as much as to say, that witnesses shall be examined to none of the treasons in the bill, except those for which he hath been indicted; and that is a limitation, I hope, shall not be put to the enquiries of this house. I hope you will put it, that they shall bring evidence to the matters alledged in the bill generally: there are several other allegations in the bill which I would have him answer to, as the alienating the affections of the king's subjects from him, which I take to be high treason.—*Members.* No, no.

Mr. J. Howe. Why? If it be not high treason, it hath nothing to do in that place. I believe it is a very high crime, and would induce me very much for the punishing of sir John Fenwick.

Mr. Norris. Sir, I do not know how the questions may be carried since candles are come in; but I think it is for the better. I think there are two things have been spoken to; one is this bill: I find those gentlemen that were against the bill on Friday, are more against it

now. I was for the bill then, and am now for a second reading of it: I think the bill is very plain, and know not what they would have mentioned in it more, unless they would have had the King's-head tavern, and what wine they drank there. I think there is all the reason in the world to hear the witnesses to prove him guilty of high-treason. As to the point of time, I should be very willing to allow it them, if that question was put; and, I think, you have been very favourable to him already in allowing him counsel.

Mr. *Smith*. I would only observe, when the bill was to be brought in, the objection was, that you had not witnesses. And now the question is, whether you can hear witnesses upon facts not particularly assigned in the bill? I believe no man can say, but that in the indictment there are particular facts that ought to be examined: I do own, for my part, if sir John Fenwick was a greater man than he is, it were better he should escape, than you should spend so much time about him. Sir, the indictment is mentioned in the bill; no man thinks that Goodman's going away is reason enough for bringing in such a bill against sir John Fenwick.

Mr. *Speaker*. Shall I read you the question? "That sir John Fenwick be allowed further time to produce witnesses in his defence, against the charge of high treason, and that he name his witnesses?"

Which question was put, and passed in the affirmative.

Mr. *Speaker*. The other question is, "That the counsel, who are to produce their evidence against sir John Fenwick, be allowed to prove sir John Fenwick guilty of high-treason."

Sir *T. Littleton*. I do think one of the reasons why this bill was brought, was, because possibly, by the absence of this witness, he could not, strictly speaking, be proved guilty; though all mankind is satisfied in his guilt. And therefore I question whether it will amount to a legal proof: and if you had such a proof as would convict him by the common proceedings of law, I should not have been for a bill of this nature; for it is against the honour and dignity of this House to do the work that an inferior court can do. But probably, by the absence of this witness, sir J. F. at a trial in the Old Bailey, might escape; though at the same time it is highly probable, the witness that is wanting to convict him, is by his means gone out of the way. Therefore I speak to the wording of the question; you say, 'shall be allowed to prove.' I would willingly prevent what may be objected when we come upon this debate: If you do use the word 'prove,' they may say, this is not proof; for still Goodman is not here. If you please to say, that we will examine witnesses to the treason, and we will be judges how far it appears to us, whether he be guilty, or not guilty.

Mr. *Speaker*. Will you let me propose it to you thus then? "That the counsel, in producing their evidence against sir John Fenwick, be allowed to examine witnesses touching the trea-

sons mentioned in the bill, for which sir John Fenwick is indicted."

Mr. *Montagu*. I do not observe, that in reading of it you say any thing as to the other allegations of the bill: I think you should word it, that the counsel be allowed to produce evidence to the allegations in the bill, and the treasons whereof he stands indicted.

Mr. *Speaker*. Well then, the question is this, "That the counsel that manage the evidence against sir John Fenwick, be allowed to produce witnesses touching the allegations in the bill, and the treasons whereof he stands indicted."

Which question being put, it passed in the affirmative.

Mr. *Speaker*. Will you please to appoint a time for it?

Mr. *J. Howe*. That I would move you is this; You were so extremely late before you went upon this information, that you had not time to go through any part of it; therefore I would move you, that you would appoint early in the morning for sir John Fenwick to be here.

And thereupon it was ordered, "That sir John Fenwick should be remanded to Newgate, and brought to the House on Monday at ten o'clock."

Mr. *James Montague*. Sir J. F. now insisted he had not notice; I humbly move, that he may be brought in, and acquainted with what you have ordered.

And accordingly sir John Fenwick was brought to the bar.

Mr. *Speaker*. The House have considered of what sir John Fenwick hath said at the bar, by his counsel, and they are of opinion, that witnesses ought to be examined there, to prove the allegations of the bill, and to prove him guilty of high-treason whereof he stands indicted; but in favour to you, because your counsel said you were not prepared, the House is willing to give you time till Monday next to make your defence; and they require you to give in a list of your witnesses; and if you send to me, you may have a warrant for their appearing at that time; and they require you to be here, so that they may proceed upon the bill exactly at ten o'clock.

And sir John Fenwick being withdrawn, the House resolved, "That the Bill for Attainting sir John Fenwick of High-Treason, be read a second time on Monday."

November 16. Mr. *Speaker*. Gentlemen, I would receive your directions in one thing: you have ordered a member to produce a letter, and the counsel, in opening the evidence, have referred to it. That member desires to know the proper time for him to do it; whether, while the counsel are managing the evidence at the bar, or whether he must stay till they are withdrawn?

Mr. *Sloane*. As to this matter, I do not question but it is to be offered as an evidence; and by the same reason that you give him the

favour to examine the witnesses that are produced against him, for the same reason the letter ought to be read in his presence, that he may explain it, or deny it: and give me leave to tell my thoughts of another matter: if that worthy member is to offer evidence of what he took from sir J. F.'s mouth, (though a member commonly gives his evidence in his place, after the counsel is withdrawn) I think it is not only fit to produce the letter in his presence, but that sir J. F. should hear what he says, and deny it if he can.

Mr. *Speaker*. Is that your pleasure, that the letter be produced before sir J. F., and that the evidence to be given by Mr. Vernon shall be in the presence of sir J. Fenwick?

The question being accordingly put, it passed in the affirmative. Then the Serjeant was ordered to take his mace, and go into Westminster-hall, and summon the members. And being returned, the order of the day for proceeding on the business of sir John Fenwick was read. [It being a quarter before 11 o'clock.] Then sir John Fenwick, and the counsel and solicitors on both sides, were brought in.

Mr. *Speaker*. Sir Thomas Powys, when you were here last, you insisted upon it, that the counsel against sir John Fenwick should be kept to the proofs relating to the allegations in the bill only; or else that you might have further time, because the witnesses were not ready. The House have considered that matter, and in favour to sir John Fenwick, that he might have no surprize, have given him to this day; but they do allow the counsel to give evidence not only as to the allegations in the bill, but to prove sir John Fenwick guilty of high-treason; and therefore, Mr. Serj. Gould, you are at liberty to go on with your evidence.

Serj. *Gould*. May it please you, Mr. *Speaker*, we are here to give in our charge, and the evidence that we have against sir John Fenwick. I find by your order, that we are now allowed to produce evidence touching the allegations of the bill, and likewise of the treasons for which he stands indicted; therefore I shall beg leave to open first, how he stands charged by the indictment.

The indictment first charges him with compassing and designing to depose the king, and put him to death. The second charge is, for inciting the French king to send an army of soldiers to invade this kingdom, and to make a miserable slaughter amongst the subjects of this kingdom. The third thing is, for adhering to the king's enemies. The fourth part is, That to effect this, he, together with several others, that is to say, Charnock, sir J. Freind, and others, did consult, propose, treat, and agree to invite the French king to send a number of soldiers to invade this kingdom, and to procure great numbers of armed men against the king to rise and be formed; and with these enemies, upon their landing and invading this kingdom, to join, for to make and carry on a rebellion and war in this kingdom. And fur-

ther it charges, that he did consult, consent and agree, to send Charnock as a messenger from sir John Freind, and others, into France to the late king James, to propose to him, to procure the French king to send soldiers and armed men to invade this kingdom. Then likewise to effect this, the indictment charges him with providing horses, pistols, and other warlike arms. This is the charge of the indictment; and these matters are in the bill: for the bill does charge him with compassing and imagining the death and destruction of the king, with adhering to his enemies, by consulting and agreeing with several persons at several times, to send Charnock to the late king James in France, to invite and encourage the French king to invade this kingdom with armed forces, and promises to join them, and assist them with men and arms.

Then the bill does take notice of other matters, that sir John Fenwick hath protracted his trial, by giving assurances to the king to make a plain discovery; by reason of which he did not come to his trial; and now one of the witnesses against him is withdrawn. May it please you, Sir, this is the charge as it stands before this honourable House; and the evidence we shall charge him with, will be of this nature: we shall give you an account, that the latter end of May, or beginning of June, sir John Freind and Charnock, and several other persons, met at the King's-Head, and upon that meeting they consulted how to invade this kingdom; and they concluded in this, that they would send Charnock into France; and he was to propose it to king James, that he should procure 8,000 foot, and 2,000 horse and dragoons; and upon their landing they were to join them with 2,000 horse. After this they had another meeting; for Charnock, to be sure of the matter, would have another meeting; and then he proposed it to them, Whether they continued in the same resolution? And they all then declared, particularly sir John Fenwick, That they did approve of it, and stuck by it; and that Charnock should go for that purpose to France. Charnock, in pursuance and execution of this treason, does go to France, and brings back a message, that the matter had been communicated to the French king; but at that time he was not ready for them, and could not spare his soldiers, and his troops. Then it rested for some time, till towards Christmas, when sir George Barclay came into England, and he brought with him a detachment of about sixteen; and their province was to assassinate the king. But there was another part, and that was the invasion; and in that part was sir John Fenwick concerned, which we shall produce our evidence to prove upon him; but it does fall out, that we have but one witness to this matter that we can produce *viva voce*; though when this indictment was found (for it was found upon the act last sessions, which required two witnesses to each species of treason) we had two; but one is since withdrawn, and that is touched in the

bill, as in truth the fact is. Now, if sir John Fenwick had come on in the ordinary course of proceedings to be tried, sir John Fenwick might have been tried upon this indictment, for then Goodman had been there; but he procrastinates his trial, he makes application to the king, and gives him assurances from time to time of an ingenuous discovery; but instead of that, when Goodman now is withdrawn, these assurances have terminated in this counterfeit confession that hath been laid before the House, and is charged in the bill.

But, Sir, to supply this, we shall produce the examination of Mr. Goodman; we shall prove to you not only the evidence that hath been given upon this indictment, upon which he hath been arraigned, but also the evidence which hath been given upon the trial of Cook, who was convicted upon that evidence. We shall go by these further steps in the case, and humbly offer it to the consideration of this House, how far sir John Fenwick will be affected with it: and that is this; here hath been Goodman, and captain Porter who still stands his ground; but they have tempted him with 300 guineas in hand, and 300 more was to be remitted to him upon his first landing in France, with assurance likewise of king James's pardon, and likewise 300*l.* a year; 100*l.* a year whereof was to be settled by sir John Fenwick. This proposition sprung from one Clancy: it could not be expected that sir John Fenwick should appear in his proper person, but he did by his lady, who was with captain Porter, and gave him assurance of all that was proposed by Clancy, that that should be performed, and a great deal more.

We shall further give this account, That when sir John Fenwick was taken, there was a letter handed to a third person; and it appears by that, that he thought himself at that time not safe, unless they could corrupt the jury: for, says he, we must now get two or three staunch persons that will starve the rest. These steps we shall proceed upon, and begin with the indictment, and call our witnesses to it.

Serj. Lovel. Mr. Speaker, I shall not repeat what hath been said; because I know what hath been materially said cannot pass the observation of this House. The method we desire leave to proceed in, is the method you have prescribed us; and that is, first to prove the allegations of the bill. And that we shall make appear to you by undoubted proofs, that sir John Fenwick does stand indicted for these treasons at the sessions at the Old-Bailey, the 28th of May, upon the oaths of Porter and Goodman; that we shall prove by records, and that is not capable of any traverse or denial. We shall also prove, by matter of record, that several who were concerned with sir John Fenwick in this conspiracy have been tried and attainted; and then we shall call a living witness to prove sir John Fenwick guilty of treason in the highest manner. Mr. Tanner, deliver in the indictment of sir John Fenwick. [Which was then read at the table.]

Serj. Lovel. The bill does charge, That he stands indicted upon the oaths of these two, captain Porter and Mr. Goodman: besides, I must beg leave to observe, that by the act of parliament made last sessions, it is enacted, That no person shall be indicted unless upon the oaths of two witnesses: had not these witnesses been sworn before the grand jury at that time, this bill could not have been found according to that law, nor would sir John Fenwick have pleaded: but he hath been arraigned, and pleaded; so that we submit it to this House, that it does appear upon record, that this indictment was found upon the oaths of two witnesses. Besides that, two witnesses are subscribed to the bill. Now that other persons have been indicted, and convicted upon the same evidence, we shall prove, and that likewise by records.

Serj. Gould. I thought when we came to give you an account of the absence of Goodman, then to have given you an account of this, and other matters.

Mr. Speaker. You will agree upon your method, gentlemen: who do you call in the first place?

Serj. Gould. Captain Porter, Sir. (Who being present). I desire, Mr. Speaker, that he will give an account of what he knows concerning this matter, as also of what is charged in the indictment.

Mr. Speaker. Captain Porter, the House requires you to give them an account of your knowledge of any conspiracy, by sir John Fenwick, against the king and this government; and likewise of your proceedings upon the indictment against him for high-treason.

Capt. Porter. About the middle of May was twelve months, there was two consultations, one at the King's-Head in Leadenhall-street, and the other in Pall-mall; these two consultations were for the considering of the best means to bring the late king James into England again: for it was said, that king William being gone beyond sea, he had left but few forces, and therefore they thought they could not have a fitter opportunity than that juncture; upon which they pitched upon Charnock to go into France, and make some proposals to the late king James, to borrow 10,000 men of the French king, whereof there should be 8,000 foot, 1,000 horse, and 1,000 dragoons; and it was proposed, when they came over to meet them with 2,000 horse.

Mr. Speaker. Where was this?

Porter. Our first meeting was at the King's-head in Leadenhall-street; after that, Mr. Charnock desired another meeting, and then we met at Mountjoy's in St. James's, and we all stood to what we had before resolved, That he should go over to king James, and make this proposal; and that if he could get so many men of the French king, we would meet him with so many horse.

Mr. Speaker. Sir, you say the first meeting was at the King's-head in Leadenhall-street; who was then present?

Porter. There was my lord Aylesbury, my lord Montgomery, sir John Fenwick, sir John Freind, sir William Parkyns, Charnock, Mr. Cook, and myself; we dined there, and after dinner Mr. Goodman came in to us.

Mr. Speaker. Did sir John Fenwick hear this discourse?—*Porter.* Yes, Sir.

Mr. Speaker. Did sir John Fenwick consent to it?

Porter. He did absolutely consent to it. Sir John Freind did propose it; says he, Do not let us propose more than we can bring.

Mr. Speaker. Then you say you had a second meeting?

Porter. When we agreed upon this business in Leadenhall-street, capt. Charnock desired another meeting, to know if we continued in our resolution; and the next meeting was at Mrs. Mountjoy's; I think then my lord Montgomery was not there, nor Mr. Goodman; but there was my lord Aylesbury, sir John Fenwick, sir John Freind, sir William Parkyns, Mr. Charnock, and myself.

Mr. Speaker. How long after?

Porter. About eight or ten days, to the best of my remembrance.

Mr. Speaker. What was said at that meeting?

Porter. The second meeting was to agree to the same thing: we desired Charnock to go as soon as possible to acquaint king James, that the sooner he came that year, the better.

Mr. Speaker. Did sir John Fenwick consent and agree, at the second meeting, to his going into France to procure the forces?

Porter. Yes, sir.

Mr. Speaker. Will you give the house an account of any thing else you know, relating to this matter?—*Porter.* That is all.

Serj. Gould. Was you examined by the grand-jury, when the Bill was presented against sir John Fenwick?—*Porter.* Yes, sir.

Serj. Gould. What evidence did you give to them?—*Porter.* The very same I give now.

Mr. Speaker. Mr. Serj. Gould, what have you to say further to him?

Serj. Lovel. We would ask, whether Mr. Cook was at the first meeting?

Porter. Yes, sir, he was at both meetings.

Serj. Lovel. Was Mr. Goodman at the preferring of the bill of indictment at the Old-Bailey?

Porter. I saw him go in to the jury, and he told me it was for the same thing.

Serj. Lovel. We have some of the jury here, and we will call them to that.

Serj. Gould. Now, if it please you, sir, we will ask him to the matter concerning Clancy's tampering with him.

Mr. Speaker. Will you give the house an account of that matter?

Sir Tho. Powis. By your favour, I hope you will give us leave to interpose in this matter: for I am sure in the case of life, and in case where there is a law prepared to be made subsequent to the fact, to condemn any man to death, you will not only have good evidence, but that which is legal evidence. And I take it,

that in cases of this nature, of a subsequent law, the evidence ought to be much stronger, and much fairer than when a man is to be tried by a law in being. If they should offer that which was said in the great case of my lord of Strafford, (which attainder there hath been an act of parliament to reverse) by a gentleman that did then appear against my lord of Strafford, That where the house proceed in a legislative way, there needs no evidence at all: but every man may follow the dictates of his own thoughts and conscience: (It is in Rushworth's Collections, fol. 377.) Yet, I hope, you will be of another opinion, and expect stronger evidence, than if a man was to be tried by a law in being. Now that which is offered now, cannot be allowed in any court of justice: they were going about to shew, that my lady Fenwick, the wife of the gentleman at the bar, that she had used some means to take off Goodman's evidence, and they would make use of that against her husband. Now, what any man's wife says cannot be made use of against him, as nothing that she says or does can be made use of for him; and by the same rule of justice, it cannot be made use of against him: for otherwise the rule would be unequal, That she might be a witness against him, but not a witness for him; that seems so unjust, that it will not be admitted in any court whatsoever.

Sir Barth. Shower. By your votes the prisoner is allowed counsel, and the king's serjeant is to produce the evidence against the prisoner: that phrase of evidence makes us believe, or at least to hope, that you will give us leave to object to that which is not so; and in this I appeal to the knowledge of the gentleman on the other side, who hath had a great deal of experience of this kind; and I am sure, in all his observations in the Old-Bailey, he cannot say this was ever admitted in case of treason, nay not in felony, the actions or sayings of other persons; and I must confess I wonder to hear him move it now.

When attempted on behalf of a close prisoner, that was not visited by any body, it was not admitted that the actions of a third person at large, should be admitted against him: There the actions of a wife cannot be evidence for, nor against her husband. It was never but in one case, and that for sodomy, allowed, and that was after two or three witnesses besides had been produced; and by the opinions ever since, it hath been allowed not to be law: and that for the economy, the danger might follow in cases of matrimony and families. Now they both do concern the acts of other persons, and not sir John Fenwick. Besides I have one objection more, and that is, There is no such thing alledged in the bill; and, with submission you have declared, that they should produce evidence as to the allegations in the bill, and the treasons in the indictment; but I cannot find any order that they should produce evidence concerning the carrying away of any witness; and it is not alledged, that Goodman is withdrawn by sir John Fenwick's privity.

As to Porter's being tampered with, there is no colour of suggestion in the bill; so that this neither being in the bill, nor being evidence at law, we must be surprized very much by it, if you should admit it.

Mr. *Speaker*. You hear the exception, What do you say to it?

Serj. *Gould*. I think what these gentlemen say, will receive a plain answer. They have made an objection without answering the subject matter; it is an allegation in the bill, That Goodman hath withdrawn himself. Now the use we make of this is, to let us in to give an account of what Goodman hath sworn, and to entitle us to read his examination: For, say we, he hath been tampering to stifle this conspiracy, to take off the king's evidence. For nobody doubts of the execrable and wicked conspiracy; and it is as plain, here hath been two witnesses to prove it: and as plain, that this indictment is found according to the late act of parliament, upon the evidence of Porter and Goodman. Now, to shew this conspiracy is carrying on, we offer to prove the tampering that hath been to take off the king's evidence, and to lay that before the consideration of this house; so the use we make of it, is only preparatory to let us in to tell you what Goodman hath sworn, and in good time we shall produce to you an indictment, where, upon his very oath, and upon the same evidence as we offer here, another of the traitors hath been convicted; and therefore we humbly offer it whether, as this case is, we shall not be admitted to prove this tampering?

Serj. *Lovel*. Before we withdraw, I beg two words as to what is objected on the other side, for the learned gentleman appeals to me: and I must appeal to the knowledge of some members, that are learned in the law, and to all, that even in criminal cases, courts are not bound up to positive evidence, but that the evidence of circumstances, and some persons to corroborate them, is admitted: And if it should be so, that nothing but positive evidence should convict, we should have very few convictions at the Old-Bailey; as to clipping and coining, where one is convicted by positive evidence and direct proof, forty are convicted and attainted by circumstances, as materials found about them, and putting off counterfeit-money. Sir, I must submit to you, whether, as the nature of this case is, this house will not think fit to hear all evidence that may concern this matter, whether certain or circumstantial; and the wisdom of this house will distinguish afterwards, what they think is material, and what is not. We do take this to be part of the same conspiracy we do charge the prisoner at the bar with, that he might not come to condign punishment; and therefore we pray, that let the proceedings of other places be what they will, that you will hear the whole matter in this case, whether the evidence be positive or circumstantial.

Sir *Tho. Powis*. I think they mistake us when they give us such an answer. We

doubt not but there is positive evidence and circumstantial; but we suppose this to be no evidence at all. Mr. Recorder tells us true, That circumstantial evidence is frequently made use of; but we say, that whatever my lady Fenwick hath said or done, is not to be admitted as evidence against the prisoner at the bar; because what she hath said by way of endeavour to draw off Goodman, is no evidence at all to be offered against her husband, and is not so much as circumstantial evidence.

Sir *Barth. Shower*. We do agree, if the bill had been brought in against my lady Fenwick or against Clancy, this had been proper evidence; and they did, and may deserve punishment for it themselves: but this is no evidence against sir John Fenwick, that is here.

Serj. *Lovel*. We think it is properly before the House, even by the order of the House itself: For in the first place, we are to speak to the matters contained in the bill. One matter is, That sir J. F. had been tried before now but for reasons mentioned in the bill; and that he delayed his trial till such time as Goodman was withdrawn; therefore what lies before us by the direction of the House, is, that till such time as Goodman was withdrawn, sir J. F. did pretend to go on to make a discovery, and afterwards put it off with what is charged in the bill: But say they, What is done by my lady Fenwick, is no evidence against him. When all the circumstances are laid before the House, what dealings there was with captain Porter, and what was said at that time, and the consequence presently after Goodman's going away, I hope it is as much evidence as the case will bear.

Sir *R. Temple*. Sir, I desire they may withdraw.

Accordingly they withdrew.

Sir *R. Temple*. I think it much concerns the honour of the house, when a prisoner is at the bar, that he should be allowed the right of an Englishman; what you do here, may be a precedent in after ages: You are told what is offered as evidence here is admitted in no court, and the answer that is made to it, is of no force at all: they tell you there is no allegations in your bill, that sir John Fenwick had any hand in his withdrawing, nor nothing in the indictment of it, and for that reason the evidence seems improper; and if it was, this would be no evidence at all; for the oaths of other persons is no evidence against the prisoner, to make him guilty of any thing.

Lord *Cutts*. I think it is agreed already, That the counsel for the prisoner should not meddle with the authority and jurisdiction of this House: For if we are to be tied up to all the forms and niceties observed in inferior courts, then to what end is the prisoner brought here? I think evidence ought to be admitted, that may clear every man's conscience, that this bill against sir John Fenwick ought to pass.

Mr. *J. Howe*. A gentleman said, We are not tied to the forms of inferior courts; but though

we are not tied to the forms of inferior courts, we are tied to that which was the ground of them, and that is, right reason and true sense: they have alledged that he was indicted; nobody doubts it. That Goodman is withdrawn, nobody doubts it. But what is that to sir John Fenwick? It might be with a design for good or evil to sir John Fenwick. My lord Jefferies said, at my lord Delamere's trial, (as I am informed) that one witness, with good circumstances, was enough to convict a man of high-treason. And I am told, it was told him then, that if they ever met him in the House of Lords, he should answer it with his head. I desire you would ask captain Porter, when he comes in, whether this was discoursed before dinner, at dinner, or after dinner? And whether he knows that Goodman heard this or no?

Chan. of the Excheq. There seems a particular shyness to know the truth of this matter, I mean in the counsel the other day: the gentleman says, That Goodman might be withdrawn to the prejudice of sir J. F. as well as for his good: I desire you will not let the government be so stigmatized. You have given leave to the counsel to examine to any thing that may be added to the Bill; for upon a commitment, I can move you to put any thing that shall be thought reasonable.

Sir Tho. Dyke. It may be a reasonable thing to enquire why Goodman is withdrawn? But the question is, Whether this be a proper time? The House is not tied to the common forms, but they are tied to the common rules of equity: and the question is, Whether the House will permit any person to suffer by the acts of another?

Sol. Gen. (Sir John Hawles.) It is discretionary, whether you will determine that this is evidence now, or after you have heard it. I cannot tell at whose trial it has, but I won't enter upon the legality of the thing; it is one thing when a man is to be tried by a jury, and another thing when he is to be tried before judges. A jury may be so swayed and possessed by it, that it may not be fit for them to hear it: but look into the court of Chancery; and there depositions, if one side say they are evidence, and the other side say they are not, are every day admitted; and the rule is, that it is sooner dispatched by hearing of it, than not. You do not sit here as a jury, but as judges, and will consider how far the actions of a wife shall concern her husband; you will do the prisoner right, and yourselves right, if you will hear them.

Sir Fr. Winnington. The question is, Whether the king's counsel——

Mr. Speaker. Let me set you right; they are not here as king's counsel.

Sir Fr. Winn. Very well: but in this House you are the judges and jury too. The evidence that is opened, is to induce you to believe that he is guilty; and the gentleman that spake last will not allow it to be a legal evidence. Then the question is, Whether you, being judges of the fact as well as of the law, should

be afraid to be induced to believe a fact, by that which is not legal evidence? Suppose my lady Fenwick had had the design, and had told her husband what she intended to do, and he should have said, he scorned it: this is possible, if you go to supposing; and that he might apprehend it would do him a mischief. Now it can be to no purpose to hear this evidence, unless it be to satisfy the House, in order to attain the prisoner. No, but say they, Let us hear, and we will judge afterwards? Why so? It cannot affect the prisoner: and if any person hereafter have a mind to have my lady Fenwick punished, they may examine it.

Mr. Sloane. The gentleman that spake last hath made one supposal; let me make another. He supposes, that it may appear by the evidence, upon the examination of witnesses, that what my lady Fenwick or Clancy did, was contrary to the direction of sir John Fenwick: if the evidence happen to be so, it is nothing. But we may suppose again, Suppose it happens, that it appears by the evidence, that it was for the benefit of sir John Fenwick to the greatest degree, to get away one of the witnesses; 'et cui bono,' is the strongest presumption to me. I do allow, in Westminster-Hall, that a woman should not be a witness for or against her husband; but if she be directed by her husband, 'Qui facit per alium, facit per se;' you do not alledge all the evidence in the indictment, that runs in general; if the evidence differs as to time and place, ye may find him guilty of the indictment.

Lord Norryes. Because I would not willingly go upon suppositions, I desire the clerk may read the question that you have passed the last day, to examining evidence. [Which was accordingly read.] Now I desire to know, whether this be treason within the indictment, or any of the allegations of the bill: otherwise, I think you have tied yourselves up by that rule.

Mr. Pelham. I did expect the gentleman that spake lately would have cleared the matter. He gave you a distinction between the proceedings of Westminster-Hall and the Court of Chancery. I am ignorant of both. I desire to know, Whether we are to go here by the proceedings of Westminster-Hall, or the Court of Chancery. If we are not tied by these rules, we may let ourselves into any evidence that will induce us to believe him guilty or not guilty: if we are tied to those rules that are observed in all courts of justice, where trials of treason are had, this can be of no validity: so I desire to know, whether we are to go according to the proceedings of those courts, or whether we may proceed as the Court of Chancery?

Sir Tho. Littleton. The honourable member that spake last, desires to know, Whether we are bound by the rules in Westminster-Hall, in their proceeding, or not? I believe it would have been to very little purpose to have thought of this bill, if those courts could have convicted him. I believe, if the counsel had tied you to the

proceedings of Westminster-Hall, and therefore that you could not have proceeded on this bill, you would have taken notice of them, and reprimanded them for saying so. I know not what to say to the proceedings of Chancery in this case; but I suppose upon this trial, you will inform yourselves by the best methods you can; and every man, according to his judgment, be for or against the bill. If upon what I hear, I am of opinion he is notoriously guilty, I shall freely pass the bill. If I do so much as doubt that he is guilty, according to the old rule, 'Quod dubitas ne feceris,' I shall not be for it; and in order to this, I am for hearing every body that comes before us. It is said, that possibly Goodman is withdrawn to sir John Fenwick's prejudice; I would be glad to hear that; if so I shall have the worse opinion of the bill. They say, it is not alledged in the bill, concerning captain Porter's being tampered with; but it is alledged, that Goodman is withdrawn; and that it is not alledged that sir John Fenwick was privy to it; but it may weigh to gentlemen's judgments, how he comes to be withdrawn. They that tamper with one witness may be thought like to tamper with another. They tell you, that the evidence of a man's wife will not weigh against her husband. It may be so in point of law; but if you think yourselves bound up to the strict rules of law, dispose of your bill presently.

Sir W. Coryton. You have been pleased to give leave to the king's counsel to prove matters against sir J. F. You have heard capt. Porter upon the fact. If they had opened the matters, that sir J. F. was instrumental to convey Goodman away, I should have been willing to have heard it: but they opened it, that my lady Fenwick was instrumental in conveying away Goodman; and this ought in no sort to be admitted. An hon. gentleman of the long robe made a difference in the proceedings between the court of Chancery, and the courts of Westminster-Hall; but I would fain know, if a fact was stated, Whether my Lord Keeper could determine the matter before a commission went to prove it. It is true, we are not tied to the forms of law, but we are tied to the forms of justice. I know no case where a wife is admitted to be a witness for or against her husband. In Brown's case, indeed, who took a woman away, and forced her to marry him; the question was, Whether she should be admitted? And in that case she was admitted as a witness, because the necessity of the thing required it; and there was no other way to prove, whether he had her consent or not. Another case there was of my lord Castlehaven, where from the nature of the thing it was admitted; for it was impossible there should be any other proof of it. But if my lady Fenwick be guilty of this matter, it must only by way of inference affect sir J. F. They tell you, they insist upon it as an indictment; then it comes to be a matter of consequence; and therefore, since the matter hath been fully stated to the House, as to what they would

prove, I think we may now give our judgment upon it.

Mr. Boscawen. You are here in your legislative power, and are no more tied to the rules of law in examining of witnesses, than you are in giving of judgment; for you can give those punishments that never are given in Westminster-Hall. I am of opinion, that my lady Fenwick cannot be examined for or against her husband; but if he send her to solicit for him, it shall have some weight with me. Those that do not believe it from what he says, may give their judgment accordingly: I desire to know of this gentleman, if I do not believe it, whether I can give judgment against him? I believe a man's conscience ought to go with his judgment.

Mr. Speaker. I will read the Question: That captain Porter be examined to the attempt of taking off his testimony as to the late conspiracy.

[Which Question being put, it passed in the affirmative.]

Mr. Harley. I suppose you will let the counsel of both sides have first done with their questions, and then there will be some questions proposed to you.

Mr. J. Howe. They tell you how that sir J. F. was indicted, and that Goodman is withdrawn; but there is one thing the counsel of both sides slip over, and that is, sir J. F. hath given in false informations; it looks as if they were agreed on both sides in that matter: I desire the king's counsel may be asked, whether they have any evidence of that matter?

Col. Crawford. Since I am mentioned in that paper—

Adm. Russel. I believe, though that gentleman was afraid that matter would have been passed over, yet that the gentlemen of this House that are therein named will take care, for their own vindication, that that matter should not be slipped over; I suppose the proper time for that is, when the evidence is over; I assure you, if nobody else will, I will.

[Then sir John Fenwick, and the counsel of both sides, and captain Porter were brought in.]

Mr. Speaker. Sir Tho. Powys, the House hath considered of your exception to the testimony of captain Porter, as to the point he was to be examined to, and they are agreed, that it is fit that all the evidence should be laid before them, and they can judge afterwards, whether it be material or fit to be allowed, or not. Therefore, captain Porter, pray do you give the House an account at large of what attempts have been made upon you, at any time to draw you off from your testimony, with respect to the late conspiracy.

Porter. I had a meeting with one Clancy, first in Mitre-Court, at _____, and afterwards at the King's-Head tavern by the play-house: at those meetings he proposed to give me 300 guineas to bear my charges to France, and to send me a bill for

300 more; and likewise that I should be allowed 300*l.* a year.

Mr. Speaker. How long had you been acquainted before?—*Porter.* Several years.

Mr. Speaker. Did he tell you who he came from?

Porter. He said, he had been with——*Fenwick*, who desired him to make this proposal to me.

Mr. Speaker. How often had you meetings with him?

Porter. About seven or eight times.

Mr. Speaker. What satisfaction did he give you, that sir John Fenwick would perform the agreement?

Porter. He told me, my lady Fenwick and my lady Montgomery should meet and confirm every thing that night. The day before I was to go, I met with my lady Fenwick, who told me, my lady Montgomery could not come, because one of her children was fallen sick.

Mr. Speaker. What satisfaction did she give you, that sir John Fenwick would perform what Clancy had proposed?

Porter. She said, what Clancy had proposed should certainly be made good.

Serj. Gould. Did you receive any thing in part, in pursuance of this agreement?

Porter. I received 300 guineas of Clancy, and he promised to me a bill of 300 more, which was deposited by——*Fenwick* in his hands, to be sent after me into France.

Serj. Gould. Pray, what letter was that he brought you?

Porter. He brought me a letter, and said it was writ by sir J. F. to king James on my behalf.

Mr. Speaker. Did he deliver that to you?

Porter. No; he delivered it to the gentleman that was to go with me, one capt. Done-lagh.

Mr. Speaker. Why did you not take that letter into your own hands?

Porter. I had it, and read it, before it was sealed up.

Serj. Gould. Do you remember the contents of it?

Porter. As much as I remember was, He desired his majesty, by reason that my going away was to save my lord Aylesbury and my lord Montgomery, &c. to pardon what I have done.

Serj. Lovel. Who subscribed it?

Porter. It was not sir John Fenwick's name; but they told me, king James would know who it came from.

Serj. Lovel. How did you proceed after the meeting with my lady Fenwick?

Porter. The next night after that he had paid me my money, and shewed me the bill, and I was to go away the next day after; they said, the boat was provided.

Serj. Lovel. Can you tell whether the boat was provided?

Porter. They were taken up presently after.

Serj. Gould. We will now produce a record to confirm the evidence that he hath given

you: this person hath been convicted for this tampering.

(Accordingly the Record for Clancy's Conviction was produced.)

Sir Tho. Powys. I desire to know, Whether they offer this as evidence against sir John Fenwick?

Mr. Speaker. They offer to prove, that this very person hath been tampered with to take off his testimony; and they leave it then to the House to judge, who is most likely to be guilty of Goodman's withdrawing. They begin to shew you, there hath been an attempt to take off this person's testimony; you have heard the person himself to it already: so now they offer to read the conviction of Clancy to this matter.

(The Record of Clancy's Conviction was read.)

Serj. Lovel. We will prove the like solicitation hath been made by Mr. Dighton, who is solicitor for the prisoner at the bar.

Mr. Speaker. What is your witness's name?

Serj. Lovel. Thomas Roe: if you please, Sir, to ask him what endeavours hath been used by Mr. Dighton to make use of him, that Goodman might withdraw himself.

Mr. Speaker. Mr. Roe, You are required to give this House an account of what hath passed between Mr. Dighton and you, in order to take off the testimony of Mr. Goodman.

Roe. About the middle of September last I had occasion to go to Mr. Dighton, to enquire, Whether the commissioners of the land-tax in Surrey sate; for I knew he was concerned in some affairs for that county: he told me, he did not positively know, but would speedily enquire. At the same time he took occasion to tell me, he knew it was in my power to do sir John Fenwick service. I asked him, What he meant by it? Says he, I know you know Goodman well, and it will be the better for you if you will tell me: I asked him, What he meant by that way of talking? He desired I would meet him some other time, and I should know further of his mind. Accordingly I did meet Mr. Dighton: says he, You know Goodman well, and if you can say any thing that can discredit Goodman's testimony, you shall have 100*l.* a year settled upon you for your life. Says I, Sir, I do know him well: says he, Did you never hear him talk of poisoning the duke of N. and robbing on the highway, and that he is concerned with clippers? Says I, I have heard him talk of those matters several times; but you cannot think I will be a witness, and expose myself, and disparage people till I know for what. Says he, For that you shall be satisfied; you shall have 100*l.* a year settled upon you, provided you can discredit Goodman's testimony, that sir J. F. may come off, and it will be done by a friend of yours. We accordingly agreed to meet the next day at a coffee-house in the city, and appointed a friend to be there; but Mr. Dighton did not meet at the time; and the

reason he told me was, because sir J. F. was that day to be arraigned. As soon as Mr. Dighton had made this proposal, I told Mr. Goodman of it, and he advised me to go on with him, and see if I could get any offer under his hand: I told him he had appointed to meet me in the city, and a friend to be there to hear me. I went, and told Mr. Dighton; but Mr. Goodman would not be satisfied with that, but said I must go to the archbishop, and tell him what passed; so I did go and tell the archbishop what I have told you now.

Mr. Speaker. Had you any meeting after that?

Roe. Yes, on the 19th of September; and then he made great asseverations, that what he said should be performed; and that I should not only oblige sir J. F. but my lord Montgomery; and that Goodman was a lost man by being become a common evidence; and that it would not be in his power to oblige any man, my lady duchess having discharged him of his employ, and he would not be in a condition to do further for me; and, says he, Whatever you would have gotten by serving my lady duchess in her concerns, shall be made up over and above this 100%. a year that I have promised.

Serj. Gould. I desire he may be asked, Whether Goodman did not acquaint him, that a sister of sir John Fenwick's had been with him, and upon what occasion?

Roe. About the time of the preferring of the bill against sir John Fenwick, I saw Goodman at Hicks's-Hall; and a little after he told me, that a sister of sir John Fenwick's had come to him, and made some proposals to him; and I acquainted the duke of Shrewsbury's deputy, Mr. Vernon, with it.

Mr. Speaker. Did you pursue this discourse with Mr. Dighton, so as to come to any positive agreement?

Roe. No otherwise than what I told you; my design was to have Mr. Dighton to have given it me in writing, or else for him to have said it before some other man; but I don't know any thing whereby I could have discredited Mr. Goodman, if he would have done it.

Serj. Gould. You observe, sir, that one of the witnesses, whose name is subscribed to the bill of indictment, is withdrawn: now to give you an account that he is withdrawn, I desire the king's proclamation may be read.

Members. No, no.

Serj. Lovel. We have Mr. Goodman's examination under the hand of Mr. Vernon; we pray it may be read.

Sir Tho. Powys. Mr. Speaker, I desire to be spared a word to this matter: I take this to be a great point, not only as it concerns the life of this person, but as it may be a matter of example in all times hereafter; that which they would offer is something that Mr. Goodman hath sworn when he was examined by Mr. Vernon; sir J. F. not being present or privy, and no opportunity given to cross-examine the person; and I conceive that cannot be offered

as evidence; for if that should be allowed for evidence, then what is sworn behind a man's back, in any case whatsoever, may as well be produced as evidence against him; and they know, that in a case of the value of five shillings, no depositions or examinations of any man can be made use of; and I am sure they will not say, that the depositions taken between other persons, where a man is not a party, can be made use of as evidence against him; and if not admitted where property is concerned in the lowest degree, I hope you will never admit it in this great place, from whence inferior courts (as to justice) take their measures.

Sir Barth. Shower. Mr. Speaker, I desire you would spare me a word of the same side. I humbly oppose the reading of this examination, as not agreeable to the rules of practice and evidence, and that which is wholly new; and this in civil causes cannot possibly be done: no deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination, and might have cross-examined him, or examined to his credit, if he thought fit; it was never pretended, depositions could be read upon other circumstances. But in criminal cases, I appeal to the gentlemen on the other side, who know the proceedings in the Old-Bailey very well, it was never admitted: nay, in an appeal of murder, if depositions be taken before the coroner, and there be an examination of witnesses upon the indictment, though the appeal be for the same fact, and in order to bring the person to the same punishment; yet, in that case, those depositions can't be read, because it is another suit; but it was never attempted in any court of justice, that the examination of witnesses behind a man's back, could be read in any place whatsoever. Our law requires persons to appear, and give their testimony *viva voce*; and we see that their testimony appears credible, or not, by their very countenances, and the manner of their delivery: and their falsity may sometimes be discovered by questions that the party may ask them, and by examining them to particular circumstances, which may lay open the falsity of a well-laid scheme; which otherwise, as he himself had put it together, might have looked well at first; and this we are deprived of, if this examination should be admitted to be read.—Now, though the practice of other courts does not oblige this house, yet we know you will consider the rules of justice; it is but justice in criminal cases, especially as our constitution is, that the person shall see his accuser. A man may swear a deposition reduced into writing, whose conscience perhaps would not let him publicly accuse the prisoner face to face: experience hath shewed it often, that several that will calumniate another privately, will not justify the same in open court of justice. What Goodman is, it is not proper for us at present to give an account of; but we oppose it at present, for that we were not present, nor privy, nor could have cross-examined him; it is only

an information before a private justice; for if not so, we know not what authority he had to examine him: and then if so, Mr. Recorder knows, that in the Old-Bailey, if Goodman had died it had not been evidence; * in case he had been sick, or withdrawn without our privity, they could not have read it; nay, if he were withdrawn by our privity, it could not be read: it is true, the inciting him to withdraw had been punishable in another man, but could not have been read to have convicted the party; and since this examination could never have been read there, and if it must be unjust, and hath not been practised, I hope you will not do it now.

Mr. Speaker. Mr. Serjeant Gould, what do you say to it?

Serj. Gould. I observe this gentleman's objection, why this examination should not be read; and, under favour, we think we are regular, as this case is, to have his deposition read. It is true, as long as the witnesses can be produced, in all courts and practice of the law, you shall not read his examination, or what is taken before a justice of peace; but that is not our case; it is now fully proved before you, that he is withdrawn; and it is fully before you, that he hath given evidence for the king, and hath been examined; and this is an extraordinary case, and that is the reason we are in parliament: he hath sworn this matter, and before a proper officer; why then shall not his evidence be read and allowed when he is wilfully withdrawn, and we say, by the contrivance of the prisoner at the bar? And the thing speaks itself. Now, with submission, I take it to be every day's practice, that where an evidence is dead, his deposition shall be read. It appears to you, that there was to have been a trial, but the witness is withdrawn; and it appears plainly that he hath been tampering. The evidence is full in the case as to Porter; and we have produced a record of conviction that does confirm it: now this is such a practice, we come into parliament to have it remedied; for otherwise men shall commit treason, and by their contrivance and art the witnesses shall be drawn away, and the prisoner shall not be brought to condign punishment. Here is the record in which he gave evidence, and he is withdrawn; and therefore I hope in this case, we shall be admitted to read his deposition: for I deny what the gentleman says to be the practice; and Mr. Recorder can give you a better account, who knows more of the practice of it, that if a witness is dead, they may read his depositions. We are here before you in parliament; and by the same reasons that others have been tampered with, this witness may be presumed to be tampered with; and therefore we are in your judgment, whe-

ther in this case his depositions shall not be read?

Serj. Lovel. It is objected, on the other side, That this evidence ought not to be offered; and for what reason? Because, say they, a jury ought to go 'secundum allegata et probata;' and what is not strictly evidence by law, you are not to take notice of; but in criminal cases (which is this case), where persons do stand upon their lives, accused for crimes, if it appears to the court that the prisoner hath, by fraudulent and indirect means, procured a person that hath given information against him to a proper magistrate, to withdraw himself, so that he cannot give evidence as regularly as they used to do; in that case his information hath been read; which, I suppose, with humble submission, is this case; but I suppose we are not here tied up to formal evidence; but it is our duty, since the house hath commanded, to lay the whole fact before you, and you are judges what is material, and what is not material.

Sir Tho. Powys. Please, sir, to spare me a little; for sure this is no small matter. I did expect that they, if they intended to have supported this evidence, would have mentioned some author, some case, or some precedent where this has been before: but he makes such a distinction, I am mightily surprized at; for Mr. Recorder cites no one instance, that ever he saw such a thing in his life; nor cites one book that hath such authority; but he gives you a distinction, whether it be of his side or our's, I must submit to you; for he seems to agree, that in cases of property, such evidence is not allowed; but in cases of life, in which we ought to be more tender, he says, it is to be allowed. Sure if it be not evidence where five shillings only may be at stake, I submit it to you, whether it ought to be admitted in the case of life? For my part, I know nothing of it, if it be a rule; but I always thought the evidence ought to be more clear and full in the case of life, than in the case of property; but Mr. Recorder turns it upon us, and says, Though it is not evidence in case where property is concerned, yet it is evidence in case of life: but I desire he will shew any one lawyer in England, that ever said it, but himself.

Sir B. Shower. I answer to what Mr. Serjeant Gould says: that this is an extraordinary case, I will not pretend to say any thing, you are the proper judges of that; we now oppose it in respect of the rules of justice. As to Mr. Recorder's distinction between civil and criminal causes; he hath admitted, that in civil causes it would not be allowed; and I hope you will be of opinion, that it ought not to be admitted in criminal. The jury must go 'secundum allegata et probata.' I desire to know what other rules a jury hath in criminal cases? But they say, that a juryman hath not as much upon his oath in trying a prisoner for his life, as in trying an action of trespass. Is not the oath, 'You shall well and truly try, &c. according to the evidence you have heard?'

* "The evidence which a witness gave on a former trial between the same parties has after his death been read in a civil action: but this is not allowed in a criminal prosecution." Peake's Law of Evidence, chap. 2. s. 2. art. Depositions.

Now, I would know whether the form of the oath, which the wisdom of our ancestors hath thought fit to use for 1,000 years past, does not direct what shall be evidence? Evidence of *prima facies* must be evidence of living persons: I am speaking for the life of a man, and for maintaining the rules of law, which I hope shall continue for ever: and that is, that the examination of a person that is absent, shall not be read to supply his testimony. What you shall think fit to do here, we must submit to; but that it is allowed below, we must deny.

Mr. Recorder. Sir, I do, with humble submission, stand to what I said: as to the definition of *allegata et probata*, in matter of property, we agree with them; but as to *allegata et probata*, in matters criminal, we must differ with them: I did say it before, and do say it again, with submission, that in many cases criminal, there need no positive evidence at all; and yet the jury, according to *allegata et probata*, in that case, may convict a criminal. And I do say, with submission, that where there is no positive proof at all; yet in that case, many criminals are, and still will be convicted. I did instance before in the case of clipping and coining, which are matters so secretly practised, as it is very rare there can be any positive witness to prove the fact: what is then the method? Why, we go by circumstances, by information of other persons, by tools, and other instruments that are found; and though nobody ever saw them do the thing, yet they are convicted. We do not offer this evidence to be as concluding evidence as if Goodman was here; but a corroborating evidence of what captain Porter hath said. If it did wholly depend upon this evidence, it may be it might have no great weight; but since there is other evidence *viva voce*, and since you have been pleased to order us to lay before you all the evidence, we humbly offer it to you, and pray it may be read.

Mr. Manley. I humbly pray they may withdraw.

Mr. Speaker. If you please to withdraw; but first I am required to ask, if on both sides you insist upon this point?

And the Counsel for both sides declared, they insisted on it. [And then withdrew.]

Mr. Manley. I should not have presumed to have given you this trouble of their withdrawing, but that a thing is insisted on by the counsel for the bill, which I think is of the greatest consequence to all the freemen of England. It is true, the rules of Westminster-hall are not binding to the legislative power; but I would not have the legislative power to be governed by the private sense of any man whatsoever, but by those rules that are the rules of justice and common equity. God forbid that we should, upon suppositions, suppose ourselves out of all the rights of the law! I never heard any gentleman of the long robe, before the learned serjeant at the bar, assert, that an examination before a justice of the

peace could be read against a man for his life. It is known to all that have looked into the A B C of the law, that it was never practised. It is true, in equity, depositions may be read, because they are taken by the consent of all parties; and it is as well a deposition of one side, as of the other, and the witnesses may be cross-examined: but that is nothing to this purpose.

Mr. Sloane. I believe I may save you a great deal of trouble in this matter; for those gentlemen from the bar that made objections, spake without book, but I speak by book; [having my lord chief-justice Hales's Pleas of the Crown in his hand.] No less a man than my L. C. Justice Hales (and I think he was past his A B C of the law; I know not how far this gentleman is advanced), in his Pleas of the Crown, in that part where he shews what is evidence to the petit-jury, he says; First, by the statute 1 and 2 Philip and Mary, c. 13, and 2 and 3 Philip and Mary, c. 12, the justice hath power to examine the offender and informer; and so he goes on in several particulars: and then, 5, he says, these examinations, if the party be dead or absent, may be given in evidence. I must allow, such an examination not of the same authority, as if the witness was present it would be, because he cannot be cross-examined; but still it must be of some weight, and it must be read: but in this case, it is of greater weight than in that which my Lord Chief Justice puts; for he says, it would be evidence, if the party was dead; or if he was withdrawn without the consent of the party against whom he is a witness, and that comes to the case in chancery, every day practised; that if any person gets my deeds and evidences into his hands, and he hath embezzled the deeds, they shall be presumed to say what I alledged, because it is his fault he does not produce them. So this withdrawing by the instigation of sir J. F. is a strong presumption that what he swears against sir J. F. is true.

Sir Rd. Temple. No man can give evidence of any depositions, nor was it ever admitted to be evidence either upon the party's death or absence; and I would not have that doctrine pass, that we are not tied to the rules of law. My L. C. Justice Vaughan, when he was of this house, told us, we were not bound to the forms of law, but we were tied to the rules of law; and if you are not, how will you judge of this crime? How will you judge it to be treason in the worst of times? In the trial of my lord Mordaunt, who was tried before the high court of justice, they would not allow of this piece of evidence, though they had thrown aside juries. We are tied by the rules of law, or we are tied by nothing.

Sir Tho. Littleton. The worthy member here tells us, we are tied by the rules of law, or we are tied by nothing. I hope he does not intend to put the pun upon us, that was by a noble lord, 'You are tied by rules or no rules; if you are tied by no rules, what rules

are you tied by?" I think you may act by rules, and yet admit of this evidence. I told you before, I should not reckon myself so tied by the rules of law, but that I would hear all evidence that should be offered: and I do not think it is for our honour to stifle any thing that may bring out the truth. A worthy lawyer said, let them produce one evidence that is of the recorder's opinion; and a member hath produced the opinion of my L. C. Justice Hales: and I hope we shall not be debarred from the satisfaction of hearing what they might hear in the courts below. Here are two witnesses that have been examined against him, which the jury did believe that found the bill. If we cannot have these two witnesses, let us have as much as we can. We have heard what one said; we have an opportunity of hearing what the other said. No, says the gentlemen, we do not desire to be informed; but I believe it must come to that at last.

Sir *Rd. Temple*. The gentleman that spake last, insinuated, as if I had dropped something he could not understand. Give me leave to tell you, there was the courts of the presidents of Wales; when they urged rules of law, then they were a court of equity; and when they argued from points of equity, then they were tied up by the rules of law; and so gave judgment neither according to the one nor the other; and so it was taken away by act of parliament.

Mr. *Boscawen*. I have seen it myself, that a justice of peace has been examined himself as to depositions he hath taken; and I take it to be an ordinary examination.

Mr. *Harcourt*. Sir, I must say, if you were to pick all the absurdities out of the trials in the last reign, you could not pick out more than has been endeavoured by the king's counsel to be imposed upon you this day: this does in some measure convince me of what was said by another gentleman the other day, that it is much better to be tried by an assembly of 400 gentlemen, than at the Old Bailey. There was a quotation of a learned author; and the gentleman read you what was evidence, and what was not: and the conclusion was, That these depositions, if the party was dead or absent, is evidence. Why, sir, if these depositions be evidence if the party be absent, then what are we doing of all this day? If that be a certain rule, there is no manner of need of applying to this extraordinary way; but if you please to enter into the consideration of that point (I am neither afraid, nor unwilling to be informed). If gentlemen will take it *de bene esse*, for better for worse, with all my heart; but if you enter into that matter, I will freely tell you my opinion of it.

Sir *Edw. Seymour*. It hath been made a question, how far you are bound to pursue the rules of law? I suppose it is no new thing I am going to say; That Bills of Attainder, and judgments of attainder, have been reversed for no other reason, but because the parliament

have not proceeded according to the rules of law: I will not say, you are bound by the rules of inferior courts, but you must be bound by the rules of parliament, and by the proceedings and practice of parliaments, which is the law of parliament. And then I would know, whether this house did admit of an affidavit for evidence? and the reason is this, because by that you make this, which is the superior court, lame, without the assistance of an inferior court.

Mr. *G. R. Bridges*. The matter before you is, whether sir J. Fenwick be guilty, in your judgments of this conspiracy? and if so I cannot imagine why you should not take all the information that is offered to you; and why not hear all the circumstances of it? If you do not read this affidavit, I do not say but it is a kindness to sir J. F. but what kindness will it be to the country and government?

Mr. *James Montague*. I hope you will not spend much more time about this, because the law is so plain. If there be any thing in the objection, it is this, That if it be evidence, the other courts below may proceed upon it: but that I take to be no objection neither; for though it be evidence, there are not two witnesses; and the courts below require two witnesses though there be other evidence, and one witness besides; so that you can't try him without two witnesses: it would be admitted in the case of felony, and there two witnesses are not required expressly by the law: and I can tell you, upon my reputation, I have seen it done several times.—The learned gent. tells you, my L. C. Justice Hales's opinion is so, and that is grounded upon an act of parliament; and I think that is of greater authority than any judge; and therefore I think that objection will vanish. He says, you have no authority to receive affidavits; but sure we must take notice of acts of parliament; and if that requires depositions to be taken, and to be evidence against criminals, we ought to take notice of it; so that what the law makes to be evidence will be good in this place.

Mr. *Harley*. I look upon this matter under your debates to be of the greatest consequence to the lives of the subjects of England, that possibly can come before you: gentlemen have given you several reasons for reading these depositions; one, that it was my L. C. J. Hales's opinion; another, that there is an act of parliament for it: now, I think, it would be proper to join issue in these two points; If any act of parliament can be produced for this, then the debate will be at an end; but if there be an act positive in fact against it, then I hope, you will not receive it: and if my L. C. J. Hales's book have not one word relating to this, then I hope that will be no argument. He begins his chapter of evidence, and says, That the evidence to the jury, in cases of treason, must be two witnesses; and then comes to the cases of felony: But is that any debate before us? and he tells you, that informations might be taken of the person himself, but that was not by the com-

mon law, but was allowed of by particular acts of parliament; and then tells you, that his information, and that depositions before the justice, were to be admitted (but he was to be by:) But is this any thing to lead you? Have they brought any statute that tells you, there must be two witnesses in this case? If you will take notice of a statute, you must take notice of a statute that is in point. If any man suffers by one witness, I believe all the world must say, he suffers unjustly: I think it is of the greatest consequence to admit of affidavits. Here it is, that the boundaries are established for the lives and liberties of mankind: and this is an observation that is found in history, that those that have broke their bounds down, it hath returned upon them to their prejudice.

Sir Robert Richard. I am sure now we are not upon the point of reading, whether it be much or little, but upon the point of hearing, and that I speak to: and, I think the gentleman near the table did not mistake what the bar said; for the counsel on the other side insisted positively, that neither by the practice, nor by the books, was a deposition to be read as evidence: against that the gentleman near the chair produced that book. As to the matter of treason, every parliament man can remember, that you have made an act, that there shall be two witnesses in cases of treason. Now, at the same time, it will be taken notice of, that you have taken care in that act, that the proceedings of this house shall not be tied up. The gentleman tells you of a court that wavered between law and equity, and so came to nothing; and I am afraid, if we bring the House of Commons down to the courts of Westminster Hall, they will make nothing of us either. I do not say that this paper shall be as strong evidence as if Goodman was at the bar; but to say, it shall weigh nothing, I can't agree neither: I agree also, to make a common practice of reading affidavits, will be of ill consequence: and if you take this to be a matter of small consequence, I am not for reading this affidavit. Now I aim not at sir J. Fenwick's blood, but the safety of the king and government: and I would not refuse any evidence in this case, be it never so small. These gentlemen speak against a matter being evidence before it is read; it is offered as evidence; if it be small, or come to nothing, it is the better for the prisoner at the bar.

Mr. Pelham. I am indifferent whether I hear that paper read, or no; but what is said by a learned gent. startles me: Says he, in Westminster Hall they are bound to the evidence of two witnesses, and there this evidence would not be proper; but here we are upon another foot. I hope we are not here upon another foot; I hope, though here we are not to be tied by the chicanery of the law, we are to be tied by the equity and substantial reasons of it. I desire to know, if any one can be tried for treason upon one witness? And if we are not tied by the rules of law, we may hear any evidence whatsoever; if the king's counsel

thinks it may satisfy your fancies, it must be received.

Lord Cutts. I conceive, gentlemen, we are out in the way of arguing: I must put you in mind that we are, at the bottom, only arguing against the jurisdiction of this House: and though that matter hath been settled before, we are told very often of the law and rules of Westminster-hall. In answer to that, I must observe there are several sorts of laws; there is the law of nature, the law of nations, the law of God, and there is the legislative; and it is a self-evident maxim, not to be contradicted, That no superior is to be circumscribed by an inferior: And I would ask, if the courts below are not inferior to the parliament? There is nothing can limit us, but the law of nature, the law of God, and the law of parliaments; and though I cannot tell you very well what is the law of parliaments, yet no gentleman hath said any thing upon that subject, that is against the question before you: The matter was in a course of law; but upon an extraordinary accident, and for extraordinary reasons, it is brought before you. The accident is the withdrawing of a witness; the reason is the securing of the king, the government, yourselves, and posterity. I do not think any man that spoke against it is for favouring sir J. Fenwick; for I think this is the worst way: I would appeal to every man, what prejudice it is to you to hear this paper read? and it may be a disadvantage to you not to hear it.

Mr. Howe. There have been many arguments given for and against the reading of this paper; and if I did not take it that the reading of this paper could be of no use to the judgment we are about to make, I should be for the reading of it: Either it amounts to a proof of high-treason against sir J. F. or it signifies nothing to you. If you suppose it to weigh any thing, I can never agree to the reading of it; for it is only an hearsay brought to convict a man that is tried for his life. But there is a greater argument which weighs more than the reason hath been urged; and that is, your enemies will have an advantage, and your government is at stake: But I do not take that to be so much an argument of their strength, as of their weakness and neglect; however, when they prove that, I will see how far I can go. It is said, that in the worst of times, they would not convict a man upon one evidence. As to sir J. F. though he should not be a good Englishman, yet his cause may be a good Englishman's. The question is, Whether there be more danger by the withdrawing of a witness, and the escaping of sir J. F. or the withdrawing of the witness, and the convicting of sir J. F.? Here they let Goodman (such a rake) go about and he is gone; and now the fate of the government seems to depend upon it. The precedent on the other side is not so much to be feared; for I suppose future governments will take care not to let a witness go about the streets again: But it may happen that certain men, for asserting the liberties of their country,

may be run upon by ill governments, and attempts made upon their lives by false witnesses. But the bill of treason provides, that no person shall be prosecuted without two witnesses. Now it may happen, that they shall have no such witnesses as can convince a jury (I believe this man to be as much guilty, in my own thought, as I believe any thing in the world, and yet I will condemn no man upon my private fancies); but here are two witnesses brought before the grand jury, and nothing is so easy as to get a bill found by them (and that is all that is done by Goodman). Now say they, if this should come before a petit jury, one of these witnesses may not be credited; so they will carry him away, and urge this for a precedent, and so this man may be convicted.

Mr. *Smith*. I think we are come to the debate of the bill, instead of reading the paper. Was the question, Whether this paper should be allowed as a second witness? Then it would be a great question with me, whether it should be read; but the question, as to Col. Sidney, was not whether the paper should be read, but whether it should supply the place of a second witness? But your debate is extraordinary; your bill takes notice of Goodman being gone away, and now you won't take notice of what he hath left behind him; which I should the rather be satisfied in, because I saw a gentleman soliciting at the bar, that did endeavour to get him away. If Goodman had been brought a prisoner to the bar, I do not know, whether it might not have been reckoned as great a fault, as now his having too much liberty. It hath been cited as a great lawyer's opinion, that it might be given in evidence; but he does not say what weight shall be laid upon it.

Mr. *Pelham*. I am sorry that honourable gent. mistook me so much; I thought I had spoke very plain; I told you, I was not against reading of the paper, till the learned gent. told you, you were not tied up as the courts of Westminster-hall to two witnesses. As to what I said of Mr. Sidney's case, it was not against the reading that paper; but I said he did rely upon it as against common justice, to be attainted upon one witness: And that attainder you have thought fit to reverse; and the reason he gives for it was, because it was impossible for a man to make any defence against one single witness.

Att. Gen. The matter you are now debating upon, is, Whether these papers should be now read? And gentlemen have let themselves into a debate foreign to the question. A great many are against it upon this argument, that they would not be of opinion to condemn him, unless there were two witnesses: That is not the question, for I think no man is ready to give his opinion to condemn or acquit him, unless there were two witnesses: One gentleman is against the reading of it, and yet believes sir J. F. guilty. I must respite my judgment till I have heard his defence: I think that the counsel for sir J. F., at the bar, are very much mis-

taken, when they said, that such a thing as an examination in writing was never read in any court of justice. I think that is a great mistake, and a good authority hath been cited for it; and every one knows the practice is otherwise; it is often allowed, that the examinations before a justice of peace are read. The question is now, Whether the examination shall be read? If there do not appear another witness to prove him guilty, you will debate that matter then, Whether you will condemn him without two witnesses? You might as well have debated before whether Porter should be examined, because no man will condemn him without two witnesses, and therefore do not examine one. Why, we know not what further witnesses may be produced, if sir J. F. was upon his trial; I think this information might have been admitted for proof, if Goodman was out of the way; but if it was admitted, unless there was another witness produced, I believe the court will tell the jury, here are not two witnesses, and therefore you must acquit him.

Sir *Wm. Coryton*. I must crave leave to differ from that worthy gentleman: I think this is the proper time to determine, whether this evidence is to be admitted afterwards? Indeed you may determine how far it is available. I thought both in law and justice, before I came into the House, that this ought not to be admitted for evidence. A gentleman grounded his argument, upon what? My L. C. J. Hales's opinion: but the fact is, that my L. C. J. Hales states the difference in cases of treason, and in cases of felony. Now in felony, they make use of depositions; and the reason is, because it is more for the advantage of the prisoner than his disadvantage; for if the witness differ from his examination before the justice of peace, that turns to the advantage of the prisoner. In the nature of the thing it seems not to be reasonable, for it is easy to turn the tables. And suppose Goodman in the place of sir J. F., and sir J. F. in the place of Goodman; it would be hard, take the informations to be as they are, to admit them for evidence; which, in my opinion, are great reflections upon persons of great honour and worth.

Sir *Ch. Musgrave*. That which I perceive to be your debate, is that upon which the counsel withdrew; you hear it asserted, that there was no instance in a criminal case, where an affidavit was allowed for evidence; and I think the learned counsel at the bar did not much insist upon it; and yet I don't think they were ignorant of the case quoted out of my L. C. J. Hales, but they thought it was not applicable to this business before the House; but only related to felonies, and when depositions were taken in the presence of the party. It is said, we are not tied up to the rules of Westminster-hall; and that parliaments may denote crimes after they are committed; but I never did hear, that the parliament did take upon them to determine that to be evidence which is not evidence in any court in the

world. If you read this paper to inform yourselves, you admit that to be evidence which is no where else to be admitted. You are told, you are not tied to the forms of inferior courts of law nor equity: If you are not bound by them, you are bound by your own constitutions. You are told, you are used to read affidavits in common causes; but if my memory serves me right, you have always had it opposed in this house; therefore I think, according to the rules of your own house, we shall not read affidavits. Will you make a new rule in this case? Pray consider the consequence of it hereafter. Suppose there came down affidavits upon another person, against a great man for high-treason, whether that may not be thought sufficient for to govern your judgments? I hope those that hear me will have a care of the matter. Why, by the parity of reason, may not two affidavits do by the help of the legislative power? I would be glad, to know, whether in the case of an impeachment, they ever heard of affidavits being read? And this is much in that nature; and therefore, why should you admit of an affidavit now, when the party charged was not present when that affidavit was taken?

Sir Joseph Williamson. I am sorry this point costs us so much time; the gentleman that spake last hath brought us to the question, how far you will admit this affidavit, as they call it, to be read? I am of opinion, notwithstanding all that hath been suggested, that it not only may be read, but that it ought to be read. None of the cases that have been instanced, comes up to the case in question; all the cases that are brought are from inferior courts, and the last that is brought is from the example and usage, in less considerable cases, and indeed of a different nature.—This bill of attainder is indeed a thing so extraordinary, as hath been said, as it never ought to be used but upon extraordinary occasions; and upon that principle, all that is feared is all answered and avoided. It is to be thought never to come but upon the like occasion; and then God forbid but they should be governed by the like precedent; and if that was proper to speak now, which will be at the bottom of it, when we come to give judgment, and we have time to consider of it, I can't think we shall differ in many voices. Whether it be evidence, and how far it is so, is not now the question; but the question is only whether it be such an evidence as ought to be read? And all the inconveniencies that have been alleged, depend only upon this, that it should not be admitted in the ordinary proceedings in the courts of justice. Now I say, there was a power lodged in the parliament of England to make a man guilty of treason, that was not so before; and that even in a reign when they came to determine what treasons were: they did not think it for the safety of the community of mankind, but that there should be a power lodged in the whole, to declare that to be a crime, that was no crime before it was com-

mitted, giving them more than is asked here: for here can be no question, but as to the forms of proceedings. The question is not upon his crime, that is no question; and I take it, that if upon any occasion, it is to be justified in this, and the law hath trusted the parliament with a greater power than now they are about to execute, and there are only objections to it raised from another place, which I think can never conclude in this.

Mr. Chanc. of the Exchequer. I am for reading of this paper, though I do not think it evidence equivalent with *viva voce*; nor do I think, that in like cases it ought to be admitted below; but I think, in your proceedings in parliament, it ought to be read, whether it be an affidavit or not; and I am more of that opinion, from what happened in a case to-day. We had a dispute, whether Porter was to be examined, because the testimony of a man's wife was not good below. But when that came to be examined, it was not the testimony of a man's wife, but his own letter appeared in evidence; and Clancy told Porter he came from Fenwick himself, and therefore the evidence, which at first, for that reason, was urged not to be heard, did amount to more when it came to the proof. I would have this paper read; not because it should supply the place of a witness; no, but because you see he hath been indicted by the evidence of Goodman and Porter, and the first is withdrawn; and by whose means you have heard: and I would know, whether Goodman's evidence did amount to accuse him of the same? I do say, in your power of judging, you are not constrained to the rules of Westminster-hall: and I would say, that for your constitution, the courts of Westminster-hall are to be governed by the letter of the law: but there is lodged in the legislative a power to judge those crimes that are sheltered behind the law: and I believe, if the several attainders were examined, there was never any attainder that went upon a more just proceeding than this. I take the crime to be a plot with your enemies to bring in a foreign power; and as if that was not sufficient, he hath made a false and scandalous confession, to bring a distrust and jealousy among the king and his people; and he hath dallied and gained so much time, as he hath had opportunity to corrupt one of the witnesses; and therefore it would be hard, if no law should reach him. It is said, why did not you keep the witness? It would be hard, after a person hath made a confession for the good of the kingdom, that he should be always kept in irons. We are debating of the bill, while we are now only purely to see what is in this paper. I should not have offered to have made use of this as a second witness; but the being an affidavit or not, is not material in this point; the commons proceed upon impeachments without affidavits. It is offered as evidence: that Goodman was a witness against him (you have had proof of); and that he hath been tampered with to withdraw, by the

friends of this gentleman. I do think we have gone more fairly and equally to work, than upon any of the records of attainder in your journals.

Mr. Brotherton. The question is, whether this paper shall be read? First, it hath not been proved before whom it was taken, nor nothing at all. It hath been objected, that there ought to be two witnesses by the late statute. But I must put you in mind, that it was so by the statute of Edw. 6. and so was the common-law before; and my lord Coke says, there must be two witnesses, and they brought face to face: and so goes to the divine law; and if it should not be so, I will put you in mind of an inconveniency: eleven witnesses were produced before the grand jury; and when they came to give evidence face to face, before the petit jury, the first witness did not know the criminal that he had sworn against. It was in the case of sir Rowland Stanley. They mention a paper against Algernon Sidney; but that paper was wrote by himself. It is said, this House is not bound by the rules of other courts; for that reason they ought to give rules for other courts. Nothing is more common than to say, judgment was so in the House of Lords, and that settles the law in other courts below.

Sir Godfrey Copley. Several gentlemen have spoke to the reading this paper; some have said, that it should be read as evidence: some others are for reading of this paper; but yet at the same time tell us, it is not to be looked upon as evidence, at least not equivalent to a witness. If the paper be to be read at all, I would know for what reason? If it be to have any sway upon our judgment, if it hath any effect upon my judgment, then in some measure it is equivalent to a witness, when it is in the nature of a witness; and if it should be read to supply the defect of a witness, then I would know, what the consequence of this might be? I do very well understand, that the court of parliament does take no precedent from Westminster-hall; nor am I afraid of any precedent they should give to Westminster-hall: but I am afraid of a precedent to future parliaments. Suppose the information of sir J. Fenwick, that hath been delivered in here, should be produced as evidence against any of those honourable persons that are charged in it, though I believe they are very innocent; and some knaves or rascals in future reigns should come in against them, and this paper should be brought to supply another witness, what a consequence would that be!

Sir Henry Hobart. I must differ with the gentleman that spake last; as to the gentleman that spake before, I did not expect any thing to be quoted out of Lancashire against the reading of it. I will tell you why I think this paper should be read; you have it suggested in the bill, that Goodman was one of the evidence against sir J. F.; they are to make good the suggestions, and this will shew, that Goodman was an evidence. You

are told the danger of the precedent, and there may come ill reigns, and ill parliaments; as to that, I shall only say, in a good reign, and a good parliament, there is no danger; and in an ill reign, and ill parliament, they will make precedents without your giving of them. Mr. St. John tells you in his arguments, It is true inferior courts, by the statute of Edw. 6, they are bound by two evidences *via voce*; but you are not prescribed by that here, but you are to judge in your own consciences as the thing appears. I may say as another did upon another occasion, let it be read; 'Valeat quantum valere potest.'

Sir Marmaduke Wyvell. I desire to take notice of one argument that hath been made use of by one or two honourable persons; which is, that they tell us, that Goodman hath been tampered with by sir J. Fenwick: I remember no such thing that hath been proved; but indeed it was said, that Mr. Dighton offered Mr. Roe 100*l.* a year to invalidate Mr. Goodman's testimony.

Lord Castleton. Let me ask you this question, Whether if you read this affidavit, you read it as evidence?

Mr. Solicitor General. I desire you would consider what you did, before you ordered capt. Porter to go on with his evidence, and did agree you would consider of it afterwards. Some are for reading this paper, and others are indifferent whether it be read or no; and those that are against reading of it, are against reading of it because it is no evidence; but that is no reason why you should not read it; for it is at most but doing a vain thing. I think you have been told already if it was insisted on below, it must be read; and the other side must demur. The court might say, it is not material, but it must be read before they can demur: so that the question, Whether it is evidence? must come afterwards; and if you go according to the rigour of law, with submission, it must be read.

Mr. Price. I did not design to trouble you in this matter: but the doctrine laid down by some men of our gown, surprises me: it is only an argument, that the court below ought to admit this paper to be read; but there is no precedent shewed, nor convincing reason given, why the courts should admit it. The question is, Whether an information taken before a justice of peace, ought to be read here? If it be to introduce a new law, and make a new crime, then you make a new sort of evidence; but if this be a crime against an act of parliament, or law in being, then you must take the evidence the law doth afford you, in the nature of the crime. The charge here is a charge of treason against a known law: but the great argument is, this is an extraordinary offence; that sir J. Fenwick, or his lady, had a hand in sending Goodman away: it is a mistake; and offering one thing that is not evidence, brings us to another; the evidence of Clancy's tampering with him: captain Porter does not say, that sir J. F. employed him; only that Clancy said so,

which is but a hearsay, and that is no evidence, unless Clancy was at the bar, and would say it. In the next place, it is said, That there was a tampering by a solicitor: what is that? Is it not natural for a solicitor to say, Is there any objections to such a witness? Is it not natural for him to lessen his reputation if he can? Now you would have a copy of an information to be evidence. It is said it is tantamount: if so, then the courts of Westminster ought to intermeddle with it, and not this house. A noble lord mentioned to you the law of nature, the law of nations, and the law of God; but he forgot one law, which was most material, and that is martial law; which if he had said, does justify the taking away a man's life upon extraordinary evidence, he had said right.

Mr. *Speaker*. The question is this, That the information of Cordel Goodman, taken upon oath, 24th of April, 1696, be read.

Which question being put, the house divided. Yeas, 218. Noes, 145. So it passed in the affirmative; and sir John Fenwick, and the counsel and solicitors on both sides, were called in again.

Mr. *Speaker*. Gentlemen, since you withdrew, the house have considered of the matter upon which you did withdraw, and they have thought fit, that the information of Cordel Goodman, taken upon oath before Mr. Vernon, 24th of April, 1696, be read.—Clerk, read it.

Clerk of the House of Commons reads.—This is signed, Cordel Goodman, and sworn 24th of April, 1696, before James Vernon.

“About two years since, or better, I understood col. Parker was resident here, in order to engage several people for the service of king James; and capt. Porter told me, he had a mind to see me, which he accordingly did; where he told me, there would be an invasion, and king James would be restored; and that in order to it he had commission to levy men, and to grant out subordinate commissions for a regiment of horse, and did ask if I would accept of one, which I accordingly did. He likewise said, he would see me as often as he could; and that capt. Porter and I should receive directions from him, from time to time, upon several meetings; and having received my commission, I understood what captains were to be in the regiment; which were captain Porter, sir William Parkyns, Mr. Charnock, sir Hugh Smithson, Mr. Higgens, and myself; and one Mr. Witherington, to be lieutenant colonel.

“The commissions were to be blank when they were to be delivered, and to be filled up by the captains, &c. I then came acquainted with Mr. Charnock and sir W. Parkyns; and by them and Parker, capt. Porter and I were informed, that there was a great body of horse to be ready in the north; but though I asked, yet they never named any persons to me, but said, it was sufficient, I should receive orders,

and a roll to march, to rendezvous upon occasion; and indeed I did not much press it, because I did gather there were a great many concerned; and at this time capt. Porter and I took a house in the Chase, with stables and barns, fit for holding horses, and as a fit place to meet, upon orders given us to march, which were then daily expected.

“Some time after this col. Parker was taken, and being committed to the Tower, he made his escape; and after that I saw him, and then he told me, he would be sure to correspond with me and Porter; and I should receive his letters of Mr. Charnock or Mr. Johnson, and he accordingly did; and in his letters he still gave us hopes, and said, he would certainly send us notice to be in readiness time enough, to be serviceable to the design of the invasion.

“The last letters I received from Parker gave me advice, That he doubted not, but the cause would come to a hearing at this Easter term; and he should write no more, but bring the orders himself: Upon which I went to Charnock, and he told me he did expect him here in a short time: But always, or most commonly, in his letters, he told me, for a sign, That when the Toulon fleet should join the Brest fleet, I might certainly depend, that we should be invaded here.

“During these transactions, capt. Porter complained, that something he was sending to Lancashire had miscarried; he desired me to set by two boxes, which I looked not into, but supposed them to be arms, and I did set them by for him: I had not bought any arms, but had bespoke some of one Perry, a gunsmith, who said, I should have them at a week's warning.

“After Parker's having made his escape, and getting into France, Mr. Charnock came to me, some time before the king's going to Flanders, and said, he had something to propose to me; and desired me to go along with him, which I did; and he brought me to one Mr. Waugh, who said, he expected a commission from king James to seize king William; accordingly we went to the Chocolate House in St. James's street; and after some discourse about the commission he said he expected, we appointed another meeting at that place, and adjourned from thence to my house in Brownlow street, where was present, Mr. Charnock, Mr. Porter, Mr. Waugh, major Matthews, and Mr. Donelagh. The subject of our discourse was, about the surprizing and seizing the king, as he came from Richmond; and after several ways proposed to that purpose, I particularly asked, suppose that the king were in our power, what then? For we ought to have regard to some end or other in such an undertaking; for I was not willing to offer any thing to his person. Mr. Waugh said, we might have a coach, and convey him away; and he said, he was assured of a fort to be delivered to him, and put into his hands (to the best of my remembrance it was Deal), which might give us shelter till we might find oppor-

tunity to carry him into France by shipping. I must confess, I did see very little probability in what he said; neither did I believe that he would receive any such commission, as he said he expected: (For about two years since, I remember I saw sir George Barclay, with col. Fountain, and Mr. Porter; sir George was then going over to France, and it was the only time that ever I saw him; and then captain Porter and I did desire, that if king James desired any such thing as seizing king William, he would send over a commission, and a pardon withal in case of an accident; which message sir George carried over, and king James refused to send it.) However, we had another meeting after that at my house, by which time, he said, he would shew us the commission, and facilitate the design; it was at a house behind the Temple, where the aforesaid company met, and Mr. Waugh brought with him one Mr. Hays, who, he said, could furnish us with a ship which would be ready to transport us after we had seized the king; but upon discourse with Mr. Hays we found that the demands were so exorbitant, and not in possibility of being complied withal; and besides, no order nor commission being produced, we did desist then; for captain Porter and major Matthews, and I, did declare, we would not meddle without sight of the commission. After this capt. Porter and I talked of having a vessel, and sending Le Rue and Charnock about it. We met at the Fountain by the Temple Gate, and sir W. Parkyns was there; and during the time of our being there, one called sir William out, and sir William called out Porter, who came in, and said, there was a gentleman that could help us in this affair; who he was I know not; I believe captain Porter may, for I saw him not: But all this proved ineffectual, for the king went away suddenly, and no commission ever came. And by letters from France, I understood king James was angry that they used his name to what he had not promised; and Porter and I wrote over, by his order, the truth of the whole matter.

"Some time after this, captain Porter, the earl of Aylesbury, sir John Freind, sir Wm. Parkyns, and sir J. Fenwick, and others, met about sending over some proposals to king James, to expedite an invasion; and likewise captain Porter said, it was proper I should be there, for he had engaged for me. I told him I would come; and at the King's-Head in Leadenhall-street, I found the persons above-named, together with my lord Montgomery, and one Mr. Cook.

"The effect of their consultation was, the sending Mr. Charnock with a message to this purpose; that if the king of France could spare such a number of foot, and so many dragoons, amounting to about 12 or 15,000, or thereabouts in all, that then upon notice given, that every particular man there was to furnish such a number of horse, some more, some less, to be ready to succour the forces from France

when landed. Mr. Charnock went and returned with a refusal, that forces could not be spared: sir John Freind and my lord Aylesbury were of opinion, that if king James would venture hither with some small retinue, he had friends enough to appear for him, without any foreign forces; but that was held in doubt.

"I used afterwards to see my lord Aylesbury; I always asked, what news he heard? He said, when he received any orders, he should know; for he having been in France (as he did not deny) I supposed him not to be ignorant of what was intended.

"And to the better facilitating an invasion, sir J. Fenwick used to send over a list of the forces, and how they were quartered, and what were in garrison, and what otherways disposed of: he having made a mistake in the account, Parker did by letter desire me to try if I could procure such an account; which I accordingly did of one Gibson, a clerk in the office, and sent it over frequently.

"After the escape of Parker out of the Tower, sir J. Fenwick, when I asked him how he got away, and how much money was given? he said, 200*l.* promised, and 300*l.* given; for when a person came in and told him he had brought him liberty, and was to have 200*l.* he replied, You shall have 300*l.* and it was made good to him afterwards.

"CORDEL GOODMAN."

"Much about the same time, I used now and then, with captain Porter, to be with sir John Fenwick, and it was agreed, that if Parker should not bring us timely orders, that what forces we could bring in, (*viz.* Porter and I) we were to take orders from sir John Fenwick; this we offered him, and he kindly accepted: and then he said, that he believed most of my lord Oxford's regiment would go to king James; when I told Mr. Paradise had promised to bring in seven or eight to me, and that Mr. Aynsworth was to bring in twenty, and Parker had said, if I made it thirty, it was sufficient for me. As to the keeping the horses, sir John said, it was dangerous, and they would certainly be seized; but the best way was to have a list of what horses were in and about the London stables. Captain Porter and I sent accordingly to view the stables. I sent Mr. Reyhough, and Captain Porter sent — Cranborn, and they took an account.

"CORDEL GOODMAN."

Jurat. 24 April, 1696.

Coram me, JA. VERNON.

Serj. Gould. Now, Mr. Speaker, if you please, we will call some of the grand jury that will give you an account what evidence they found the bill upon.—Mr. Gracedue, you were one of the grand jury that found this bill?

Gracedue. Yes, Sir.

Sir T. Powys. This is so far from being evidence, that I think it is the oath of the grand jury, that they shall not disclose or discover the king's secrets. The bill of indictment is but an accusation. A bill of indictment cannot

be given in evidence against a man for the least crime soever. It cannot be given in evidence to be credited, because it is but an accusation; and by consequence, whatever any witness says at that time can go no farther. When a person comes upon his trial, they cannot so much as resort to any thing that is sworn before the grand jury, nor make use of it.

Sir B. Shower. We humbly oppose this evidence; because the gentlemen can give no instance in their reading or observation, that the testimony that hath been given before a grand jury, hath been given in evidence to a petit jury: and it is part of the oath of a grand jurymen, that it should not be disclosed. We do not say, it will bind your House; but I hope it will be evidence to you, that it is not agreeable to the rules of law.

Members. Go on, go on.

Mr. Speaker. Mr. Gracedue, will you give the House an account, who were the witnesses before you upon finding the bill?

Gracedue. The witnesses before us were captain Porter and Mr. Goodman.

Mr. Speaker. Can you remember so well, as to give an account to this House of what evidence Mr. Goodman gave?

Gracedue. Yes, I think I can. When he came before us, he told us, that he was at a meeting at the King's head in Leadenhall street, where there was sir J. Fenwick, my lord Montgomery, capt. Porter, Mr. Charnock and others; and the business was to send Mr. Charnock over to France, to procure men to invade this kingdom; and 8,000 foot, and 2,000 horse was proposed. He told us, the result of that consult was, that if France would supply 8,000 foot and 2,000 horse, it would be a sufficient power to come over; and that they would supply 2,000 horse among themselves. Upon which Charnock replied, gentlemen, you send me over upon uncertainties; you say, you will supply 2,000 horse; but unless you give me some assurance, I cannot, nor will I go. And the question was proposed to all of them, if they would make good their proportion; and they promised singly. Says I, did sir J. Fenwick promise? And he said, Yes. Says I, did my lord Montgomery? And he said, Yes. He was asked, who else? But, says he, it is not a question for you to ask us; and for that he referred himself to me: for, he said, he was not bound to answer further, having proved the indictment.

Serj. Lovel. We desire Mr. Joshua Meade may be asked to the like purpose. Were you one of the jury that found the bill against sir John Fenwick?—*Meade.* Yes.

Mr. Speaker. Pray, who were the witnesses before you upon finding of the Bill?

Meade. There was captain Porter, and Mr. Goodman, Sir.

Mr. Speaker. Can you remember what Mr. Goodman testified then?

Meade. Mr. Goodman did then testify, that sir John Fenwick, my lord Montgomery, &c. were at the King's Head tavern in Leadenhall

street; and Charnock and the rest there did consult how to bring in their old master; as to Charnock, that they agreed to send him over to king James, to know whether the French king could furnish them with 8,000 foot and 2,000 horse, and that they would endeavour to meet him with 2,000 horse. Hereupon Charnock (Goodman said) put it to every man of them, to know if they were all of one mind? And they all said they were. This he did prove, and this is all I can remember.

Serj. Lovel. We have many more to the same purpose, if the House think fit to hear them.—*Members.* No, no.

Serj. Gould. We will go thus much further; that upon the trial of Mr. Cook, wherein there was evidence given by this gentleman, and in that this gentleman that is the prisoner at the bar was particularly named to be concerned, we will call them that were present there at the giving of the evidence: but first, we desire to read the record of Cook's conviction.

Thereupon a motion was made for the counsel to withdraw; and being withdrawn, a motion was made for candles, which passed in the affirmative without a division, in regard it being dark without candles, there could be no motion made for adjourning the debate, or remanding the prisoner.

Afterwards a motion being made for adjourning the House till to morrow morning, the house divided. Ayes, 141. Noes, 163. And so it passed in the negative; and sir J. Fenwick, and the counsel and solicitors, were brought in again to the bar.

Mr. Speaker. Mr. Serjeant Gould, the last evidence you were about to offer was, that of the record of Mr. Cook.

Sir T. Powys. Mr. Speaker, we oppose that being offered as evidence; as I understand it, they are going to give in evidence against sir John Fenwick what was sworn against Mr. Cook; that is not admitted in the courts below; for according to that method, the trial of one in the company would be the trial of all the rest. This was never allowed in any other case, and I hope you will not allow it here.

Sir B. Shower. The indictment is, that they did consult together, but their crimes are several; if they had been mentioned in one indictment, and one had been tried at one time, and the other at another, it would not have been allowed that they should give in evidence against the one, what had been sworn against the other; for though their charge is by the same witness, and for a fact done at the same time, yet the defence of the parties may be different; and it cannot be expected that we, on the behalf of sir John Fenwick, are prepared to give an answer, in regard of any thing that was sworn against Mr. Cook.

Mr. Speaker. Mr. Serjeant Gould, you hear the exception.

Serj. Gould. We hope in this case we shall go on with our evidence, as offered and proposed to this House. These gentlemen have made their objections, as if they were below in

the inferior courts; but we are here now before you in a parliamentary way; and what is that which brings us here, but because there is a witness withdrawn by artifice, so that we cannot produce him? And therefore we come, and humbly apply ourselves to this honourable House. Now, Sir, you are judges of the method of coming at the truth, and supplying that defect: if we could produce him, there would be an end of the matter; but in this case we are in the judgment of this honourable house, whether we shall not give such evidence as he hath given upon his oath, though in other cases it is not admitted?

Serj. Lovel. When we produce the record of conviction, we only produced it to shew you there was such a trial; and by that means to let us in, to shew you what was sworn by Mr. Goodman at that trial.

Then upon the motion of Col. Granville and sir R. Temple, sir J. Fenwick, and the counsel and solicitors, withdrew.

Sir R. Temple. If I did not believe what is now offered, is what was never offered before, and of dangerous consequence to every one here, I would not have troubled you at this time of night. There has nothing been offered that this hath ever been done. They say, it hath not been done in inferior courts: pray, let us see if ever it hath been done in parliament, that what was given in evidence at another trial, should be given in evidence against another person here, when this person was not by, and had no opportunity to defend himself against it; I am sure it was never done yet.

Sir T. Mompesson. This gentleman complains this was never done. When the duke of Monmouth was impeached, the bill was read three times in one day, and that gentleman moved for the impeachment.

Sir R. Temple. Here were three witnesses that did declare they saw him in actual rebellion, at the head of an army; but I hope I am not to answer for all the proceedings then.

Col. Granville. When I saw them going on to make use of that as evidence, which was never allowed in any court, I thought I ought to move for them to withdraw. I shall not give my consent to have it read, until somebody satisfies me it is good evidence against sir J. Fenwick. I cannot see how you can admit this for evidence: are we to read all the trials that are upon this plot? therefore I desire you will bid them produce what is evidence against sir J. Fenwick, and not to trifle with you.

Sir T. Littleton. If you proceed in this manner, I know not when you will have done. They do not tell you, they produce this as evidence against sir John Fenwick; nor do I take this to be the only evidence to prove him guilty. If nothing but exact proof would have satisfied, this bill would not have been brought in: but this is to make as good proof as the nature of the thing will bear. You have heard several

things before, in relation to Goodman, that possibly might strictly be no more evidence against sir J. Fenwick than this; as Goodman's being withdrawn. First, they offered to prove that he was gone; that it was suspicious that sir J. Fenwick was privy to his going: why did you admit the evidence of what he said to the grand jury? What is this, but to give evidence of what he said to the petit jury, wherein the grand-jury and petit-jury have both believed him?

Mr. Harley. I think if you had come to one determination before you had entered upon this matter, you had very much shortened your business; that is, that you would not expect such proof as is necessary at law; and it may be, if you would come to it now, it would save you time: for I find by the counsel, that what is sworn against another man, at another time, would not be evidence at law against the prisoner; and I believe if he should except to a jury-man, because he was upon Cook's trial, it would not be allowed as a good exception, and he would be told, he was no way concerned in another's trial.

Mr. Howe. It is a strange sort of evidence that is offered here, and it is a strange way of bringing it in. The house made nothing lately of hear-say, and yet now hear-say must be taken for evidence. I have heard that the grand-jury take an oath not to discover what was sworn before them; this, since the grand-jury have subjected themselves to (yet you have brought them here as witnesses to give an account of what was sworn before them, which I am afraid is a breach of their oath), it shall make me give less credit to what they say. We are here to attain a man, but we must not talk of proof; that is a strange thing! I am sure, if you do not find it with proof, it would be against proof. Shall I be plain with you? I question, if this house had heard what Goodman sworn at that trial, and what was alledged against it, whether this house would have been of that jury's mind: for I have heard that two or three did swear, he was not at the place at the time he swore he was, as plain as a negative could be sworn.

Mr. Harcourt. If you please to let the king's counsel go on upon this, you will save a great deal of time, and prevent any exception to any evidence afterwards: for it is not in the power of man to offer any thing more absurd. I don't believe that ever any man heard of such a thing offered, that a record should be given in evidence against a man, that is no manner of party to the record: I am sure never any such thing was attempted before. As for the other things, you had something offered that made it seem doubtful how far you should give credit to them. Upon those matters, the counsel at the bar for the king told you, that there was some pretence that it was law, and practised below, and a book was produced to justify it: but in this case, if there be book, practice, precedent, or any thing to justify it, I will sit down. The answer made it ten times worse:

the gentleman said, he would not have the record read, but upon that record to prove what was sworn at the trial: why, does that concern any person in the world but Cook?

Lord Cutts. If the worthy gentleman that spake last had made out all his propositions with clearness, equal to the assurance with which he asserted them, they would have more weight: but I will say, that which he hath asserted does not appear to me so. I take this to be the same thing, in some measure, debated over again. It hath been told you, that this house are to give their judgment in a matter of great importance; and therefore I think it is fit that all the whole matter should be laid before them; when that is done, they only are the judges of what weight it is.

Mr. Sloane. I go along with those gentlemen, that this is no sort of evidence against sir J. Fenwick: but our question is about a witness that is withdrawn, and to know what he said, and how he was believed when he was here. How he is gone, we have seen already; and therefore though I think the verdict against Cook, nor nothing of that can be given in evidence against sir John Fenwick; yet if he hath withdrawn the witness, and the credit of him is at stake, as you have heard evidence of what he said upon oath before the trial came on, by the same reason you may hear what he said at the trial.

Mr. Pelham. I think it would shorten our debates, if we were truly satisfied about what we are a-doing, that we are trying sir John Fenwick, as we are told at the bar; he called it a trial, and it is a trial. I must confess I was in hopes I should never sit in the House of Commons to try any body; I did not think it the business of us; if I had, I would not have come hither: but since we are come into it, is any thing more natural, than to examine whether this evidence be proper, or such evidence as any court would allow of?

Sir W. Williams. I suppose there is no gentleman of our profession that hath seen any record, will say, that this hath been offered in any court of law: I believe, if he was upon his trial upon the indictment, nobody will say it would be read against him. Let us consider how many judgments, that have been given hastily in the late reigns, have been reversed. What is the reason that is given for it? It is for receiving that for evidence, which was not evidence in the law: Your bill of right takes notice of it.

Sol. Gen. I did not think this matter would have held you a quarter of an hour; but if gentlemen will debate upon the same matter that hath been over-ruled twice before, all that is to be proved by this record is, that one Peter Cook was attainted for high-treason: if the counsel on the other side would have owned Peter Cook to have been attainted, you had not been troubled to have the record brought to the table. But as to what they say, that sir John Fenwick was no party to the record, and therefore it can be no evidence against him, I

suppose it would be evidence for him. Suppose Goodman had sworn he never had been at the King's-head-tavern, would not the prisoner have produced a witness to prove what he had sworn? Then I would put you in mind of a case, because there is a nicety in this matter without any reason; it was in the trial of alderman Cornish; he was indicted and tried, and the great fact was in the house of one Shepherd; there was a witness against him, one Rumsey, who swore, &c. says Mr. Cornish, he was a witness at my lord Russel's trial, and he did not name me to be one; and it went so far, that when Shepherd said, I was in the room; he stood up and said, No, it was read before I came in. Mr. Cornish would have produced a witness to have proved what Rumsey said: says the court, we cannot admit of that; for it does not appear to us, that my lord Russel was ever tried for high-treason; and there, upon that slip, was that gentleman destroyed. I pray it may be read; I have given no opinion of what force it is, but I think it depends upon the same reason; nay, you have more reason to do it, than any thing you have read to-day.

Mr. Price. It is very much pressed that you should read that, which, when read, they say, is not evidence, but only to introduce another matter. If it be not evidence, upon what account shall they read it? But if it introduce other evidence, this is an ingredient and part of that evidence. Now suppose the record should be produced, and they should bring witness to say what Goodman swore at that trial: would that be evidence? No sure, for nobody ever pretends that this hath been admitted either at law, or in parliament. By what law? By what rule? By what measure of reason are we to proceed in this house? If you would permit to be produced a record of conviction against a third person, and this to be evidence against one that is not present, I think you may as well admit to be produced a record of the conviction of any other concerned in the assassination. But I stood up principally upon the observation made at the bar, and he put you that which he takes to be a sinister case; for, says he, suppose sir John Fenwick had brought this record, and made use of it to take off Goodman's testimony, should it not be evidence? Yes, no doubt of it; and there is the distinction. It is one thing, where you are to give in a record to convict and attain a person, and another thing, where it is to prove a man perjured, and to invalidate his testimony; for when evidence is brought against a prisoner, he hath no way to lessen his evidence but what is collateral; if it be upon a trial when another is concerned, if the witness gave a contrary evidence, or the party was acquitted, then the record may be made use of against the witness: but it differs very much, where you bring evidence to take off the credit of a witness, and where you bring it to convict or attain a person. The case of Cornish, that turns upon the same reason, and it was only to be used to take off the

testimony of Rumsey; but if this record of the conviction of Cook be brought to any purpose now, it is to satisfy your consciences, that Goodman gave a good testimony at that trial; and I wonder the serjeants should offer it, who are sworn to offer nothing in violation of the law.

Dr. Orenden. If I did not think this question had been determined before, I should not trouble you in this debate; for did not we receive what Goodman deposed upon oath before a justice of peace? Was it read because it was taken in writing, or because it was his evidence? Now they offer you an evidence of his that was not put into writing, but they will prove by witness; what is the difference? If it had been taken down in writing, it must have been admitted as the same was before.

Sir M. Wyvell. That worthy gentleman desired to know the difference, &c. That deposition was against sir John Fenwick, but this evidence, that they offer now, was given against Peter Cook.

Att. Gen. You are now upon a debate, Whether you shall read the conviction of Peter Cook: I do agree with those gentlemen that have spoke of this matter, that the conviction of Cook, nor any evidence upon his conviction, can be evidence against sir John Fenwick. I do not pretend that this is; nor do not believe that this is offered upon any such consideration; but it is one of the allegations of the bill, that several of these gentlemen were present at this consult, of which sir John Fenwick is accused; therefore, I suppose, the counsel for the bill did offer this record to make good that allegation, and so think it may be properly offered: unless it be admitted; I do not see how it can be made good further; I do not think it proper to examine to what Goodman swore at Cook's trial.

Sir W. Williamson. I speak only to shew my concurrence with the attorney-general; Mr. Attorney hath stated it right, no doubt, as to the conviction of this person; as Mr. Attorney offers it, it may be proper enough.

Members. Call them in, call them in.

Sir C. Musgrave. I hear gentlemen say, call them in: Do you intend when you call them in to read this record? I think the learned gentleman hath stated it, that it ought not to be read as evidence. Now the counsel for sir John Fenwick said, they hoped you would not suffer it to be read as evidence against the prisoner: I never heard the counsel say, that Cook was not attainted, nor ever heard that any man did doubt it; then if it be no controversy between the counsel, to what end is it brought hither? Do you think that the steps that are urged to be taken in this case, will not be a precedent for posterity? I take it that there is great deal of difference between the paper you have read and this record; and therefore, if you call in the counsel, I hope you will not gratify them in reading of it.

Mr. E. Harley. Before you call the counsel in, I humbly propose it to you to consider to

what purpose this record should be read; if as evidence, you overthrow all the course of proof that is settled by the common law, and statute law; for it hath been in all trials opposed, to give in evidence that which is improper, because it should not influence the jury. I would not have it said, that under the reign of king William, any thing was done contrary to the law and constitution of the nation. There hath been an instance given of the trial of Mr. Cornish, though that case does not come up to it: but we know what was done in those reigns hath been justly reflected upon; and I hope you will not make a precedent here, to encourage judges to do what is against law.

Mr. Speaker. Gentlemen, this is your question, that the record of the conviction of Peter Cook shall be read.

Which question being put, the House divided. Ayes, 181. Noes, 110. So it passed in the affirmative.

Mr. Speaker. Gentlemen, You have had another question that hath been the subject of your debate, That the counsel for the bill be admitted to give evidence as to what Goodman swore against Peter Cook.

Mr. R. Harley. The learned gentleman did tell you, That what Goodman said at that trial, ought not to be given in evidence; and therefore, I think, gentlemen won't insist upon that, that is carrying it too far; and, I think, he opened it, that it was only to prove that Cook was attainted, and to make use of it no farther.

Mr. Speaker. Is it then your pleasure, that sir John Fenwick and his counsel be called in?

[Which question being put, it passed in the affirmative, and accordingly they were called in.]

Mr. Speaker. Sir Thomas Powys, the house hath determined to have this record read, not as evidence against sir John Fenwick, but to prove the allegations in the bill, and that Cook was attainted. Read the Record.

[Accordingly that Record was read by the Clerk.]

Sir B. Shower. We are sure the Record does not prove that he was convicted upon Goodman's evidence.

Serj. Lovel. Look upon the indictment.

Sir T. Powys. It appears by that that Goodman was a witness upon the indictment; but it does not prove by that, that he was a witness upon the trial.

Serj. Gould. May it please you then, Mr. Speaker, thus far it is agreed, that here is a record of the conviction of Cook; and it is agreed, and the record speaks it, that Goodman was a witness, for it is indorsed upon the indictment. Now the main dispute is, whether Goodman's evidence did prevail to convict Cook upon that indictment? And for that we shall apply ourselves. Call our evidence, some of the jury, and some that were then witnesses,

and they will give you an account upon what evidence that conviction was.

Sir T. Powys. In what you were pleased to acquaint us at our last coming in, you were pleased to give such a reason in relation to the reading of this record, that if we had heard it before, we would not have troubled you to have it withdrawn; for it was proper to make out the allegations of the bill, and that Cook was convicted; but, we apprehend, they can carry it no further than what they have applied it to. But I perceive from hence, the gentlemen of the other side are encouraged to proceed to another piece of evidence, such they call it; they are going to call the witnesses to prove what was sworn at the trial of Cook, where sir John Fenwick, nor no person on his behalf, was present, either to hear, or observe, or cross-examine, or offer any thing to their credit, which possibly he might be furnished with, though Cook was not: I hope that will be no more allowed of as evidence here, than in any other place.

Sir B. Shower. We humbly oppose their calling of witnesses to give this account of the evidence given at Cook's trial. And we submit it to your consideration, whether you will think it just, that the evidence that is given with respect to one man only, shall conclude another person that stands at the bar in defence of his life, or that it shall be given against him. Every man's defence is several: and we opposed the reading of the record before, and so do now the calling of any witnesses to this purpose, for the same reason.

Serj. Lovel. We call these witnesses for no other purpose, but to prove that Goodman, what he did inform by that paper, he did swear before a jury.

Mr. Speaker. Gentlemen, you must withdraw. [Accordingly they withdrew.]

Mr. Manley. I thank God I have that regard for the laws of England, and to every Englishman's life, that when I see any thing attempted against it, I must give my testimony against it: I did not believe they would have insisted on it, for there was a gentleman that sate near to you, who in the close of his debate, I thought, had satisfied every body, that this was a thing that ought not to be read; if they should do it, it would be a thing of dreadful consequence; if you should admit of every thing these gentlemen that come in for the bill offer, I know not where it will end. How will it appear that upon Goodman's evidence the jury found Cook guilty? For they might find Cook guilty, and yet give no credit to Goodman; for he was contradicted materially, and there might be other evidence upon which they might find him guilty, and yet lay aside the evidence given by Goodman: but whether one way or the other, we cannot tell. They tell us, we are not to be guided by the rules of Westminster-hall; but we are to be governed by the rules of justice; and we are not at this time to seek a way to the king's favour, by voting against a criminal for high-treason.

Mr. Sloane. There is no manner of doubt of it, That that gentleman is in the right, who tells you, If this indictment and conviction of Peter Cook stood singly, as to sir J. F. it is no evidence; and if they will produce Goodman now, it shall be no evidence against them; but take the case as it is, here is a witness, who hath given me satisfaction, that it is one of sir J. Fenwick's friends or agents (which is the same thing as if done by himself) by whose means this witness is withdrawn: now the question is, What could this witness say, when he was here? What did he say? It is not conclusive, but it is material for you to hear what he did say when he was upon his oath.

Sir C. Musgrave. The gentleman of the long robe that spake last, was pleased to tell you, It is very reasonable that you should hear those persons, as to what Goodman swore at Cook's trial; I confess, I think this is harder than all the rest, because what you have hitherto admitted was in writing; one was an examination before a justice of peace, the other a record; but for any man to say, he can exactly repeat what any man swore at the trial, to me is wonderful: why, in his evidence, the least mistake of a word alters the nature of the thing, and therefore this would be a bold undertaking for any man; for if he wavers in the least circumstance, it is not true that he swore so: then this gentleman was no ways concerned in that trial; and to what purpose is it read, if not to the prejudice of sir J. Fenwick? I do not know but by the same rule, you may hear evidence of what any man hath sworn upon all the trials this three quarters of a year.

Mr. Sloane. I have been called upon to know in what cases testimony hath been given, that witnesses have sworn so and so at a former trial. It is every day's practice between party and party, that where a witness doth die, between the same parties (I will state the case fairly) it is given in evidence, that such a witness, at such a trial, did swear so and so; sometimes they take it in short-hand, and then they can tell the words of it; otherwise they repeat it upon their memories; but I will not strain it: but I put it with a further reason upon it; for we do not desire to hear it as conclusive evidence upon the prisoner, but only in this sense; here is a witness supposed to be carried away by the prisoner's means; and therefore, is it not necessary to hear what he said before he was deluded and carried away? Not that after it is heard, it is any conclusive evidence; but it is reasonable we would come at the truth, 'omnibus viis et modis, quibus mediis sciri poterit.'

Sir T. Littleton. A gentleman says, To what purpose should it be read, if it be not to the prejudice of sir J. Fenwick? On the other side, we may say, it is for his benefit; that is only supposing one way or another: I will hear any body to his benefit, and any body to his prejudice. Says a worthy gentleman, It is not done in criminal cases: why, in this

case you have heard the grand-jury, what he swore before them already; and what objection is there more against hearing what he swore in another case, than against hearing what he swore upon the indictment? The main inducement for you to hear it is, because he is gone away, and cannot be heard *viva voce*, and with suspicion that it was by contrivance of the party.

Mr. Grey. I would speak but one word as to what the gentleman that spake last but one said; and that is, as to the courts below, That one man is allowed very often to give in evidence what another swore; it hath been so, and it is at the peril of any person that swears, that he swear truth; for he may be prosecuted, if he does not swear truth; but I would ask him, what remedy there is here, if he do not say the truth? We have no remedy against him, if he takes away this man's life by what he says here.

Mr. Smith. Truly, Sir, if I must give my opinion, I do think it is very reasonable that bills of attainder should be only upon extraordinary occasions; I think that, take it at best, if there was not a place where the witnesses are to be sworn, and more particularly examined, I know not whether I should give my consent for the passing of this bill through your House; for the witnesses against the prisoner are not sworn, nor the witnesses brought against them; so that we can only give our opinion upon the probability of the matter; for what that gentleman says weighs with me, that it is a difficult thing for any man to charge himself with what was sworn at a former trial; for the mistake of a word may alter the sense very much. We are told by a worthy gentleman, that there was two or three witnesses that did give such evidence against the testimony of Goodman, that it is a wonder almost how Cook could be found guilty: it is our misfortune that Goodman is not here; it would have been worth our while to have heard what Goodman could have said in his own defence; but since there are such witnesses like to be offered against Goodman's testimony, is it not reasonable that we should hear what Goodman said for himself?

Mr. Howe. Sir, I always thought it very reasonable, that you should hear any evidence that might tend to your information; but I think it is plain, that nothing can tend to your information that is alledged by any person that is not to be believed; that is to say, is not to be believed from the nature of the evidence, though from the most credible person in the world. I know not whether these witnesses are to be brought or no: but I have heard that Cook, after he was condemned to die, without any apprehension of his being saved, did, upon the Sacrament, declare, that Goodman was not upon the place at that time he swore himself to be there. I have heard since, that the same Divine that gave him the Sacrament, Dr. Wake, when he had confessed it, after he had made such a declaration, had such an abhor-

rence of it, that he would go to him no more; but I cannot think we can have information from these persons, that I suppose did not think of giving evidence in this trial, and therefore did not take notice so particularly of what he said; and if so, it is losing your time to hear it.

Mr. Speaker. Gentlemen, the question is this: that the counsel against sir John Fenwick be allowed to examine witnesses, as to what Goodman swore at the trial of Peter Cook.

Sir Godfrey Copley. I must confess it would weigh with me, if it had been made appear, that sir J. Fenwick had taken off any evidence, and I should be ready to apply it as well as I could; but I must needs take notice of what was said in this debate, that we had done as much as this comes to already: this makes me a little more apprehensive, and to take care what we do now, since what this House does hath so quick an operation. We are citing precedents of this very day already, and make one thing a hand to draw on another; and so they may easily be made use of in after parliaments.

Sir H. D. Colt. I believe no one gentleman doubts, that Cook was convicted upon the evidence of Goodman; if they do, I would know the reason of it; for upon the last act, there are to be two evidences to the same treason: there were but two positive witnesses against him for treason, and they were Porter and Goodman: I think, therefore, he was convicted upon the evidence of Goodman; what then needs any person to remember any particulars that passed at the trial, if they remember in the whole, that he was convicted by the evidence of Porter and Goodman?

Mr. Speaker. As many as are of opinion, that the counsel against sir J. Fenwick be allowed to examine witnesses, as to what Goodman swore at the trial of Cook, say, Aye. —Ayes 180. Noes 102.

[Afterwards the question of adjournment was put, and it passed in the negative; and several gentlemen that were against the bill, to about forty, went away together in a body; some of them having declared, that their health would not give them leave to stay there longer.]

And sir John Fenwick and the counsel were brought in again.

Mr. Speaker. Mr. Serjeant Gould, the House do allow you to examine witnesses as to what Goodman swore at the trial of Cook; pray go on with your evidence.

Serj. Lovel. We call Mr. Collins, Sir. [Who was brought to the bar.]

Mr. Speaker. Was he a juryman?

Serj. Lovel. He was one of the petit-jury, Sir.

Mr. Speaker. Mr. Collins, can you give the House an account of what was sworn by Goodman upon the trial of Cook?

Collins. To the best of my memory, I will give the best account I can. Goodman did depose, that he came to the King's-Head in Leadenhall-street, and enquired for captain Porter, according as the captain had ordered him; and the captain came down and carried him up into the room where the gentlemen were. There was sir John Freind, sir Wm. Parkyns, Mr. Charnock, Mr. Cook, and sir J. Fenwick; there was two others, if you please to have me name them.

Members. Yes, yes.

Collins. My lord Aylesbury and my lord Montgomery: this was what he deposed.

Mr. Speaker. Go on, Sir; you have named those that were at the meeting.

Serj. Lovel. Did he give you an account of what was agreed on at that meeting?

Collins. I think it was about sending Charnock to France.

Mr. Speaker. Sir, you should repeat all the particulars, what Charnock was to do.

Collins. I cannot remember any thing further than what I have told you.

Serj. Gould. If you please that Mr. Cooper may be asked to this?

Mr. Speaker. Was you of the petit-jury that convicted Mr. Cook?—*Cooper.* Yes.

Mr. Speaker. Can you give the House an account what evidence Goodman gave to you for conviction of Cook, and what he said in that evidence?

Cooper. Mr. Goodman did declare upon his evidence, that he was at the Old King's-Head in Leadenhall-street, where he did meet with divers persons that were in consultation; he named Charnock, sir J. Fenwick, sir J. Freind, and divers others.

Mr. Speaker. What was the consultation?

Mr. Cooper. It was about sending Charnock over into France.

Mr. Speaker. To what purpose?

Mr. Cooper. To bring over forces, or encourage the bringing over of forces: that was the purport of his message.

Mr. Speaker. Will you produce any other evidence to this point?

Serj. Gould. We desire this gentleman may be asked to the same purpose.

Mr. Speaker. Was you one of the petit-jury?

Another Witness. There was capt. Porter, and Mr. Goodman, that were the two evidences; and Goodman did say, that he had been at the Old King's-Head in Leadenhall-street, one Coxe's, and sir John Fenwick was there, and several other gentlemen, consulting of an affair to send over into France for some forces to be brought over into England; and that Charnock was the person, and they all agreed he should go over.

Mr. Speaker. But did he give you an account of what Cook and the others did agree to, upon which you found Mr. Cook guilty?

The same. We did apprehend that Cook did consent that Charnock should go over to France, and acquaint king James, that there

had been a meeting of several gentlemen, and that they had made several offers of soldiers and people that were to be raised here, and to acquaint king James with it; and he declared, that sir John Fenwick was there at the same time.

Mr. Speaker. Pray, can you give this House an account of what exception was taken to Goodman's credit, and how it was answered?

The same. There was exception taken, that he was guilty of a great many crimes, and that he had his pardon; and the fines were levied upon him; but it was said then, that he had paid his fine, and that he was a very good evidence in the case.

Mr. Speaker. Mr. Serjeant Gould, have you any other evidence to produce?

Serj. Lovel. If you please, Mr. Speaker, here is Mr. Tanner, the clerk of the arraignments, that best knows the nature of these things; that as to these objections that were made, it appeared to the court to be a contrivance, for he was never bailed, but discharged without any more to do. If you please that he may be asked, What objections were made to Goodman's reputation, and what answer was made to it?

Mr. Speaker. I did ask the juryman that; and I suppose you need not labour this point, unless the credit of Goodman comes in question here.

Serj. Gould. Then may it please you, Mr. Speaker, we have one other piece of evidence against sir J. Fenwick, which we are humbly to offer to your consideration, and I think it is very material; and it is some of the evidence which I did open in stating of the case, wherein sir J. Fenwick hath, in a manner, given a verdict against himself; for while sir J. Fenwick was working of his escape to go beyond sea, at that very time there was a letter written by him, directed to his lady, and delivered into the hands of one Mr. Fowler, who was to cause it to be delivered to his lady by one Webber, who was taken up when sir John Fenwick was.

This letter imports, That sir J. Fenwick looked upon himself as having no defence, but depended only upon a contrivance with the jury; they were to work with some persons of the jury, who were to stand it out, and to starve the rest; and so by that means to save him. Our evidence of this will be, that it fell out that Webber (we have him not here now, but have endeavoured it as much as was possible, but he is gone too out of the way), that he was taken at the same time that sir J. Fenwick was; but by reason of the protracting of sir John's trial, he comes, and is delivered, there being no charge against him; and he is, since his deliverance upon his Habeas Corpus, gone out of the way; but we shall, in the method of our evidence, produce you Mr. Fowler, the person to whom this letter was banded, who will give you an account of this letter; and then will produce this letter: to which end, we must humbly beg the favour of a worthy member of this House, Mr. Vernon, who hath

this letter, that it may be produced, and shewed to Mr. Fowler.

Mr. *Vernon*. Sir, I received your order to bring the letter that sir J. Fenwick wrote, while in custody at Rumney, which was sent up to me by Mr. Mascall, who had it of Mr. Fowler; and, if you please, I am ready to deliver it.

Mr. *Speaker*. Who sent it to you?

Mr. *Vernon*. One Mr. Mascall, a justice of peace of Rumney.

Sir *T. Powys*. I hope now we shall make an objection to this letter with good authority. Surely for them to produce a letter, as sir J. Fenwick's, is not to be allowed as evidence, unless it was proved that he wrote it, because that sort of evidence was particularly taken notice of by parliament: and judgment given upon that sort of evidence, by comparison of hands, in the case of Mr. Sidney, and the act of reversal of his attainder does allow it to be illegal evidence. This is such an authority as, I hope, will bear no dispute: and the courts of Westminster-Hall have since thought it so; they did so in the case of Crosby, who was tried the other day in Westminster-Hall.

Sir *B. Shower*. In this objection we have the opinion of inferior courts, and the parliament too; for the particular evidence Mr. Sidney was convicted upon, was upon a paper which was found, and proved by some who pretended to know his hand; and I am sure that is more than they can pretend to, and more than they have yet opened. We do therefore humbly oppose this evidence, it being in the case of the life of a man; and the king, Lords, and Commons, having declared, That this sort of evidence ought not to be allowed: and therefore, I hope, you will not allow it in this case. And in Crosby's case, upon reading the act of parliament, this evidence was not allowed, and Crosby was acquitted.

Sir *T. Powys*. I have a copy of the bill for reversing the attainder in my hand; and it says, 'The producing a paper found in the closet of Mr. Sidney, which was not proved by any witness to be his hand-writing, &c.' And, we hope, if in the judgment of the parliament that was not thought reasonable evidence to attain him, this will not be thought reasonable in parliament to attain this gentleman.

Serj. *Gould*. As this case is, we hope this may be a concurring evidence: it will be plain, upon the evidence we shall give, that Webber was with sir John, and taken with him; and at that time this letter was handed by him over to Fowler, to be carried to my lady. Now, Sir, we humbly offer it to your consideration, How far it is available, and what operation it will have? Whether, in a case of this nature, these two being taken together, and Webber delivers this letter to Fowler to deliver it to sir J. Fenwick's lady, and the import of the letter concerns sir J. Fenwick for his acquittal; you will not suffer it to be read? It is not to charge him with a treason, for that is the case of Algernoon Sidney: it is not to prove a crime

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upon him; but we will prove that sir J. Fenwick handed this letter over, that it might come to his lady; by which he desired his lady so far to work the matter, that some juryman might be found to starve the rest, and stand out for him; if we could produce Webber, we would; it is plain, Webber corresponded with sir John, and was with him.

Serj. *Lovel*. I humbly beg one word in this matter: the counsel on the other side do very well know, the constant practice is, That in the case of a deed or will, let the value of the estate be what it will, if the witnesses cannot be produced, or are gone beyond sea, they always admit evidence by comparison of hands. But for the case of Algernoon Sidney, there is no doubt but his attainder ought to be reversed, because that attainder was upon no other evidence; for there was no other proof, but a paper, that he himself did say, was only for the exercising of his own ingenuity and parts; and it was said to be written for no other purpose, and proved only by the comparison of hands: had there been any other witness to corroborate, it had altered the case. But in our case, we do produce the letter, not for the convicting of the prisoner at the bar; but we are humbly to lay before you all the matter of fact. It will be worthy of your consideration, what you will think fit to take, and what to reject; this is a matter for your own judgment. We produce this letter for this purpose, to shew you, that after sir J. Fenwick was taken, he apprehended his case to be so desperate, that he used these indirect means.

Mr. *Speaker*. What mean you by that? This letter came from Mr. Fowler.

Serj. *Lovel*. Here is Mr. Fowler that received it from Webber, when sir J. Fenwick was by, in the presence of sir J. Fenwick.

Mr. *Speaker*. Shew Mr. Fowler the letter. [Accordingly the clerk went down to the bar, and shewed Mr. Fowler the letter.]

Mr. *Speaker*. Do you know that paper?

Fowler. Yes, sir.

Mr. *Speaker*. Where have you seen it before?

Fowler. I had it from one Webber, that was at Rumney, about the 3d of June, as I remember.

Mr. *Speaker*. Was that the time that sir John Fenwick was seized?

Fowler. He was then at Rumney. Mr. Webber, I was told, had some acquaintance with me, and desired to speak with me. I went to him; and he was rising; and when up, says he, Mr. Fowler, I would desire you to put a letter into the post; says he, there is no hurt in it; it is directed to Mrs. Frances Farrer, at the countess of Carlisle's in Soho-square; and when I had delivered it, he desired me to come to him again.

Mr. *Speaker*. Did you come to him again?

Fowler. Mr. Mascall, of Rumney, sent for me to his house, and told me, that he had heard that I had received some letter from Mr. Webber; and when he had opened it, and saw

what it was, he thought fit to send it up to the secretary of state; and I made my mark upon it, that I might know it again.

Mr. *Speaker*. Have you made your mark upon it?—*Fowler*. Yes, Sir.

Serj. *Lovel*. I desire he may be asked, whether sir John Fenwick was not in the same room when Webber delivered it?

Fowler. Yes: but I question whether he saw Mr. Webber give it; for he delivered it privately, as I thought.

Mr. *Speaker*. Was sir John in the room then?

Fowler. Yes, sir.

Mr. *Speaker*. Can you say any thing more of sir John Fenwick's knowledge of that paper?

Fowler. No, I know no more.

Serj. *Gould*. If you please then, Mr. *Speaker*, because perhaps there may be some objections, that we should give an account of Webber, we will call a witness, that we have done our utmost to find him out.

Members. No, no.

Sir T. *Powys*. That which I was going to offer is, that this proof is short, if that which in the act of reversal of the attainder of Mr. Sidney is admitted to be no proof against him; for the act recites that letter was found in his closet, and proved by comparison of hands, and yet for all that, this sort of evidence is condemned by this act of reversal as illegal evidence. This case before you comes short of that; for here is no proof by comparison of hands, nor that it was in the possession of sir J. Fenwick: but only that a person in the room without the privity of sir J. Fenwick, delivered it to another; and the witness says, he did it in a private manner.

Sir B. *Shower*. With submission this letter could not be read in any place whatsoever against sir J. Fenwick, in a civil cause; for even in that case, they must prove it to be his hand-writing by comparison of hands.

Serj. *Gould*. I think not to insist upon it:*

* This Letter was written with a black-lead pencil, and was as follows:

"What I feared is at last happened; had I gone alone I had done it; but the other was betrayed from London. It is God's will, so we must submit. I know nothing can save my life, but my lord Carlisle's going over to him, (meaning king William) backed by the rest of the family of the Howards, to beg it, and offering, that I will be abroad all his time, where I cannot hurt him; and that I will never draw sword against him. I must leave it to you what else to say. All friends must be made. My lord Devonshire may perhaps, by my lady; my lord Godolphin and my lord Pembroke, by my lady Montgomery; Mr. Nelson by the bishop of Canterbury. My lord Arran might engage his brother Selkirk to use his interest with Keppel. I believe, if my lord Carlisle would go, it were best before my trial, or else they will cut me short for want of time; if he can prevail with him for a pardon, he will procure it as well before my trial as after, at least

But that we shall desire is this; we have now done with our evidence, only we shall desire the worthy member, Mr. Vernon, to give an account what was the reason why sir John hath not been tried; for indeed he hath very much trifled with the government, pretending still to make a free and ingenuous confession.

Sir T. *Powys*. I am of counsel for this gentleman at the bar; for his life, for his fortune, for all that he hath in the world. It is not only this gentleman's case, but it is a case that may be of great consequence in all future times. I have, as it was my duty, attended for at least these twelve hours, either in opening the matter, or by producing such evidence as, we hoped, we did fairly object to. Sir, there are several things offered on their parts, which I confess we little expected, and which will require something to be said to; and I have a great deal to offer on the behalf of sir J. Fenwick, both as to this method that is taken, and what is alledged in the bill, and what is contained in the indictment upon which the bill is founded, wherein I desire to be heard: and since you have been pleased to allow us to be counsel for him, I am sure we shall have a fair and favourable hearing. We have a great deal to offer to you, both as to the matter of the indictment, and the manner of it: and I hope to shew you, that the indictment, as it is laid, does not contain a sufficient charge of treason. We have likewise a great deal to say, as to the evidence they have offered, at least what they call so: but I must make it my request, that we may have liberty until to-morrow morning to make our observations, and answer what hath been said by the counsel on the other side. I am not in a very good condition by this long

he may prevail for a reprieve, till some can come over to him. My lord also will have an opportunity to engage Bentinck [the earl of Portland,] and get my lord Essex to join with him. I cannot think what else to say; but the great care must be the jury, if two or three could be got that would starve the rest; that or nothing can save me. Money, I know, would do it; but alas! that is not to be had, nor shall I get enough for counsel. I beg of you not to think of being shut up with me; I know it will kill you, and besides, I have no such friend as you to take care of my business: though it would be the comfort of my life, the little time it lasts, to have you with me: and I have this only comfort now left, that my death will make you easy. My dearest life, grieve not for me, but resign me to God's will. You will hear, as soon as they bring me to town, where they put me, and then I would have a servant, or somebody with me. I am interrupted, so can say no more now. Engage sir John Lowther, the new lord, who has more interest than any body. Let my lord Scarsdale engage Jermaine to engage Overkirk for me. Speak to my lady Arlington. If my trial could be put off till the king comes back, there would be more opportunity to solicit him."

attendance, and by attending my duty in the courts in Westminster-hall; and I am afraid I am not now in a condition to do my duty, as may be expected from me. I must own it, I am not prepared as I ought to be; and I hope when there is so great a stake, you will allow us until to-morrow morning.

Sir B. Shower. I beg your favour in the same manner, and to the same effect as *sir T. Powys* hath done. It is to be acknowledged there are several things offered in evidence, which is new to us lawyers. We do not desire to trifle: we do not desire it on behalf of the prisoner by way of delay, but on behalf of the length of the proceedings, that you will give us a fair hearing, as you have allowed it to the king's serjeants; and that we may make that defence that is incumbent upon us in discharge of our duty to the prisoner.

Mr. Speaker. Gentlemen, you must withdraw. (And being withdrawn.)

Mr. Smith. I would not give an opportunity to any man to practise with witnesses, to hinder the truth of the matter from appearing, after they have heard the evidence for the bill. I would know what list of these witnesses *sir John Fenwick* hath given in?

Mr. Speaker. You did make an order, that *sir John Fenwick* should deliver in a list of his witnesses; but I believe he did not send in a list to any body upon that account, for I have made no order for any.

Lord Coningsby. I am convinced that you are obliged to sit so long as to hear the witnesses on both sides; and therefore my motion is to call in the counsel, and ask them, if they have any evidence to produce; but I do not desire the counsel should go on to make their observations to-night.

Sir Walter Young. I think you are rightly moved by that noble lord that spoke last. I think if *sir J. Fenwick* hath any evidence to produce, he ought to produce it now; and that you ought not to give him time till to-morrow morning to produce that.

Mr. Speaker. Is it your pleasure that *sir J. Fenwick* and the counsel be called in, and told, that the House do expect, if they have any witnesses, that they do examine them to night; but as to their observations the House will give them time till to-morrow morning?

Which was generally consented to, and they were brought in again.

Mr. Speaker. *Sir Thomas Powis*, the House have considered of what you said, when you went out, and they are inclined to allow you time for making your observations: but they have commanded me to ask you, if you have any witnesses to produce? and to let you know, that if you have any witnesses to produce, they expect you would produce and examine them to-night.

Sir T. Powys. Sir, I would acquaint you with all the openness that becomes me on this occasion. I must confess we have not any witnesses that we propose to call; but when we

come to speak to the matter, we hope to give you some satisfaction as to that; but at present we have no evidence to produce, unless it be a copy of a record.

Mr. Speaker. Sir, if you please to withdraw, you shall know the sense of the house.

Accordingly they withdrew.

Chan. of the Exchequer. I suppose, since the gentlemen have no living witnesses to produce to-night, you will not think fit to receive them at any other time, for it is giving them too much advantage; and the whole meaning of the chicanery of the counsel, is only to get time to reply, *Mr. Dighton* having heard the evidence. And now I have mentioned him, give me leave to tell you, That I think you cannot rise without taking some notice of him. I think there is as plain a subornation proved in *Dighton*, as can be, by one *Roe*; and when you have heard such a character of a man, and there is no other evidence that he can solicit, I think you ought to take care that he be forth-coming; and that he should be taken into custody. I think you may give the counsel further time as to the record; that cannot well be falsified; though I believe in a matter of this moment, where the government is concerned, there never was such a proceeding by the counsel, as this has been, to entertain us six or eight hours together, by delays.

Mr. Smith. I suppose before you hear any thing as to *Dighton*, you will do something as to the putting this cause off to another day; I humbly propose that you will go on this again on Wednesday.

Sir H. Hobart. When it is proper to go upon ways and means, I shall come into it: But while this is upon your hands, I believe you will never get heartily into other business: and therefore I humbly move you that you will go upon this to-morrow morning.

Thereupon the house came to these Resolutions:

Resolved, That this house will proceed further in relation to this business of *sir John Fenwick* to-morrow at twelve o'clock.

Ordered, That *sir John Fenwick* be remanded to Newgate. That the bill be read a second time to-morrow morning.

Mr. Russel. I am unwilling to trouble gentlemen at this time of night; but I would know, Whether, when *sir John Fenwick* is called in, you will ask him any questions upon that paper?

Members. No, no.

The counsel were called in, and withdrawn again.

Resolved, that this House being informed that the counsel for *sir John Fenwick* have no living witnesses to produce except to prove a record, that this House will not hear any witnesses, except to prove the said record.

Ordered, That *Mr. Dighton* do attend to-morrow morning.

November. 17. Sir John Fenwick and the counsel on both sides were called in.

Mr. *Speaker*. Sir Thomas Powys, you that are of counsel for sir John Fenwick, the House agreed last night, to give you time till to-day to make your defence, your observations upon the evidence that hath been given.

Sir *T. Powys*. Mr. Speaker, I am of counsel for sir John Fenwick, who now stands before you upon the greatest concern he can have in this world; and as you have been pleased to assign us to be of counsel for him, and I must own have very favourably heard us hitherto, so I shall think myself very unfortunate, if I should let fall any expression in his defence, that should seem indecent, and give offence to this House; for I am sure I have no intention to do it, but on the contrary, to behave myself with all the deference that is possible, in a case of this nature.

The thing I shall insist upon, will be upon three heads. 1. The manner of proceeding, and method that hath been taken in this prosecution. 2. I shall take notice of those things that are alledged against him in the bill, upon which he is to make his defence. 3. I shall beg your favour, to observe what sort of proofs they have offered on the other side, and which they call evidence.

As to the first matter, I must intreat the favour of you to be thus understood: That when I say any thing in relation to the manner of proceeding, I do not speak in opposition to the power of parliaments; for I know very well, that our lives and estates, and all that we have, are subject to acts of parliament; but I hope you will permit me to offer some reasons, which (I hope) may be of weight, in opposition to the exercising of that power in the way you are now going. Nobody can say, but when an act of parliament is passed, though the party concerned may think it was upon hard terms; yet when it is become a law, it is not to be opposed. I cannot say but those persons, who in the last sessions of parliament were imprisoned by an act *ex post facto* and subsequent to the fact complained of; yet when it was passed into a law, they were legally detained: But, I hope, I may so far take notice of their case, as some kind of reason against this, to the end that those laws may not grow familiar, that they may not easily be obtained; because precedents generally grow; and as that law 'ex post facto,' extended to liberty, so this extends to life; one precedent is apt to beget another; and therefore, sure, you will be careful how you give precedents, especially in case of life.

The first thing I observe, is obvious; that is, the person who is to be sentenced by this bill is forthcoming, in order to be tried in the ordinary method of justice. He is not only indicted, and actually under process; but he hath pleaded, and he is ready, when his majesty, in the course of justice, shall call upon him, to undergo his trial; and either there is sufficient evidence, legal evidence against him,

as the king's serjeant insisted there was: and if there be so, then, under favour, there is no reason but he should have the benefit of an ordinary trial, which is the birth-right of all the king's subjects: or there is not sufficient evidence against him; and if there be not, it will be a good reason against making a particular law for taking away his life: For, we think, nothing can be said for this law, but want of evidence; and that, to my understanding, is a very odd reason.

Sir, I would not spend time in taking notice, That the meanest subject in the kingdom is entitled, by being born in this kingdom, to be tried by a jury, where there are those just advantages, that cannot be had in another case: There is a liberty of challenging 35, without shewing any reason, and as many more as he can any way object to with reason. The witnesses are upon oath, and all the proceedings are by certain known rules and methods, and not only by the statute of Magna Charta, but by the common law of England, much more ancient than that statute; and though the proceedings therein are such as a criminal may sometimes escape, yet the just advantages are so much beyond any thing of that nature, that I hope we shall never complain of that ancient course of proceeding by jury: I am sure it is the honour of our government, the mark of our freedom, and envy of our neighbours; and I hope, that method of trial shall never be laid aside, though sometimes it may not have the effect that is desired by it.

I would take notice to you, that in a case of the greatest crime, and most notoriety of fact, yet the persons concerned in it were brought to their trial. The regicides, who did not fly, but were found upon the restoration of king Charles 2, though their treason had the worst effect, even in the murder of the king; yet, notwithstanding, though the fact was so notorious, those that were found upon the place were admitted to their trials in the ordinary course of justice; although at the same time there was a bill of attainder against some that fled, and some that were dead, and so could not be tried.

I would, with your favour, likewise observe, That the parliaments of England have been so far from depriving persons from their ordinary trials, that whereas the common law of England says, that persons out-lawed for treason and felony, if taken, shall be put to death without trial; yet the parliament, in the reign of Edward 6, made a law, providing, that criminals that returned within a year, according to that law, should be admitted to their ordinary trials.

Sir, all along the statutes run in favour of trials; there are no less than two acts of parliament in the reign of Edward 6, in the first and fifth year of his reign, that say, there shall not be less than two witnesses against any person for treason: And I hope I shall never see a law made so much in opposition to those acts, as that a person shall be sentenced to death

without so much as one witness, as I shall shew by and bye.

Perhaps it might be thought extraordinary, That in the same parliament that passed a bill for regulating trials in cases of high-treason, requiring two witnesses with great strictness, and giving further advantages to the criminal than ever were before allowed, an act should pass, to put a person to death, without any trial at all. And let any one compare the preamble of that act with this bill.

Sir, I take it, with humble submission, that the present case is not at all to be likened to most of those bills of attainder that may be cited; those, when they come to be looked into, will be found either to have passed against such persons as fled from justice; and therein they only pursued the rules of the common law, which allowed them to be out-lawed, and by consequence to be attainted: and the parliament therefore, in attainting them, did but the same thing; and therein, there was nothing done extraordinary. True it is, that where persons have been forthcoming, there have been some few bills of attainder: but I will presume to say, they are never mentioned without heavy censures, and a great complaint against them.

This cause is not like the late instance of the bill of attainder against the duke of Monmouth,* for he was present in the kingdom: yet he was in direct opposition to any method of trial; he was in defiance to all courts of justice: but here is a person who submits himself, and hath pleaded, and stands ready to be tried; and I hope, I may take notice, to take off all prejudice that may be raised, that this gentleman, though he was of the parliament that passed that bill, yet he was not in town, until at least a month after the bill was passed.

I do agree, there are some cases where persons have been attainted without being admitted to be tried. In the beginning of the reign of Edward 3, Roger Mortimer was attainted and executed, without being tried; but 28 Ed. 3, it was reversed, because he was not brought to judgment according to the law of the land, 1 Ed. 3. The like in the case of Edmund earl of Arundel: but 4 Ed. 3, Richard his son petitioned in parliament, setting forth the proceedings to be against the Great Charter, and insisting, that there ought to have been due process of law, and he was then restored in part; but 28 Ed. 3. there was an act of reversal, declaring, that it clearly appeared, that the said Edmund was unduly put to death; and that the statute by which he was attainted, was void, erroneous, and null. There is an instance

* See this Case, vol. 11, p. 1023, in a Note to which, p. 1040, is contained some matter concerning the mode of passing the Act of Attainder against him. In the works of lord De-lamere, see his Trial, vol. 11, p. 509, printed 1694, is an article, intitled, Observations upon the Attainder of the late duke of Monmouth, which see. See, also, 2 Ralph, 143.

in 32 H. 8. Col. 4. Inst. fol. 37. of Thomas Cromwell earl of Essex, who, though he was in custody in the Tower. yet he was attainted without being tried; but the words of my lord Coke are as follow, 'Auferat oblivio, si potest; si non utrumq; silentium tegat:' for the more high and absolute the jurisdiction of the court is, the more just and honourable ought it to be in its proceedings, and to give examples of justice to inferior courts. And he adds further, to the end, as I apprehend, that the reversal of this attainder may be of ill use: I am, says he, confidently persuaded, such worthy and honourable members shall from time to time be of both houses of parliament, as never any attainder, when the person is forth-coming, shall be had hereafter, without hearing of him; which I understand to be, without trying of him: and it is memorable, what my lord Coke recites, that he who thus died, attempted the like against another.

There is another case, of Thomas Seymour, admiral of England, who likewise was attainted by act of parliament; and as it appears, without execution: you have an account thereof in the second part of the History of the Reformation, fol. 98, 99, 100, whither I will refer you, only to read the sentence of the learned author, there pronounced against him. That latter case is, that of my lord Strafford, which every body knows. I shall, as the best account of that matter, crave leave to read the words of the parliament in the act of the reversal. I will not trouble you with reciting the whole, but only read the beginning, and some part thereof in another place. "Whereas Thomas, late earl of Strafford, was impeached of high-treason, upon pretence of endeavouring to subvert the fundamental laws, and called to a public and solemn arraignment and trial before the peers in parliament, where he made a particular defence to every article objected against him; insomuch, that the turbulent party then seeing no hopes to effect their unjust designs, by an ordinary way and method of proceedings, did at last resolve to attempt the destruction and attainder of the earl, by an act of parliament, to be therefore purposely made to condemn him upon accumulative treason."— And then it goes on to shew, it was carried by the tumult of the people; and then follows— "And to the end that right be done to the memory of the deceased earl of Strafford afore-said: be it further enacted, That all records and proceedings of parliament relating to the said attainder, be wholly cancelled and taken off the file, or otherwise defaced and obliterated, to the intent the same may not be visible in after ages, or brought into example to the prejudice of any person whatsoever." So that the parliament that enacted that reversal did consider those proceedings as very evil and unjust, and was not willing there should be any remains of such an example to future ages.

Sir, having made these observations as to the manner of proceeding, I come now to that which is the subject matter of the bill at pre-

sent before you, and which we take to be the charge against sir J. Fenwick: I must crave leave to observe, that in all courts of justice, where any person is accused, he is to make his defence 'secundum allegata et probata': it is not enough that a matter is proved, if it be not alledged; nor that it is alledged, if it be not proved; but if it be both alledged and proved, then it is a full charge, and requires an answer. It is not only the law of England, but I believe all nations, and wherever any person is to make his defence, especially in capital crimes; that to which he is to answer must be alledged against him: from whence I shall observe what is alledged against sir J. Fenwick; for, I hope, we are not concerned to defend him further than as to what at this time he is charged with. This bill of attainder, as it is drawn, and now stands before you, doth not so much as alledge, or say, that sir J. Fenwick is guilty of the treason whereof he was indicted; and that hath prevented us from producing witnesses to that, and several matters which the king's counsel have entered upon: for though you have permitted them to examine witnesses to several things quite out of the bill: yet, I hope, you are not come to any resolution, that these matters shall be thought fatal to sir J. Fenwick, that are not so much as alledged against him. We do not therefore think we are bound, or ought to follow them in those things that are totally out of the bill; and therefore his being guilty is not now the question, because it is not a charge upon him.

The first thing that is alledged in the bill is, That sir J. Fenwick was indicted at the sessions, for that which is laid in the indictment to be treason (which by and bye I shall crave leave to be heard to); and, I think, nobody will say this alone does require any answer, further than to own the fact or to deny it: and we do admit that he was so indicted. I need not labour much to clear him of the consequence of that alone; for very often innocent persons have been indicted and accused (for an indictment is no more than an accusation); and this bill, as I have observed, doth not say he is guilty. When the bill hath recited that matter, it proceeds to take notice, That they by some unfair prevarications (for so I agree they were, if the facts alledged in the bill are true, which by the way hath not been yet proved, by producing any one witness) did obtain the king's clemency to put off his trial, in expectation of an ingenuous confession, which the bill takes for granted he hath prevaricated in, by charging several persons of honour and fidelity with matters of a high nature, only by hear-say; and by using other unfair artifices to put off his trial. How far it is made out, that I must submit to you; we think at present there is no proof of it, and by consequence we are not concerned to answer it: but had they proved it as fully as it is laid (though far be it from me to excuse such a behaviour); yet when a criminal is to be tried for that which will be of fatal consequence to him if he be

convicted, nobody can say it comes near treason, by unfair means, to contrive to put off his trial.

The next thing the bill recites is, That one of the witnesses, who might have been produced against him upon his trial, if it had proceeded as was intended, is since withdrawn. I cannot say, but Goodman is withdrawn: but as the bill does not so much as alledge, that it was by the means or procurement, no nor privity, of sir J. Fenwick; so from thence that part of the bill charges no offence home to sir J. Fenwick: for in case the same witness had happened to have died by the act of God, it would not have been said to have been a good reason for this bill of attainder against sir J. Fenwick, unless he had contributed to it.

From these premises follows the enacting part, That sir J. Fenwick be attainted of high-treason; and in future times the act must be supposed to be grounded upon the inducement to it. And I humbly submit it to you, Whether this bill, condemning him for high-treason upon such recitals, will be thought to be reasonable?

These being the allegations of the bill, I will now, with your favour, come to that, which they on the other side do call proofs; and I must humbly observe to you, and submit it to your judgment, Whether in the case where a man's life is to be taken away, by a subsequent law made on purpose for him, the proofs in that case ought not to be much more evident, than if he were to be tried by a law already in being? In my poor apprehension (I speak it with all submission to you, Sir,) it would be too much at once, to make a subsequent law to condemn a man to death, and to do it upon doubtful and uncertain evidence, or rather upon no proof at all. Nothing could excuse such a law, but an undeniable proof of the fact. And therefore, surely, the position we find of Mr. St. John's, in my lord Strafford's case, is of most dangerous consequence. I am afraid none are safe, if that be admitted, that a subsequent law may take away a man's life without any evidence, other than the private opinion or conscience of every particular law-maker. He is pleased so to assert, that it may be done, as in Rushworth's History of that Trial, fol. 677. I am sure if this be so, no man knows how long his life is his own: I hope this doctrine shall never be followed or approved. Sir, we have the happiness to live under an establishment that every man does, or may know the law he is to go by: every one is bound at his peril to take notice of the laws, and to act accordingly, because they may be known: but at this rate none but prophets can live amongst us.

In the next place, I would observe what course they have taken in their evidence who are the king's counsel.

First, They have betaken themselves to that which is not alledged in the bill; and we think that this is not agreeable to a course of justice.

In the next place, to make out what they

insist on, they have produced but one person that comes hither *viva voce* to speak to it; and I must take notice to you, that he is not upon oath. I know very well it is not your course in this house to administer an oath; but I know very well, though it is not your course in this house to administer an oath, yet, I hope, that is so far from being a reason why this bill should pass without an oath, that it is a good reason why such a bill should not begin here: there is no place in the world where a person is sentenced to death without an oath. In the case of my lord Strafford, the proceeding first was by way of impeachment, and the witnesses had been first examined upon oath in the House of Peers; and that bill of attainder takes notice of it, reciting that it had been fully proved; and, by consequence, we may suppose, that they would not otherwise have passed it, that being the ground of their proceeding upon that bill of attainder: but for the bill to begin originally in this place, to form such a judgment, the heaviest that can be pronounced against a man, a judgment of death, corrupting of his blood, and forfeiting all he has in the world; and this upon bare allegations, without so much as the sanction of an oath, is extremely hard. Mr. Porter is such a person, that I know not how he hath gained so much credit, that this act should pass upon his parole to take away the life of a man. He was lately of that horrid conspiracy of the assassination of the king; and shall that man, who was so lately of that villainous disposition, to be engaged in a crime of that black nature, and not convicted by his own conscience, but by the danger he had run himself into, not so much as pardoned his crime, but at this time, if I may without offence use that expression, drudging for his pardon; I say, shall this person's life be taken away by his parole?

Sir, The next thing I would go to, is that (which likewise they call evidence), which is an examination, as they term it, of Goodman, taken before a justice of peace: but he was not examined, and I must insist upon it, that though you permitted it to be read, yet I did observe you did not declare it to be evidence; but you were, I presume, willing to hear all things, and then judge what would be the evidence. And, I think, the king's counsel did not press it further. Sir, as this is not evidence that would be allowed in an inferior court, so, I hope, you will not allow it to be evidence here; for then it is like to be followed by other courts, who observe the proceedings here as their great rule. It is only what Mr. Goodman thought fit to write down without being examined.

Sir, the next thing they resort to is, What Goodman swore upon his examination in another cause, where sir J. Fenwick was neither party nor present. Sir, there are, I suppose, such reasons against that sort of evidence from natural justice, that it is not admitted in any court: because there may be a weak defence, or the person that swears it against one, per-

haps may not, when face to face, have the confidence to persist in it, in case it be false, against another; or at least that person who was not a party before, when he comes upon his trial, may think of such questions as may go a great way to discover the truth, may produce such evidence against his credit as may overthrow it.

But if what is sworn at one time against one man must be always taken for truth against all others, the trial of one of the company is the trial and condemnation of all the rest: and how contrary is this to a fundamental rule in our law, That no evidence shall be given against a man, when he is upon trial for his life, but in the presence of the prisoner; because he may cross-examine him who gives such evidence; and that is due to every man in justice.

But I would with submission inquire, how they are sure that Goodman would have sworn this matter again, if he was now forth-coming? Because he did swear so in Cook's cause, is it necessary that he would swear so again now, if face to face with sir J. Fenwick? Nobody can say so positively and absolutely; they only can imagine it, because he once swore it, therefore it is possible that he would do so again: Whereas we may as well say, he did then swear to save his own life; and having done that, and found an opportunity to get out of the way, his own conscience might put him upon flight, to prevent his doing of it again, and that might be the reason for the withdrawing of himself. However, I insist upon it, that there is no proof that it was by the procurement of sir J. Fenwick: The bill does not alledge it, and the proofs do not come up to it: Nay, there is nothing offered to such purpose, save only that Mr. Porter was pleased to say, That another man told him, that the 300 guineas he was offered, and 300 more he was to have received, were to have come from sir J. Fenwick: but hearsay evidence is to be rejected, especially against a man for his life; because every man is at liberty to talk at large: But God forbid that that should be allowed for evidence!

The next thing they went upon was what Mr. Roe said; that Mr. Dighton, who by your permission is solicitor for sir J. Fenwick, was inquiring of him what he could say to take off Goodman's evidence: The words I think he used were, What he could say to discredit Goodman's evidence; and, I hope, that does no way affect sir J. Fenwick: For it does not appear that he had any authority from him; but it is only suspected, because he is now solicitor for him, which he was admitted to after the time spoken of. But I take the words to be nothing relating to Goodman's withdrawing of himself; but to inquire what he could say to discredit his testimony, which supposeth he would appear; and imports the quite contrary of withdrawing himself: and if had gone no farther, I think, there had been no fault in that; for any solicitor may enquire up and

down for the advantage of his client; and the word solicitor imports his employment. As to the offer Mr. Roe says he made him of a very great recompence, how far he is guilty of that, I suppose he can give some account, if you should please to enter into an examination of it; and as I find he does not doubt to clear himself: so that sir J. Fenwick is in no sort proved to be privy to Mr. Goodman's withdrawing himself, much less to be proved to have had a hand in it.

There is one thing more I would offer, and that is grounded upon the bill of indictment preferred at the Old Bailey against sir J. Fenwick; That the matter in the very indictment that they have read on the other side, as it is there laid, and as far as it hath been offered to be here proved, does not amount to treason; or, at least, it hath been made a very great doubt, and by some within these walls: But this I offer with all submission; I have the author in my hand, who is a person of note of the king's counsel; he hath furnished me with such arguments as, I hope, I may be admitted to put you in mind of without offence.

The indictment lays, That there was a conspiracy and agreement to call in foreign power, and to that purpose to send Charnock to France; but the indictment does not say, That Charnock was sent, only that there was a meeting, and an agreement, and a conspiracy, to send him: So the indictment does not lay it as a thing done, nor does the bill charge it so; but only takes notice, That he, I mean sir J. Fenwick, was indicted for conspiring and agreeing to call in a foreign force; so that this bill does not say that Charnock was sent. And I appeal to you, Whether it be proved that he was sent: For Mr. Porter says no more, but that there was a meeting at the King's head, and he named sir John Fenwick to be one who was present; and there it was, he says, agreed, that Charnock should be sent into France. Now, if there was nothing more than an agreement and conspiracy to do it, and no further act, but such a meeting to do it, but the person was not actually sent, or, at least, not proved to be sent; then, from this learned author's opinion, I insist upon it, that this is not a sufficient overt-act of treason. In the late case of my lord Russel, whose innocency is vindicated by this author, he takes notice, That a conspiracy or agreement to levy war is not treason, without actual levying war; and of that opinion was my lord Coke, and my Lord Chief Justice Hales. A conspiracy or agreement to call in foreign forces, unless actually done, or a person, at least, actually sent, or something more than a bare agreement for that purpose, is the same as a conspiracy to levy war. And in the case of my lord Russel, the proof being only, That he and others met together, and agreed to seize upon the guards, and levy war, which he never actually did, it is insisted upon by this author, that that was not treason; for that indictment went no further. And therefore my author says, "Show

me where such an accusation was ever agreed to be more than a conspiracy to levy war; and that such a conspiracy was ever agreed to be treason within the statute of Edward 3, till within these few years."

Sir, now I must humbly submit it to you, whether this be any thing more: and for the purpose you will please to consider, What this present bill, and what that bill of indictment is: for it is not, for that Charnock was sent into France to solicit forces; but only that sir J. Fenwick was at a meeting, where they did agree so to do. Calling in foreign forces is levying war, but conspiracy to levy war is not treason, unless it be actually done: a conspiracy to call in foreign forces is nothing more. And therefore I humbly insist upon it, That neither by this bill, or by the indictment recited in it, or the proofs offered before you, any thing is charged, but only an agreement at the meeting mentioned by captain Porter, a single person, and he not upon oath, to call in foreign forces. For he only says, That Charnock told him he had been in France. I shall not trouble you any further; we have not thought fit to produce witnesses, for the reasons I have offered: for that we do not find, that sir J. Fenwick throughout the bill is charged with being guilty of treason; and we are not willing to enter upon the defence of a matter not charged upon him. I hope, Sir, you will not make a precedent, That where a person is indicted, and ready to abide his trial, in the ordinary course of justice, as sir J. Fenwick now is, that he might be taken out of the hands of the ordinary judges, and be brought to this bar, to receive his trial here.

A matter of this nature may be of very great consequence: we know at present upon what ground we stand; for by the statute of Edward 3, we know what is treason; by the two statutes of Edward 6, and the late act of treason, we know what is proof; by the statute of Magna Charta, we know we are to be tried, 'per legem terræ et per judicium parium'; that is, a peer by his peers, and a commoner by a jury: but if bills of attainder come into fashion, we shall neither know what is treason, what is evidence, nor how, nor where we are to be tried. Sir, I submit it to you, and hope this bill shall not pass.

Sir B. Shower. Mr. Speaker, I am of counsel for sir John Fenwick, the prisoner at the bar: and first, I am humbly for to thank you for your candour, of which I have had frequent experience; and humbly beg for myself, That if I offer any words that are indecent, or unfit for me, that you will interrupt me; for it is furthest from my intention so to do. The bill that is brought into this House against sir John Fenwick, is that whereby every one of you (with submission) are to declare and pronounce, That he shall be drawn, hanged, and quartered, as a traitor. And the question before you is, Whether you will do this in this case?

Sir, I shall not pretend to question, nor enter

into any debate or argument in this thing concerning the power of parliaments: no question, but in all governments, there is some supreme power; and by our constitution it is lodged in the king, Lords and Commons. There are precedents of attainders, and that many; but can they shew me, where there hath been any attainder by parliament, for high-treason, upon one single act, which, if treason, was determinable at common law? There have been bills of attainder for flagrant treasons, and for great ministers of state: some topping sinners, who have been above judges and jury, and whom inferior courts could not tell what to say to: but I believe I may say this, That for a single consult or agreement between four or five private gentlemen, in a private room, in which there was no danger, but by the consequence of the resolution, if it was put in practice, no man can shew any precedent for attainting any person in parliament.

If you please to observe, the 25 Edw. 3 reserves the power to parliament, to proceed in treason not expressed within the statute; but as to the compassing the king's death, adhering to the king's enemies, and those things that are there particularly specified, it seems the sense of the parliament to leave them to the rules of the common law. So 1 Hen. 4. No. 144, upon the roll it is at large complained of accusations in parliament for treasons and felonies, and declares for the future, they should be determined in the inferior courts.

1. This was occasioned by sir Raw. Harray; Cotton's Abridgment, 189.

There is a melancholy precedent or two of single acts of attainder; but they are most of them reversed. Sir Thomas Haxey in Richard the 2nd's time was attainted for bringing in a bill into the Commons House against the prerogative; but 1 Hen. 4, it was reversed with great censure, Cott. Abridg. 362, 363. There are others in Hen. 3's time, but they were for acts in that reign, which were questionable, whether or no within the statute of Edw. 3, and were for such actions, as perhaps were not for the honour of the prince, or good of the government, to disclose by public trial, as the attainder of the queen, and others concerned.

I beg leave to repeat the words of a great author, the bishop of Salisbury, in the History of the Reformation, which I crave leave rather to do, because it hath been approved of by this House, for he had thanks of the parliament for it; fol. 359, 360. where speaking of these sort of attainders, he says, "After these executions, followed the parliament in 1539, in which these attainders were not only confirmed, but divers others were made of persons in custody, without bringing them to trial;" (and he says) "which cannot be enough condemned as a breach of the most sacred and unalterable rules of justice."

That of the marchioness of Exeter, &c. I shall make no paraphrase upon it: there is no question but you will agree; and I must admit,

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Salus Populi to be Suprema Lex; but for an act, not the last of May, but last May was twelve months, the danger passed, the persons executed that were concerned in the great treason, and all danger that might have been from that act gone, and no fear now concerning it, I hope you will not use the extraordinary power of the legislative, to punish for that fact which may be punished by the ordinary rules of law.

The reason suggested in the bill is, That it is impossible to have this gentleman tried by the rules of the common law; for otherwise there is none: for you will not waste your time; and if the doctrine that was broached here yesterday be true, there is no occasion to trouble you now; for according to their doctrine, there is legal evidence, and there is no need of a bill of attainder; but taking that for granted, that we must do; otherwise there is no reason for this bill. Then the bill says, That Goodman was an evidence, and that he is withdrawn; which I must observe, is neither laid, nor proved to be by the privy, consent, or procurement of sir John Fenwick. There is no pretence of it in the bill; no insinuation of it, nor any evidence to that purpose. Then suppose Goodman is withdrawn, we may presume you will not pass a bill to put sir John Fenwick in a worse condition than if Goodman was present, if he had been ready to have sworn the same thing.

In case you do pass this bill, you do put sir J. Fenwick in a worse condition than he would have been if Goodman were here: perhaps it might have been reasonable to have an act passed, that Goodman's depositions should be read at the trial, if Goodman was withdrawn; but we hope it cannot be a reason to condemn sir J. Fenwick of high-treason without trial; for the consequence of this is (if it were by his means), that he is punished greater than the thing requires. For if Goodman was here, sir J. Fenwick would have had his trial by a jury, the benefit of challenges, exceptions to the array, might have challenged upon account of favour, if any of the grand-jury had been impanelled; had his legal exceptions to the testimony of the witnesses; might have these witnesses examined upon oath; might give evidence upon oath to it; and all this he is deprived of: so that now he is in a worse condition, by Goodman's absence, than if he was present. We insist upon it, therefore, and submit it to you, whether any punishment can be imposed by the legislative power, but only to supply that defect, and put the case in the same circumstances it would have been, if such a miscarriage had not been committed. But this bill is to condemn him to death upon the oath of one witness, though there was your act of parliament last year requires two. With submission to their judgment, it was the law of the land before that; and in all cases, where trials are 'per testes;' and it is the law of God, and the law of the whole world; and no law allows a man to be condemned but by two wit-

nesses; and the reason that here one witness is admitted, is, because he hath the benefit of a jury, and challenges to them, who the law supposes are privy to the fact, and therefore are to come from the vicinage, from the neighbourhood of the place where the party dwells; and for that reason, in cases of felony, where no statute interposes, the law allows but one witness. Natural reason requires two witnesses in case of so great crimes, because that one witness can be no rule to guide your judgments; one affirms, the other denies; this is equal; and presumption ought to be on the side of innocency, rather than otherwise; but we hope, in this case, it will not be thought reasonable to pass the bill to condemn sir J. Fenwick for treason, and to condemn him to the basest of executions, upon the testimony, nay, upon the parole of one witness. And it is no more than if Goodman had been dead, then you would not have done it. If Goodman and Porter had both come to this bar, you would not have done it, but have referred him to his trial at the common law. Now what is there pretended by them to induce you to judge the contrary, or at least without so much as an allegation in the bill, that sir J. Fenwick procured his withdrawing? I propose it to your consideration, Whether there be any proof that Goodman is withdrawn? He was once in custody, let out upon bail, the prosecutors approved the bail, he never yet called upon his recognizance; nay, there is not one tittle of evidence, but that Goodman may be in the same lodging where he was: and then suppose, when you have passed this bill, Goodman should appear again, and contradict his testimony he has given before; then it may be too late for you to do right to sir J. Fenwick. It is not so much as offered that Goodman could not be found; they offered a printed proclamation, which I am sure the king's serjeant will not allow to be any evidence. Whether it passed the great seal before it was printed, or whether it passed it at all, *non constat*; for it was not read; they waved it. It does not appear sir J. Fenwick consented, or procured Goodman's withdrawing; he could not procure it, for he was a prisoner, and so not likely to affect it, being a prisoner, especially for his life.

As for my lady Fenwick, whether she did so or not, I am sure you will be of opinion, it ought not to affect sir J. Fenwick: suppose Clancy a stranger to sir J. Fenwick, and in truth he never saw him: or suppose him a friend, and he officiously did what he did; he ought to answer for it; and I think he hath undergone the punishment the law thought fit to inflict in that case; it is his own crime, and by the rules of justice, no man's crime ought to tend to the punishment or misfortune of another man: the act of one criminal, thought to be a party, or acquaintance, or a friend of sir J. Fenwick's, ought not to affect him, nor nobody but the actor; it is he that hath suffered for it.

And what hath been said in that matter ought not to influence your judgments; for it is not improbable, but what Clancy told Porter is false; you will never allow hear-say, nor permit your judgment to be governed by any thing but what is certain, and hath all the moral rules of persuasion: hear-say was never, by any law, in any court of the world, allowed, nor indeed believed in private conversation.

As to my lady Fenwick, there is this further, That husband and wife, in respect of crimes, are distinct persons; and what one does cannot affect the other, no more than she deserves to be executed for what sir John Fenwick did: and as to what Porter says concerning it, it only relates to himself; it proves no suggestion of the bill, which is, That Goodman is withdrawn, because a stranger to sir J. Fenwick (and it must be so in construction of law) made an attempt upon captain Porter; therefore Goodman being withdrawn, there was an attempt upon him, and by the same person, and by the same means: this is no evidence; it carries no logic in it, and will not prevail upon your judgment.

We offer another thing to your consideration: it is said, that one Roe was spoke to by a solicitor of sir J. Fenwick's, Whether or no he could say any thing to the discredit of Goodman, as to his robbing or clipping? The asking of that question was lawful; and to desire him to testify it was lawful: I must agree, to offer too great a sum of money may subject him to an information in the King's Bench; (but Mr. Attorney knows that best) but God forbid it should affect sir J. Fenwick! Mr. Dighton was not his solicitor at that time, not appointed, nor had any liberty to come to him; besides, it cannot be an evidence, nor cannot induce you to believe, That the same person was instrumental to get away Goodman, because he asked Roe, if he knew Goodman to be guilty of those crimes; for there is no evidence, that he asked him to persuade him to withdraw himself.

There is another thing we could offer to you: there is no proof of that, which, upon the first reading of this bill, was aimed at, to be punished with greater pains than the common law inflicts, and that is, the giving of false papers and accusations against great persons; they have not attempted any thing like it; so that that is to be taken as if there was no such thing. Neither is there any proof of protracting his trial, by any promises of confession or discovery; they opened it, but did not attempt the proof of it, but waved it.

But take it to be so; I hope you will not pass an act to attain a man for making a false accusation, which only incurs an action of *Scandalum Magnatum*, or fine and imprisonment upon an indictment; and, I hope, you will not condemn him to a greater punishment, when, at the time he did it, he had no notice of that punishment. The design of the law is to influence men by fear of penalty; and how can

that be, when penalties are not known at the time the fact was committed? I speak with submission still; it seems not just, that I should forbear with so much caution, from an action that exposes me to the penalty of 20*l.* as from an action for which the law says, I shall forfeit my life: now, Sir, in this case it might be expected that he should incur the penalty of fine, pillory, and imprisonment; but not that he could incur the penalty of death.

Then, Sir, as to the protracting of his trial by such promises of confession: certainly the putting off his trial, in itself, is so far from being a crime, that it cannot be thought but lawful: it is every man's duty, upon the principle of self-preservation; and it was at the liberty of the government and ministers, to do as they thought fit in it.

In the next place, we do insist, that there is no treason alledged nor proved in this case: there is no pretence of truth nor charge, in respect of the assassination; nor of buying of arms or horses, though mentioned in the indictment: and if sir J. Fenwick had been to have been tried upon this indictment, and they had had both these witnesses there, all that could have been proved, must be of the consult; as to the rest, he must have been found not guilty: and I believe it is most notorious, that the whole company there could not have raised what was talked of. Now, as to this single act, it hath been said, that a conspiracy to levy war is not treason: My lord Russel was attainted for it, and that attainder was reversed upon this very account, and the act declares the reason of it, he being denied his lawful challenges, and by strained construction of treasons he was unlawfully convicted of treason. Now the overt-act in the indictment was this, that my lord Russel, and others, did consult and conspire to seize the king's guards: the proof of it went further, that they sent sir Thomas Armstrong to view them and seize them: but then the question is, whether the consulting to send a man to invite foreign forces, is any more than a consult to seize the king's guards? We say each are levying of war, and it is not within the clause of adhering to the king's enemies; for they must be either present aiding and abetting of them, or sending them money, arms, and ammunition, and the like; and I think, for that, I may appeal to your act made against corresponding with the king's enemies; which, I suppose, if the law before was otherwise, it needed not to have been made. Now here is only a consult and agreement to do this act.

It hath been questioned, Whether *scribere est agere*? But here it is only *mittere*; nay, it is not so much, it is only *agere mittere*; six men had between them a little private discourse, and at last one of them did agree to send Charnock to France: The question is, whether the law of the land will warrant this to be treason? And if not, then you must not pass this act upon such a single point. Dr. Story's case is denied to be law; this case is no more than that in my lord Dyer, for writing a letter

to invite the Spanish king to invade England; and it was a time of great fear of them, as it is of the French king now; and he was attainted upon that, but that judgment hath been questioned and denied to be law. My lord Hales expressly, in his Pleas of the Crown, says, that a conspiracy to levy war is not an overt-act of the king's death; and that attempting to levy war is not treason. Now the sorts of treasons are these three; compassing the king's death; levying war; or, adhering to the king's enemies. Now for compassing or agreeing to levy war, to apply that to be an overt-act of compassing the king's death, hath been always complained of as a strain of the law.

Upon these reasons, we think this would not have been an act of compassing the king's death, as laid in the indictment; and then if it be but a question, whether it be or no? we hope you will not proceed in your legislative, especially when he is deprived of the advantage of insisting on this at his trial at common law: witnesses are there upon their oaths; he might have had a challenge to the jury; he might move in arrest of judgment. Now the question is, whether you will pronounce sentence of death upon him for high-treason, upon one single act, a year and a half ago, just after the act of parliament for regulating trials in cases of high-treason; and if we had had a trial at law, we should have canvassed these things, if we had witnesses upon their oaths; for the pardon reached the 29th of April, they could swear no new discourse but just in May; and now they say it was in the middle of May; if it had been before, the king's grace would have exempted sir John Fenwick from punishment; and these things we should have had the advantage of, if we had had the liberty of a trial.

There is another consideration; sir J. Fenwick hath pleaded, and hath so pleaded to issue, and issue is joined, and a *Venire Facias* is awarded. Now we submit it to you, whether you will think fit to take it out of the hands of the common law, when there is no extraordinary necessity? And the consideration we have to offer to you, if you do not cast out this bill, if we should have the good fortune, as we hope for in another place, sir J. Fenwick stands still liable, and must submit to his trial, if the king's counsel think fit to prosecute him, and we think it hard to undergo your censure, to be condemned in this place; and if (perhaps) he be acquitted here, to undergo the like danger in another, and then to be tried in a third: and for these reasons, we hope, you will reject this bill.

Serj. Gould. May it please you, Mr. Speaker, I have hearkened to what these gentlemen have objected, and could not be aware of all they have said; they have enlarged upon several topics; I shall recollect them as well as I can, and answer them in the method they have taken. I never did think, that the parliament would take things out of the ordinary course of justice, nor attain any of treason, unless in cases extraordinary; and these gentlemen have agreed,

that in cases extraordinary they have done it. They likewise have agreed, and sir Bartholomew Shower has told you, that there are some treasons, by the statute of 25 Edw. 3, reserved by that act, to be declared by parliament. Sir Thomas Powis says, This is taken out of the ordinary course of justice: So says sir Bartholomew Shower; says he, here is an indictment before you, the party hath pleaded not guilty; and they say he may be tried in the ordinary course of the law: and therefore they look upon it as improper to bring it here.

The gentlemen are mistaken very much, to think that I did say, that the examination that I said was evidence here, would be allowed below. If I had thought so, I should have thought at the same time, this House would not have meddled with it: but I do disagree with them in this; and take it, that where a case is extraordinary, you will come and meddle with the matter. Here is an abominable treason, that is agreed on all hands. Here is plot upon plot; here hath been a plot now to take away the king's evidence; there was two witnesses in the beginning, and it is very plain that one of them is not here; for that here was a proclamation produced, and I did look upon that matter as taken for granted, that Goodman was withdrawn, and for that matter they may be easily satisfied. They say, we have not proved the suggestions of the bill; but we think we have: for first of all, captain Porter hath here sworn it expressly; it is not a thing of loose, bare talking, but he hath proved a deliberate and formed conspiracy; he hath proved, that it was actually agreed upon a first, and at a second time; and that Charnock was sent in order to the execution of it: and what was it for? It was plainly to depose the king.

He tells you, for that purpose they had desired 8,000 foot, 1,000 horse, and 1,000 dragoons from the French king; and these gentlemen agreed to join them. Now can there be a greater evidence of deposing the king, and consequently of imagining his death? It is an evidence of the imagination of the death of the king, as well as of the rebellion; it being so in the necessary consequence of it. Now, I think he hath fully proved that. Then we offer to you, how far you will allow of this examination: Why? because upon a second contrivance here is a witness withdrawn: and can we give you greater evidence of that than we have given? we have proved that there was tampering, let the thing run as far as it will. Captain Porter was dealt with, had 300 guineas in hand, and 300 more he was to have remitted to him; and was to have 300*l.* a year, whereof sir J. Fenwick was to pay one. It does follow after, that he is withdrawn: we must leave it to this honourable House, what construction you will make of that; Whether here is not a second plot?

Now this matter is brought before this honourable House, we have gone so far in it, as to produce Goodman's examination that was taken before a justice of peace: we have shewed

you the evidence that he hath given upon a former trial; and now he is gone, sure nobody but must justly infer, it is by sir J. Fenwick's means: so that here they have taken away the evidence that is necessary in the ordinary course of proceedings. In such an extraordinary case I think it hath been usual for the parliament to interpose: therefore, what they pretended, under favour, that this should not be evidence, is all taken off. For now we are in parliament, you will make use of such informations as can give you any light into the matter, and may obviate and cure the distemper that is upon us; and you are judges of your own methods, and how far sir J. Fenwick hath been concerned upon the instances we have given you, that is in your judgments. As for what sir Thomas Powis tells you; says he, this power hath not been executed by parliaments very frequently, but it hath generally been done where persons are withdrawn from justice, and cannot be come at in the ordinary course. Why, we are in the like case; if so be we cannot come at justice in the ordinary course, and that by our evidence having been tampered with, and drawn away; then, Sir, under favour, by their own arguments, it is proper to come before this honourable House; so that notwithstanding what hath been said, we do think we have given you evidence.

And as for what they said, that we have not given any account that sir John Fenwick, by giving assurance of his confession, had protracted his trial; for that I did apply myself, that Mr. Vernon might give you an account of it: so that upon the whole matter, we must leave it to your consideration, and hope we have given you good satisfaction, that there hath been a great plot against the government; and there was no evidence of any other matter before the judges, and they allowed it to be high treason. Here is the same evidence, only we have not one of them *viva voce*.

Serj. Lovel. Mr. Speaker, I shall not trouble you nor the House very long; but I humbly hope, with a little pains, to satisfy the House, that most that hath been said on the other side is not much to the purpose. Sir, I will consider, with the leave of this House, what the common law was before 25 Edw. 3, and how the law does now stand; and draw some consequences from thence, and the necessity of this case.

The statute of 25 Edw. 3, I must observe it, is not an enacting law, it is only a law declaratory; for all those particular instances of treasons that are mentioned there, were treasons before that law was made; and so, by the preamble of it, plainly appears: but the judges had a greater liberty upon constructive treason, and upon accumulative treasons; and that was left too much at the discretion and liberty of the judges below, and the executive power of the law. Then that statute comes and restrains the judges in that point; and says, that they shall not give judgment in any cases of treason, but only in these cases particularly

mentioned there: and that statute says, that if any other matter which shall be thought treason should come before them, they shall not proceed to judgment, but acquaint the king in parliament with it. I only make use of it, to prove how treasons stood before that act, and how it comes to be altered from the common law: and I am sure it is not to be denied, but that one witness was sufficient at the common law: but then comes 1 Edw. 6, c. 12, and that, for the security of the subject, does ordain, That in cases of high-treason there shall be two witnesses of the fact: but that statute does not alter, but was made for the security of the subject in point of proof. But in that statute of 1 Edw. 6, c. 12, that does provide there shall be two witnesses in cases of high-treason, there is an exception of treason for counterfeit-ing and forging of the coin; and that is the reason that the law is taken now, that though there must be two witnesses in the cases of other treasons, yet in the case of coining there needs but one. The offence or crime is never the greater, because there are to be two witnesses to prove it. In this case that is here before you, we come to desire your help, because one of the witnesses is by art and fraudulent means withdrawn: Does that purge the crime at all, or lessen it? No man will say the crime is less, but it does prevent a regular trial before the courts below; and that is the reason why we did come here; and we hope this defect shall be supplied by a special law. But, say they, it is very hard a law should be made *ex post facto* to take away a man's life. It would be very hard, if the case was as they have stated it, to make a crime *ex post facto* that was not so before: but I do not take it to be hard for a law to be made to repeal another, to make a matter triable that was not triable before.

Suppose a law should be made, that all treasons from and after such a time, suppose from a time before the fact is here supposed to be committed, as May was twelve months, should be triable as at the common law; no doubt the parliament may repeal a law in part, or in all. No man can say but sir John Fenwick might be tried at the common law by one witness, before the statute of 1 Edw. 6. So that I do observe, and humbly submit it to you, that this law, by the act, is not changed as to the crime; the crime is as it was before, it is only changed as to the number of witnesses. The instances that have been observed on the other side, with humble submission, I think, do not reach our case. We do not insist that there are two legal witnesses; we do confess the information that hath been read is not a legal proof; but this House, in their legislative capacity, is not to be confined to the evidence that a jury must have below. This House may take what ways and methods they please to satisfy themselves. Say they, here is the life of a gentleman that is concerned. I know all good men will be tender of the life of a man: but here is the life of the king, and the safety of the kingdom, the peace and safety of us all, that is concerned in the

same case; and let them put these things into the balance, and consider which ought to weigh most.

You have a record before you, of the conviction of Peter Cook, who was indicted by the same witness.

A learned gentleman, that is of counsel for the prisoner at the bar, did make the same objections as are made now, at the Old Bailey (it may be, there are some other particulars now); and after all the debates and arguments that could be used at that time, it was unanimously resolved, that the crime was high-treason: and if it was high-treason in Peter Cook, it is no less in sir John Fenwick, who was present at the same time, and engaged in the same business: for what was a crime in one, was the same in both.

I think it is too diminutive an expression, to say, this was nothing but a little twittle-twattle. They did there meet upon a solemn consultation; and not only once, but they did meet a second time; and what was it to do? It was to invite a foreign power to invade this land, and to make war with the king and kingdom; and they did promise and solemnly engage to assist them with armed forces; and it was proved, that they did agree with Charnock to go into France; and Charnock was not willing to go the first time he was desired, till he found they were staunch and steady in their resolutions; and upon a second meeting they were all found so, and then he would go: I think that is an overt act of treason, if there be any. And when he came back, he said he had been in France, and brought an answer to the message he went about: This is all now laid before you. But, say they, this is an extraordinary case; I do agree it; but because it is an extraordinary case, and for the safety of the king and kingdom, it is fit there should be an extraordinary remedy.

They ask, what mischief it would be if this gentleman should be left to the ordinary course of law? It hath been the wisdom of all ages to make a law, to punish such as by their artifice would evade the law. Here is this gentleman, as we say, guilty of high-treason; but that we submit to you.

This gentleman was in the prosecution of the law, and might have been tried in the regular way, and had the witnesses upon their oaths; (the grand jury have found *billa vera* upon their oaths) but we must appeal to a worthy member of the House (who because he was a member we did not call upon him) to give you an account how he did delay and protract his trial; and now they know he cannot be tried at all, they pretend he is willing to be tried: and because he cannot be tried, they would have it as an argument that he should not be punished by any other means.

Sir, if so notorious a crime as this is should be committed against the body of a nation, and go unpunished, either in the common course, or by some extraordinary methods, the nation would be in a doubtful and dangerous case.

When this House hath passed their judgments in this matter, it will go to another place, where it will have another examination; and it will have that regular consideration that all other acts have. We are in an extraordinary case, and do think, that this extraordinary case does deserve an extraordinary punishment.

Sir B. Shower. I beg pardon but for one word: no man does abhor such consults more than myself; but I do not think, that discourses are such an overt act of high-treason, as deserves the punishment of death.

Sir John Fenwick and the counsel then withdrew. And being withdrawn,

Admiral Russel. I think this may be a proper time to ask questions: if so, I think myself enough concerned to trouble you with one or two. I think, in the paper [meaning Fenwick's informations] that hath been read, I am mentioned twice. These are the questions I desire to have asked, what proof he hath of this? whether ever he saw—? And, what proof he has that I sent captain Lloyd over, and that I gave him a list of the ships? And that I said, we could not fit out 30 ships in May? and whether or no, since this revolution he hath had any conversation with me?

Col. Crawford. What that honourable person says, calls me up; my name is mentioned in sir J. F.'s paper; I desire you would ask him, why he mentioned me in his paper, as he hath done? And that you would require him to make proof of what he says in relation to me.

Col. Godfrey. I desire some questions may be asked him in relation to a noble lord, my lord Marlborough: if he be guilty, I would have it known, and I would as willingly have it known if he be innocent, as I believe it will so appear. I would have him asked, whether, since the beginning of this war, or from the time of this king's landing, sir J. F. did ever speak to him, in public or private? Or ever did write to him, or receive any message by word of mouth, or letter, from my lord Marlborough? He says, that some service he had promised king James, inclined him to promise him his pardon: I would know what that service was? And in relation to his sending Lloyd into France, whether he can, by any body else, make that appear?

Col. Crawford. That gentleman hath put me in mind of one short question: whether ever he conversed or spake with me in his life?

Mr. Bridges. Whether sir J. F. hath any body but himself to support the hearsay he hath given an account of? And I desire a question may be asked him on behalf of the duke of Shrewsbury; what proof he has that the duke of Shrewsbury came into the office of secretary of state again, by the operation and consent of king James?

Mr. Vernon. I desire a question may be asked previous to that, because it is so in time; how he knows that noble lord was in treaty with king James, before he went out of the secretary's office, when he first came there?

Col. Granvil. I desire he may be asked, what proof he can give, that my lord Bath was to betray Plymouth into the hands of king James, or the king of France; and whatever else my father is accused of in that paper?

Mr. Harley. I humbly propose it to you for the method of your proceedings, since you take this method, whether it will save you time for you to look upon that paper, and ask him as to the several parts of it, what proof he can make of it.

Mr. Howe. I do not oppose sir J. Fenwick's being examined to this paper; but it might have been more to your credit, if you had examined him before your vote: [a vote made a little before, by which that paper was condemned]. But here are a great many gentlemen rise, to ask a man to that which he does not pretend to any proof of. The best way for saving your time is, I conceive, to have the several parts of the paper that does concern these gentlemen, read to him: and to ask him upon what grounds he gave the king that information. This will lead him into all that he knows of the matter.

Mr. Boscawen. I am not against the question that is proposed last; but you may ask him that at last. But there is a noble lord that is reflected on in that paper, and that is my lord Godolphin: I desire you would please to ask the same questions as to him.

Lord Coningsby. I did intend to take care of my lord Godolphin; there is a hard reflection upon that noble person; but under favour, you must, I think, let him know you have such a paper; and then ask him in general, what proof he has to the particulars of that paper? And then you will do injustice to nobody.

Mr. Norris. There have been several questions moved by several worthy members; and, I think, the questions ought to be asked: but, I think, there is one previous question to all these: and that is, when you tell him that you have such a paper, I think the first question should be, whether ever he delivered those papers to the king?

Sir R. Delaval. I find I am named in that paper that sir J. F. hath given; I desire that part that relates to me may be read to him; and that he may give a reason why he hath said so of me and Mr. Killigrew.

Lord Walden. There is another mentioned, and that is commissary Crawford; I desire he may be asked, what proof he hath, that he gave Mr.— a list of the army?

Chancellor of the Exchequer. I can't blame gentlemen for asking questions that concern them or their friends: some are for reading of it to him, I am against that: but yet I would have you to enquire into this paper. And being you intended to do it, it might have been as well enquired into before Mr. Dighton came last to him. I think you may put yourself into an easy method, and avoid all leading questions; and ask him upon every name in that paper, as you come to it, What he knows of that gentleman? And ask him no other question.

Mr. Smith. I was standing up to the same purpose: I would not have you to put words into his mouth, nor let him know by any question what answer he is to make.

Mr. Speaker. Gentlemen, I am willing to do you any service I can: but here are long informations, and I never read them, nor know the contents of them, but as they were read at the table.

Mr. Attorney General. I think the method lately proposed will save you a great deal of time, and is proper for the discovery of the truth: that you will name the persons to him in order as they are in the paper, and ask him in general, What he knows of those persons? But when you call him in, I am not for asking him to the particular things he hath said against them in that paper; because that paper, though it is under his own hand, is not his own; and if he knew it then, he knows it still.

Col. Mordaunt. I won't pretend to propose any thing, only for the shortening of your time: If after you have informed him there is such a paper, that you should ask him, Whether he will own it? And then, What sort of proof he will bring to prove it? You will find he will either tell you, he will advise with counsel, or whether he will give any answer at all.

Lord Cutts. I have only one question to be asked sir J. F.; It is not a question that relates to any person named in that paper. I think there is no one person that he hath named, but is eminently known or believed to be in the interest of this government; and none but what are in some post of trust and employment in it. Then, I think it highly necessary to know, how it comes to pass that he hath had so much conversation with persons of that character, and none with those people that he hath been seen daily to converse with? And if he hath, why he hath not discovered them, as he hath done the rest?

Mr. Speaker. Is it your pleasure I inform him we have the informations?

Mr. Palmer. If I am not mistaken, when you first called sir J. F. before you, he referred himself to what he had informed the king; and referred himself to that paper, as often as you asked him any questions. And if you ask him general questions, I presume he will give you the same answer: Therefore, I think, it may be proper to ask him, Whether this is the paper that he delivered in, or not? Or otherwise, I doubt he will tell you, he knows nothing but what is in that paper. Now, if he refers to that paper, you may ask him, if he knows it again, if it be shewed to him.

Mr. Sloane. What this gentleman has said, has partly interrupted what I was going to offer; but as to what he says, That when he was here before, he referred to his confession delivered in to the king; we did not tell him we knew of that: But he put it further, That he was not bound to accuse himself, and that what he said might be given in evidence against him; and so far he was in the right:

For if he knew of any body that was concerned in a conspiracy against the government, that was misprision of treason at least in him. I don't question but it was a very mischievous contrivance; but if he should confess it, without some assurance of being indemnified, he proves himself to be guilty of it.

Mr. Vice Chamberlain. You are now upon the method of your proceedings. There is great suspicion whether this paper be sir J. F.'s own or no. If you will tell sir J. F. that in the paper in your hand he hath laid things to the charge of persons of trust, whom this house hath a good opinion of; and that this house desires to know, What ground he hath for it? if he does not think fit to give you an account of it, there is an end of your enquiry.

Mr. James Montague. The house seems to agree, that they will have sir J. F. sent for in: I suppose you will not have the counsel, nor solicitor, by; and when he withdraws, I desire he may be kept private from his counsel and solicitor.

Lord Cutts. By sir J. F.'s behaviour, when he first appeared at the bar, and by what he said then, I believe sir J. F. did tell you to this sense, That he had assurance from a noble person, that what he then said, should not rise against him in judgment; and I think he was told, If he dealt ingenuously, he might expect favour, or to that effect. I do, for the saving of time, mention it to you, to consider how far the house may give him security, that what he here says shall not rise up in judgment against him; and that if he dealt ingenuously he might expect some favour from this house.

Mr. Harley. You are upon the nicest thing in its nature, that possibly can come before you. I think before you call him in, it ought to be understood that the questions be very plain.

Mr. Manley. I think you have been well moved from the other side, That we should not read this paper to sir J. F.: And I am of that opinion from this consideration, besides what hath been mentioned: We are here in a judicial capacity as well as a legislative; and this paper I take to be an examination made upon sir J. F.; and as my memory serves me, some things he speaks of as matters of fact, which he does positively assert; which being contained in the same paper with other matters of hearsay, if you should read that paper to him, and ask him a question, Whether that be his paper? That, I doubt, will be contrary to the rules of law: For it will be asking, Whether this information against himself be true or false? And I think it does not become the dignity and honour of this great assembly, to ask him any questions that may make him accuse himself.

Mr. Vernon. I would observe to you, that he has not considered these two papers: The first of these papers I think the bill refers to, and that is under sir J. F.'s hand; and there he does charge nothing at all upon himself, but it is an accusation upon the persons named.

In the first paper he does say, There was a select number to manage the affairs of king James, and — was sent over, but they are not named; and afterwards he went about to explain it in the second; and the bill referring only to the first, I suppose you will confine yourselves only to the first paper.

Mr. Chan. of the Exch. I would think of some way to reconcile these things you are going upon: For though gentlemen are in the right to press for these questions, yet I do not think it the business before you. Therefore I think you should acquaint sir J. F. that this paper hath been presented to you, which this house hath thought false and scandalous: But before he goes away, this house has a mind to hear what he would say to it; and let him say what he would upon that, then you would not lead him by any question. The first person that is named I have a great respect for, and am as willing he should be vindicated as any. The first question that you ask him is, What he knows of my lord Godolphin? But that you should literally ask him questions, as the paper states it, I don't think it proper for this assembly to ask; for there are facts beyond the Act of Indemnity, many of them. After you have done with the paper, I have some questions to ask him: I take these matters to be false; but I shall have some questions to ask him which I believe will prove true.

Mr. Bridges. Before you call in sir J. F. I would offer one thing to your consideration: I think that paper you are upon is written with sir J. F.'s own hand. Why may it not be fit for you to ask sir J. F. if that be his hand?

Members. No, no.

Mr. Speaker. Is it your pleasure that sir John Fenwick be called in?

Which Question being put, it passed in the affirmative. And he was brought in without his counsel.

Mr. Speaker. Sir John Fenwick, this house does understand, that you have given informations against several persons of great quality, that have been in the government: and they do expect from you, that you should deal clearly and candidly with them, and give them an account of what you know in relation to those persons. I am commanded in the first place to ask you, What you know of my lord Godolphin, in relation to this matter?

Sir J. Fenwick. I am under a double prosecution for my life: I know not but what I say may turn to my own prejudice: I hope the house will not think it an obstinacy in me; and since this house have done me the favour to hear me by my counsel, I hope they will please to consider what they have said.

Mr. Speaker. No doubt the house will consider what you have said by your counsel, that is, in reference to your own defence; but they do expect from you, as I told you before, that you do deal candidly with them in what you know of this matter.

Sir J. Fenwick. Sir, I am under prosecution for my life: and, I hope, the house will please to consider, that I know not what inconveniency may come upon me by it; and I hope, the house will excuse me, for I do it not out of obstinacy, but for my own preservation.

Mr. Speaker. You would do well to advise yourself well in this matter; it is of great concernment; the favour of this house, if you deserve it, may be of great kindness to you. I have only in command to tell you, what the house expect, and you are to consider how to answer it.

Sir J. Fenwick. I hope the house will not put me upon any thing that will hurt myself: I should be sorry to incur the displeasure of this house, but I hope they will consider my condition; and I am sure the justice and honour of the house is such, that they will not press any man to do any thing that may hurt himself.

Mr. Speaker. Sir, if you please to withdraw.

[Accordingly sir J. Fenwick withdrew.]

Lord Cutts. I would humbly propose something to you to save your time, and remove this inconveniency. The house have heard what sir J. F. says: I cannot but say, that in matters of blood we cannot be too tender; but that I would propose to you, if this house approve of it, is this: suppose you wave the whole matter to the last moment of passing your bill, and then I shall have something more to say to you in the matter.

Mr. Clerk. Now I think it may be very proper for you to proceed in your legislative capacity. I am glad the house have taken so much pains in the examination of the matter; and it is no small satisfaction to me, that the gentleman was brought to the bar upon this enquiry; very probable, another time may induce him more to comply than he does at present; though, if I may speak my opinion, there is little hope of the gentleman's answering your expectation here: and I think the first thing you are to do now, is to read your bill.

Mr. Pulteney. One of the allegations of the bill is, that his trial was put off upon several repeated pretences of making a confession. The counsel for the prisoner took notice that that allegation was not proved: the counsel for the bill told you, they must refer to a worthy member of this house, who could prove it; the worthy member is Mr. Vernon. I suppose, before you enter into a debate, as there will be after the second reading of the bill, gentlemen will desire to have all the evidence. And I find your order is, that Mr. Vernon do give in his evidence while sir J. F. is at the bar; and therefore I humbly move, That sir J. Fenwick may be called in while Mr. Vernon gives his evidence.

Mr. Speaker. I suppose if Mr. Vernon gives evidence, you will call in the counsel.

Members. Yes, yes.

Mr. Speaker. Pray, then, hear the motion

that hath been made. Shall I put the question, that sir J. Fenwick and the counsel be called in, while Mr. Vernon does give his evidence?

Which question passed in the affirmative; and sir J. Fenwick and the counsel on both sides were brought in.

Mr. *Speaker*. Gentlemen, you that are of counsel of both sides; the house, before they proceed any further, was willing to hear the testimony of a worthy member of this house, which hath not yet been given; and they are willing that sir J. Fenwick and you should be present while it is given. Mr. Vernon, will you please to acquaint the house, &c.

Mr. *Vernon*. If I understand the counsel for the bill aright, that which they did appeal to me for, was about the protracting of sir J. F.'s trial, and upon what pretence it was. The account, Sir, that I can give of it, is this: that sir J. F.'s trial was put off, will appear best from the frequent adjournments of the sessions at the Old-Bailey for six or seven weeks together. For when sir J. F. was committed to the Tower (which was, as I take it) on the 19th of June, there was, I believe, a sessions to be held soon after; for, as I remember it, the first application that lady Mary Fenwick made for putting off sir J. F.'s trial was upon the 30th of June; and the petition was, that he might have some friends come to him to advise him how to make his application to the king: on the 30th of June or about that time, my lady Mary Fenwick did first propose, that somebody should be sent over from sir J. F. to the king upon some matters of importance, but did not declare what they were; but only that she was told there was such matters, and she had a proper person to send, and would acquaint the lords justices with the man, if he might have leave to go to the king: but afterwards my lady Mary Fenwick said she could not provide a person so soon; and, I think the 2d of July, she came and offered to go herself; and said, if it was not as much for the king's service, as sir J. F.'s benefit, she would not undertake the journey. She had leave to go, and would have capitulated, that the trial should be put off till she returned; but the lords said, when she should return, would depend upon her pleasure; but they would write to the king at the same time, and gave notice of her intention, and that the trial should not go on till they had an answer of their own letter.—There was a passage in the transport-ship going to Holland, and my lady Mary Fenwick desired to speak with sir John in private, in order to her journey; the same night she came back again, and said, she had considered of it, and said, she would not go; and several reasons she gave. Upon the 7th of July there was a noble lord that was in the commission for the administration of the government, said, he had had an application made to him from another noble peer, my lord Carlisle, who desired that he would go to sir J. F. for that he had been very earnest to speak with him. That noble lord

did acquaint the lord justices with it, who acquiesced in what he thought fit to do in the matter.—He went the same day to sir J. F. and the next day the lords justices met again; he then told he had been with sir J. F. and that sir J. F. had told him, he had sent to the king; for he did not allow it should be otherwise communicated. My lords then thought it was fit to stay for the king's answer. This was the 7th of July; and by what accident I know not, but no manner of account came till the 7th of August, that the letter was received; but the 7th of Aug. the letter was acknowledged to be received; and the answer that then came to it was, that the king had not received any great satisfaction by the message; (I know not what it was) but that sir J. F. should be tried; but withal, that noble lord acquainted my lords justices, that the king was pleased to write to him, that what sir J. F. had to say, should be sent him in writing. It happened at that time, that the judges were upon their circuit; and there being the king's directions to receive what sir J. F. had to say in writing, that noble lord did undertake to go again to sir J. F.; and, I suppose, he did receive something from sir J. F. which he sent to the king: when the answer to that came it was in September, and that noble lord was at the Bath; and so it required a little time.—Why then it appeared, that the king's direction was, that what sir J. F. had sent to the king, he should prove it; and he should likewise shew his ingenuity in confessing what he knew of any other designs against the government: and the 10th Sept. as I take it, I was directed to go to sir J. F. who was then in the Tower, and to acquaint him with this message from my lords justices. Sir J. F.'s answer was, That he had no more to say, or some words to that effect; and then he must prepare for his defence as well as he could; but if he could speak with that noble lord, he should be glad to do it; but he was not come from the Bath, and direction was then given for his trial. Again, in the mean time, that noble lord did come, and he did go to sir J. F. and he brought an account from him, That sir J. F. would prove to the king, and make out what he had said; and was ready to give the lords justices satisfaction: and upon that, I was sent to sir J. F.; I carried the message in writing, which you may see when you please; and it was to ask him, Whether he was willing to make out by proof, what he had already said to the king; and whether he was ready, in compliance with the king's directions, to give the lords an account of what he knew of any design against the government? I carried sir J. F. this message, and he returned an answer in writing, That he was ready to make out to the king what he said, and would acquaint the lords with all the matter that he had not observed to the king; (his arraignment was then to have come on the 17th) but he did dictate a paper which was brought to the lords, which they thought fit to be sent to the king; and the trial was put off as to that time; and before an

answer from the king came, it was (I believe) the beginning of October: and this is the account I have to give you.

Mr. Speaker. Gentlemen, you consider that this evidence is given, with relation to that part of the bill, that sets forth, how sir J. F. had delayed his trial by offers of confession. You have heard what the evidence is; if you have any thing to observe as to that point, you may speak before you withdraw.

Sir Tho. Powys. As to this matter, I can only say, that in itself at least according to our rules of law, it is not, in any degree, treason: what you will construe it to be, I cannot tell. We think it is only what is very usual when persons are under an accusation; they will put off their trial as long as they can: perhaps their witnesses may be out of the way, or something else may be the reason of it, and it does not carry any crime in itself; at least, not of the nature that this bill is of.

Sir Barth. Shower. We do think, with submission, that, considering the nature of the bill, and the particular case of sir J. F. will (in some measure) answer this fact: I take this singly in itself, as it hath been observed, not to consist with honour; but it does not import a crime, for any man to use little insinuations to put off his trial. But, suppose it was unlawful, or that which they call prevaricating: I hope it is far from making him guilty of high-treason, which is the greatest crime this bill designs to pass sentence for; and, I hope, you will consider, if it be an offence, it is so at common law; and the same evidence will prevail to bring sir J. F. to condign punishment by the common methods. And if it be no offence, I hope you will not by law make it an offence, so as to inflict the greatest punishment for this artifice.

Mr. Speaker. Mr. Serjeant Gould, have you any thing to say?

Mr. Serj. Gould. No, Mr. Speaker.

Mr. Speaker. Then withdraw.

And being withdrawn,

Mr. Sloane. I propose it to you, Whether, if the paper be evidence, it should not be read in the presence of the prisoner?

Members. No, no.

Then the question was put for Candles; which passed in the affirmative, and they were brought in.—Ordered, That the counsel be discharged any further attendance at this time.

Mr. Methuen. There can be no debate previous to the reading of your bill. I desire the order of the day may be read.

Accordingly the Order of the day for reading of the Bill a second time, was read by the clerk. Then the Bill was read a second time by the clerk.

And being afterwards opened by Mr. Speaker, and he having expected for some time, and no member rising up to speak:

Mr. Speaker. Shall I put you the question of commitment?

Sir Tho. Dyke. Sir, I hope you will not put the question of commitment until some ex-

ception is made to the bill; I am sure it is as liable to exceptions as any bill that hath been brought in a great while: it is a tender subject to speak of, the pretence of the bill being for the preservation of the king and government: and if I thought it was really so, I should be heartily for it; for I think there is no comparison between the value of the king's life, and that of private persons: but that hath been often said, but not proved; therefore, I think, I may tell you my reasons why I am against the bill. That the parliament hath a power to make such a law, is agreed; but I think it ought not to be used but upon extraordinary occasions, when great persons are concerned, that cannot be otherwise brought to justice, and when crimes do not fall under the denomination of the law, which is not the present case. This case is, that a gentleman is charged with treason; and it is proved but by one witness; though the counsel did say, that a consult to levy war was not treason. Now either it will not be the crime that is alledged, or it is not proved. Here you are judges, prosecutors, witnesses and jury: I would know in what country it is so? Besides, the witnesses are produced here, and not sworn; and upon the whole, there is but one witness. Sir, I am against the bill, and against it, as being of dangerous consequence.

Mr. Pultney. This matter before you is of such a nature, that as a debate is rising upon it, I hope all gentlemen will hear one another with the greatest attention that may be. The worthy member admits you have a power to pass the bill, and I do not find that contested by any body; though (with submission) the latter part of what he said, contradicted what he admitted at first; but since that is so much agreed, I shall say but little to it, and that is this: that without such a power as this, any government would be imperfect, and would want a sufficient power for its own preservation, upon extraordinary occasions. You have been told, this hath been an untrodden path; but, I believe, gentlemen are pretty well satisfied it hath not been so untrodden, and many precedents of that kind have been quoted; and the counsel against the bill have admitted, that there have been frequent precedents. An objection hath been made to some of them, that they were made in ill reigns; but I take it to be no objection, that the precedent was made at one time or another, since it is agreed, that we have such a power, and that that power hath been executed.—The chief matter before you is, Whether in the present case, there is sufficient ground for you to exert that power? And upon that, give me leave to observe the nature of the crime of this gentleman, and the evidence that hath been brought to prove him guilty of that crime. His crime is high-treason, the highest crime in the law: it is for conspiring the destruction of the king, and the overthrowing of the government. The overt-act which the bill tells you (and which is mentioned in the indictment) is his inviting in a

French force, in order to accomplish his design. If this crime would admit of aggravation, some other parts of the bill would aggravate it; but I think it will admit of none. The counsel at the bar made a doubt, whether or no, that which was laid in the indictment did amount to a sufficient overt-act of high-treason; and his argument he drew from a book that hath been put out by a learned gentleman of the house; but the gentleman could easily have answered himself; and, I presume, did not speak his own opinion. For that gentleman did write a book, called, 'His Majesty and Government Vindicated:' by which he endeavoured to overthrow the arguments in the other book of the other gentleman.—As to the proof before you, you have had the testimony of Mr. Porter, whose evidence hath been justified by the several convictions grounded upon it; and by the confession of several gentlemen, that have owned the fact at the very time when they have been going out of the world: and there hath been no evidence brought by the prisoner at the bar, that should invalidate the testimony of this gentleman. And so (with submission) you have one undoubted evidence, that does charge the prisoner with the fact mentioned in the bill: you have other proof that does not come up within the letter of the law; but you have strong circumstantial proof, that every gentleman will apply to his conscience in the judgment he shall give in this matter. One of the allegations in the bill, is, that he did, by repeated promises of making a confession, from time to time, gain a delay of his trial. It is a great presumption, that that was in order to a design that he had of seducing Mr. Goodman, that was one of the witnesses; for it was observed to you, what practice there was in the case, with the other evidence, Mr. Porter.—Sir, gentlemen have objected the consequences of making a precedent: you were very well told by a worthy gentleman that spoke the other day, near the place where I am, that in the case of a good parliament, it is not to be imagined that they will make use of this precedent, but upon as good a ground as you have now; and an ill parliament, they will have the same reason, for they will copy after the same precedents that have been made before, and will not stick at doing of it. Besides, let gentlemen consider the way of arguing: I have a power to do such a thing, and yet if I have such a ground as is sufficient, I shall not make use of it: to say you have a power, but shall not exert it, is as good as to say, you have no power at all. There were some precedents cited by a learned gentleman that spoke against the bill, and he particularly quoted that of my lord Strafford; and the act of parliament that repeals that attainder, was in part read to you: but, sir, the reasons given in that bill of repeal of my lord Strafford's attainder, are, that it was obtained in a tumultuous manner, which influenced the parliament in doing of it; and that it passed in the house of lords, when most of the lords were absent: and at last, the king, when

he gave his consent, by commission, to the passing of the bill, it was with great reluctancy. It is certain, all these are reasons that are given; but there is not one that questions the parliament's power of doing it; though upon the trial, gentlemen may remember there was a doubt in the law, whether the evidence was sufficient. Sir, it hath been urged to you, of what ill consequence it would be, and how much injustice, to make a law to punish a man *ex post facto*; but that the parliament may declare that to be a crime, which was not so before, nobody doubts; and without that, the clause in the 25th of Edw. 3, signifies nothing; and I do not imagine it is a greater injustice to supply in point of form, as to matter of evidence, when the fact committed by the prisoner was against a known law, at the time when it was committed: and the rather, if I think that defect of form in the courts below was occasioned by the prisoner. It is a matter of blood, it is true; but I do not aim at this gentleman's life in it; but any man must believe he must be concerned in great matters, to bring to pass this great design; therefore, all I propose by it is, to get his confession, which in all probability we might have had, if the other witness had remained here.—Sir, upon the whole matter, I do think we have power to do this: I do think here is good evidence (I speak with respect to myself) to think him guilty of this crime. I do think, if this bill does miscarry, there is the greatest blow that can be given to your constitution. And give me leave to use this expression; I think, if this bill miscarry, it not only turns this plot upon you, but makes it impossible ever to come to the depth of any other; and for these reasons, I am for committing of this bill.

Mr. Newport. Sir, I am unwilling to trouble you at any time, but more especially at this time, when I am afraid I am like to speak against the opinion of the majority of the house; for I see gentlemen are in great haste for the commitment of this bill.—Sir, in this matter I look upon myself, as every gentleman here, to be a judge; and therefore, I will in this case, as in all others, go according to the dictates of my own conscience: I must be saved by my own faith, and never will pin my faith upon another man's sleeve: perhaps it may be a weakness in my nature, that I am very tender in the matter of blood; but I hope gentlemen will not be in so much haste to commit the bill; for 'De morte hominis, nulla est cunctatio longa.' A gentleman below said, the other day, it was possible in his own private opinion, he might believe the prisoner guilty; and some notice was taken of those words: but, Sir, I would put a case for argument's sake, and would have it taken no otherwise; and I would go a little further than that honourable gentleman; and suppose that I knew, of my own private knowledge, that sir J. F. was guilty; yet, Sir, with humble submission, as a judge, I do not think it ought to weigh one way or another with me; and will give you my reason

for it; for as a judge, I am to go according to my judicial knowledge, and not according to my private knowledge. It is a maxim 'Nil refert quid notat iudex, si non notat forma iudicii:' and it puts me in mind of a case in Hen. 4's reign: two men travelled together, and one killed the other, and the judge saw it: afterwards that judge went the same circuit, and an innocent man came to be tried before him for it; and yet the judge, in that case, was obliged to go according to his judicial knowledge; all the judge could do (the man being found guilty) in that case, says the book, was, to respite the judgment and execution, and to make application to the king for the poor man's pardon.—The evidence that is produced, is first a living witness; the next evidence was the confession of Goodman, taken before a justice of peace; for that, truly I did not think yesterday it was a legal evidence: I am sure in a court of law it would not be admitted; but the house was pleased to read it, and gentlemen, when they pressed it, told us, read it, 'valeat quantum valere potest.' Then if you strike this paper out of the case, with humble submission, there is nothing left but the testimony of captain Porter; and so then, in that case, you have but one witness. It would seem a little strange, that the commons of England, that lately were so very careful of the lives of the subject, and were so desirous of passing a bill, that did provide, that where there were two species of treason in one indictment, and one witness to one species, and another witness to another species, that that should not be good evidence to convict a person of high-treason; that they should be attainting a man for treason upon one single evidence! Surely they will say, we have mightily changed our opinions since last sessions. I speak not this upon the account of sir J. F.; I know him not, though I am not a stranger to his character, and I hear that is none of the best: I speak it as it may be my case, or any man's whatsoever. God knows, we live in an unsettled time, and how soon a precedent of this nature may turn upon any man whatsoever!—Amongst the great irregularities committed in the late reign, I thought that of Mr. Algernon Sidney one of the greatest strains I saw in Westminster-hall; for there was my lord Howard a witness against him, and the next evidence was a book that he had wrote against sir Robert Filmore, which, I think, is printed since this revolution, and I have it in my study; and I hope, I shall not be hanged for it. That was construed to be calculated for a treason that hath not been committed above two months, and was the second witness to convict him; but that attainder was reversed, and it was fit it should be so; for I thought it a hard strain to convict him upon that evidence. I am very sorry this bill is brought into this house; nor can I imagine, after all that hath been said by the learned gentleman, why this man was not tried when there were two positive witnesses against him. All the reason

this gentleman has told you, is, that he promised to make an ingenuous confession: but any man might have easily seen through this confession, that it was only an artifice to abuse the king's best friends; nay, the rather, when this gentleman's brother had served this very government, but two or three years ago, the same trick. We know my lord Preston was attainted of high-treason, and then he must do something for his pardon; and he made an ingenuous confession, as he called it, whereby he accused most of the great men; and when he had a pardon, though his confession was under his own hand, and delivered to the king, he denied every word of it; and what he told was to save his own life. My neighbour cited you several precedents; I have looked into a great many of them, they are mentioned in Rushworth's Collections, in the great Argument, that Mr. St. John made for passing the bill against my lord Strafford; and as to those precedents, all I can say is, I could not have come up to them, if I had lived in those times. The last precedent was of a cook that put poison into the pot of the bishop of Rochester: And what did they do? They did enact that he should be boiled alive.* I have a great honour for the present bishop; but if it had happened in his family, I should hardly have consented to the like.† 'Judicandum est legibus, non exemplis.' I should be glad this gentleman might suffer his due punishment; but I am not, by any means, satisfied in the passing of this bill: and as to what gentlemen say is the reason why this man was not tried, because it was thought he would have made an ingenuous confession: Sir, if they have made any mistake, I will not help it by the passing this bill of attainder. I ask your pardon for troubling you so long: I am a judge in this matter, and ought to deliver my opinion. I hope no man doubts but I am as zealous for this government as any man whatsoever; but let what will come of it, I cannot give my vote for passing of this bill.

Mr. Solicitor General. This is a bill for attainting sir John Fenwick of high-treason: it is the greatest crime we know in the law; and, I think, the greatest crime known in a government. It is much greater than murder, or any

* See Foster's Report of William Nicholas's case (Crown Law, pp. 68, 69.) "The Statute 22 H. 8, c. 9, is printed at length in Rastal's edition: and by the preamble it appears, that one John Roose, a cook, had poisoned 17 persons of the bishop of Rochester's family, two of which died. John Roose, therefore, by a retrospective law, is made guilty of high treason, and he is ordered to be thrown into boiling water, the idea of which new punishment possibly arose from Roose's having been a cook." Barrington's Observations on 1 Edward 6.

† See some particulars concerning him in the Introduction to the Trials for the Rye-house Plot, Vol. 9, p. 362, and in the Seven Bishops Case, Vol. 12, p. 183.

thing else; because it subverts the government, and the law whereby these crimes are punished; and persons should be deterred from committing these crimes. It hath been made a question by the gentlemen at the bar (I think two of them), whether this matter that sir J. F. is indicted and accused of, is high-treason or not? I must confess I heard something of it without doors; and that they would make it out, that if he was guilty of the matter charged, it was not high-treason. I thought it somewhat a bold matter, but did not think they would have undertaken it in this place, though they might have pretended some flaw in the indictment: But it seems they have the authority of a good lawyer in it; and they have quoted one learned author, as they please to call him, though I take that for a great compliment: I believe they may mean myself; and they have done me some honour; for they say, my lord chief justice Hales was of the same opinion; and then said something of Dyer. Now he hath read something at large out of that author he spake of, and challenges any one to shew any opinion, that ever a conspiracy to levy war was high-treason within the statute of 25 Edw. 3. Now, I would give a challenge on the other side, that he would shew me any opinion before that time or since, that a design to depose the king is not high-treason within that statute. The author that he speaks of says that expressly in the matter of my lord Russel, and tells you particularly; and in 'The Government Vindicated,'* which was only an answer as to the prosecution of my lord Russel, there are several cases cited, that a design to depose the king was high-treason, and agreed to by that very person; and it always was agreed to be high-treason. Then take the state of this case, and that of my lord Russel: The great matter was, that he sent some persons to view the guards (it was said, in order to seize the king); this was evidence against my lord Russel, for a conspiracy to levy war: But it was said, that this was not so much a conspiracy to levy war against the king, as against the guards. But this is of a quite different nature: Captain Porter hath given you an account of it (and I think Goodman's examination is to the same purpose,) that they met in Leadenhall-Street, and consulted how to bring king James back again; and the only method they could think of, was to send Charnock over to king James, that he might prevail with the French king to send them 10,000 men, and they would meet him here with 2,000 horse: And for what purpose was this? It was to bring back king James again. I would be glad to hear if those gentlemen that were at the bar, or any body else, could say this was any thing else but a design to depose king William: And they cannot shew me one lawyer's opinion, but that designing to depose the king, was ever called imagining the death of the king, within the statute of 25 E. 3. The first resolution of this matter was pretty

early; I think it was Henry 4.'s time, and that was pretending Richard 2 was alive, and that he was the lawful king: So that the matter is treason, as it is charged in the indictment.—Then, as to the precedent, that it is an ill precedent: I must confess, I am not afraid of a precedent of this kind: I should be glad if these gentlemen should turn back, and see how many attainders have been by act of parliament. But I dare say, there have been more men destroyed by the irregular judgment of a commission of Oyer and Terminer, than by all the acts of parliament, whether legal or illegal.—As to what they say of my lord Coke, who mentions the attainder of my lord Cromwell and sir J. Mortimer; the gentleman pretends to repeat my lord Coke's words at large; but he did not deal so well as he ought to do by you; for he should have told you all my lord Coke tells you; that Cromwell was never brought to answer, never permitted to say any thing for himself, neither in parliament, nor where he was. Now, pray, Sir, is this the present case? Hath not sir John Fenwick been heard by you? I would be glad that gentleman, or any body, could shew me, that any person hath so fair an hearing before commissioners of Oyer and Terminer, as sir John Fenwick hath had before you. As to sir John Mortimer, it is much of the same nature: My lord Coke says, there was a jealousy of sir John Mortimer's pretending to the crown; and because they suspected him, they did give out, that he said, that the earl of March was heir to the crown; and if he did not, he would pretend to it himself, &c. Now, says my lord Coke, this was but a bare pretence, and nothing else: He speaks as if he did not ever think him guilty of those words, and says, having indicted him, they not being able to proceed that way, they made it good by act of parliament, and he was condemned: So that what my lord Coke complains of, is, that these persons so condemned were never heard; and if this be the truth of the matter, these precedents (with submission) have no affinity with yours. But I believe this may be said in this case, sir John Fenwick hath been heard, and that more than ever any one in parliament was before, in a capital matter.—As to the case of my lord Strafford, he had counsel assigned him to stand by and hear, but not to prompt him. If there arose any point of law, he was to propose the matter to the lords, and the counsel was to assist him by their direction. And in the case here before you, you have allowed sir John Fenwick counsel, not only to assist him in point of law, but to assist him in point of fact too. They have made answer for him; so that I say, he hath been tried fairer than any man ever was in parliament, be it upon bill or upon impeachment, that is, as to the matter of precedent. Then it hath been said, this would not be good before the judges. I must confess it; but the evidence captain Porter gave of his own knowledge of sir John Fenwick, every body will agree is what the law will allow. But he

* See Vol. 9, p. 741.

is but a single witness, and you ought not to proceed upon the evidence of a single witness. Let us see how the law stands upon the whole matter: You have made an act of parliament last sessions, and I own the law was before that, that there should be two witnesses in case of treason; but all that goes no farther than to trials in the King's-Bench, and commissioners of Oyer and Terminer, and gaol-delivery. And if you look upon those acts, it is very plain; for they refer mostly unto the judges, what they shall do in such and such cases: But then you will see what is the reason of making those rules; I think there was good reason that you should not put that power in persons below, that you have in yourselves: You give them rules to proceed by, and they are to keep up strictly to them; you may act by other rules. It is one thing when I command my servant to do such a thing, and another thing when I act myself. And there is a difference when a judicature is by few, and when it is by many; the law puts a greater confidence in many than in a few. The ordinary trial is by twelve jurors; but if it be a matter of an high nature, as an attain, then it shall be by twenty-four; and you do prefer a greater number in every thing to a few. It is said, though a judge do think in his conscience a person guilty, yet he ought not to make use of that private knowledge; and a case was quoted out of Hen. 4. But I think that judge might have behaved himself something better than he did; and sure I am, now he would be blamed. I do not say, that a judge upon his private knowledge ought to judge; he ought not: but if a judge upon the bench knows any thing, whereby the prisoner might be acquitted or convicted (not generally known) then I do say, he ought to be called from the place where he sate, and go to the bar and give evidence of his knowledge; and so the judge in Hen. 4.'s time ought to have done, and not to have suffered the prisoner to have been convicted, and then get a pardon for him; for a pardon will not always do the business: for there may be a forfeiture that the king's pardon doth not restore. But though we act as judges here, do we act only as judges? I thought we were as well triers of the fact as judges. There is this difference between the judicature of Westminster-hall and this court: They are to judge upon a fact found by a jury; but we act both the part of a jury in trying, and also of judges in judging what the fact amounts to: So that if a juryman may make use of his private knowledge to acquit a prisoner, as (I think) nobody doubts but it is his duty to do, then every gentleman in this House may make use of his private knowledge to acquit the prisoner, or convict him.—I confess, for my part, I am satisfied, that sir John Fenwick is guilty of this crime for which he stands accused. I do think this crime is high-treason; I think there is no danger of a precedent in this case, if you convict him, being convinced upon the evidence you have heard, that he is guilty: I do own, if any gentleman think he is not guilty of meeting

at the King's-Head in Leadenhall-Street, or at Mrs. Mountjoy's, for the purpose given in evidence, he ought to be against the bill; but I think, every man that is of that opinion ought to be for the bill. I am one of those that think he is guilty, and therefore am for committing the bill.

Mr. Harcourt. I can readily agree with the gentleman that spoke last, that high-treason is the highest crime in the law; and further, that the matter of the indictment that is mentioned in the recital of the act is undoubtedly high-treason; and I am sure he will agree with me in one thing also, that the greater the crime is that any person is accused of, the clearer the proof ought to be by which he is convicted.—Some gentlemen have begun their discourse in relation to the power; but sure it is no argument, because I can do a thing, therefore I will do it; because we have power to repeal Magna Charta, and all other subsequent laws, which have been made in favour of life and liberty, and property, by the same consequence we ought to do it: A better reason must be given me, before I consent to this bill.—Then for the precedents, it is said, there have been many, and many have been mentioned; and if I thought it worth while, I would mention many more you have not heard of. As for precedents in general, they are so far imitable as they are grounded upon true reason, and agreeable to justice; but I do not remember any one precedent of this nature, for a person in custody, forthcoming, to be tried, yet to be attainted without a trial at law, but what has been universally branded; and they all seem to be reproaches even to those ill reigns in which they were usually made; and rather to be marked out as rocks for us to avoid, than patterns for our imitation.—Before I particularly mention the facts how they stand before you, I would beg leave to observe upon the general method of your proceedings, and tell you what staggers me in it.—I have often heard this called a trial, and that we are the judges; the gentleman that spoke last gave us another title, and told us we were the jury also. I know no trial for treason but what is confirmed by Magna Charta, *per judicium parium*, by a jury, which is every Englishman's birth-right, and is always esteemed one of our darling privileges; or *per legem terræ*, which includes impeachments in parliament; but if it be a trial, it is a pretty strange one, where the person that stands upon his trial hath a chance to be hanged, but none to be saved. I can't tell under what character to consider ourselves, whether we are judges or jurymen: I never heard of a judge, I am sure not of a jurymen, before, but he was always upon his oath: I never heard yet of a judge, but had power to examine witnesses upon oath, to come to a clear sight and knowledge of the fact: I never heard of a judge, but if a prisoner came before him, the prisoner was always told, he stood upon his deliverance, and had not only a power to condemn the guilty, but to save the innocent. Have we this power? Suppose upon

such a trial as this (if it must be called so) it may so happen, that a person that comes before us, should be the innocentest man in the world; what judgment is it that we can give for so much as such a person hath made his innocency fully appear? Is the Speaker, by his warrant, to send him back again to Newgate? You can't dispose of him otherwise, though you were satisfied of his innocency: but in such a case, the party must undergo a double trial, which is contrary to all the rules I have heard of. If I am a judge in the case, I beg leave to tell you, for my own justification only, what a definition I have met with of a judge's discretion: my lord chief-justice Coke says, it is 'discernere per legem;' and by that discretion I beg leave to consider this case: if judges make the law their rule, they can never err; but if the uncertain, arbitrary dictates of their own fancies, which my lord Coke calls the crooked cord of discretion, be the rules they go by, endless errors must be the effect of such judgments.—As to this particular case, I did expect from the gentleman that spoke last, that he would have told you there was a plain evidence, why you should go on to the passing of this bill; but instead of that, I am surprized to hear a thing mentioned, that in parliamentary proceedings a man may be hanged by one witness; certainly that is not to be taken for granted.—As to this particular case, I would take captain Porter as upon his oath, for supposition: You have one witness against sir John Fenwick of high-treason, and, with your leave, I desire to examine what you have more in this case.—Yesterday you voted a paper to be read, Goodman's narrative or examination; it is a different case now you have it before you to determine upon. Yesterday the question was only for hearing; but gentlemen now consider how far they ought to believe it, and the other evidence we heard. And first, there is some evidence that Clancy tampered with Porter, and gave him a sum of 300*l.* and so they would infer, because Porter was tampered with to be gone, therefore Goodman was. It was told us further (and I desire I may be informed if I am mistaken,) that Clancy said, he came from sir John Fenwick; and afterwards my lady Mary Fenwick said, she would make good what Clancy had said; and from these arguments they presume, that sir John Fenwick knew of it. Give me leave to tell you a rule I never heard contradicted, that presumption is to be made in favour of life; but to presume a man guilty because Porter was tampered with by another, because he said it was by sir John Fenwick's order; shall we presume sir John Fenwick did it? Is hear-say to be evidence? Or is a man to be had to the gallows upon presumption? How often, and with how much reason, have we heard exclamations against judgments upon presumptions, inuendoes, constructive and accumulative treason? &c.—Gentlemen, there is some further evidence, and that is, of what was sworn at Cook's trial; and some gentlemen thought fit to have the record

read, and an examination of what was sworn there. I can never go so far as to think it reasonable, that what evidence hath been given in one case should affect another man; but all this is to be answered, by calling it parliamentary proceedings. We doubt it is no evidence in the courts below, but they are mentioned with some kind of disdain, as very inconsiderable. In this case, I beg leave to say this in their vindication, that whatever the rules in Westminster-hall are, it is not therefore reason because it is a rule; but because it is reason, and reason approved of by long experience, therefore it is a rule; and if they make their rules for that cause, I hope that is a cause why we should imitate them: but I would not have those rules thought matters of form, but substance, or more properly part of the law itself.—Upon the whole matter; if no gentleman will give us a reason why this is evidence, but one witness, and that not upon oath: and if we are to come to our parliamentary discretion to supply that defect, the want of the other, it is a discretion I will disclaim all the days of my life. And I hope you will reject the bill.

Lord Cutts. If, sir, the gentleman that spake last had been speaking to Westminster-hall, I should think that he had shewed a great deal of reason, and spoke with a great deal of judgment; but since I think you are here upon a quite different foot; I shall not follow him (because I will not unnecessarily detain you) to answer every particular.—I remember, when the counsel for the prisoner first spake, they took notice to you, that precedents were procreative, and one begat another, and they are apt to multiply; therefore I do think, it is of the highest moment to you, what precedent you make to-night: and if any gentleman can be satisfied, that the precedent of passing this bill, will be of worse consequence than the precedent of not passing it, I shall humbly submit. I do think, sir, the matter before you is of the highest importance; and I must confess, it is with a great deal of satisfaction to myself, that I do see gentlemen seem to apply themselves with a great deal of seriousness to this debate. Sir, I shall not pretend to make a particular answer to what the counsel for the prisoner did say; as to the precedents of acts of parliament, I think this answer is sufficient at present for that, that if we have no precedent, we are under a necessity of making one. It is told us, that of all the precedents none will justify us in this proceeding; but at the same time it must be considered, that we are in a case, the like to which never yet happened in England.—The first thing I shall apply myself to, is the jurisdiction of parliaments; and truly, I think, it will be very necessary to say a little upon that. I have heard none call this power in question, the thing speaks itself; it is the legislative power, and the etymology of the word tells you what it is: It is a power that can make laws, and abolish them; a power that is superior to all other powers whatsoever, and we are part of that legislative power; and therefore I shall say

no more to that, it being a matter agreed, that we have a power to proceed in this matter. Now I will take leave to observe something as to the particular case before you.—Though a gentleman that spoke some time since, did speak to you of the nature of the crime; yet, with submission, I think there remains something to be added to what he said. The conspiracy of which sir John Fenwick to me appears guilty, is not only against the life of the king, not only to depose the king, not only a conspiracy to raise a rebellion, but at the same time to contrive an invasion from France, and bring in a foreign power. I know not what better expression to tell my thoughts in, than by using a term which physicians use in some desperate cases; they tell you, there is a complication of distempers; and I think this is a complication of treasons: this is the highest crime, and it is attended with all the aggravating circumstances this crime can admit of. Now, in giving our opinion, and passing our judgment upon this matter, I think there are two considerations ought to guide us: there is a consideration we owe to the prisoner that is brought before us: and another consideration which we owe to the common security. As to the first of these, it being a matter of blood, wherein the life of an Englishman, the life of a man of his quality and figure, is at stake, we ought to proceed with all the calmness that is possible; and I do agree, if there was nothing but presumption, that ought to be in favour of life. But pray let us consider how this matter stands: let me desire those gentlemen that are of opinion we ought to have so much tenderness for the prisoner, to lay before them another scene, and sort of consideration, at the same time. I do consider the hardship (if I may use that expression) of passing this sentence; I do consider what a condition we had been in, if the contrivance that was laid had taken effect; that is the weightiest part of the matter before you: and though it was disappointed then, I know not how far off it is at present; this ought really to weigh with you. And I hope I may take leave, upon this occasion, to observe to you, what one of the wisest and best of the Romans said upon an occasion of this nature: he tells you, That a man that would consider his duty aright, must consider the matter in all its parts and circumstances; and when that is done, must act adequate, as well to the community, as to himself and his neighbour. I would apply that to the present case; and would desire those gentlemen that express so much tenderness in this case, to have some for the government, and themselves. It was told you, That the prisoner before you does not stand convicted of any crime; it was told you at the bar, that the most we ought to pretend to, is no further than to leave him in the condition we found him: I think, with submission, the prisoner stands convicted of high-treason, with the highest conviction upon earth, and that is, the general consent of all mankind; for I will be bold to say, I do verily believe, that there is

not one gentleman within these walls, nor that walks the streets, not a living soul, that doubts of his crime. But, Sir, I would put this matter yet further; I am not only satisfied in my own conscience and reason, of the justice of your proceedings, which ought indeed to be the foundation of every man's opinion; but I am satisfied, that in this way, there is no hardship imposed upon sir John Fenwick, if he will be his own friend: for I doubt not, upon what hath passed in this proceeding, that before things are brought to the last extremity, if sir John Fenwick be his own friend, if he be so much a penitent and friend to the government, and to posterity, to tell truth, and leave off his dissembling, and be plain; I doubt not but he will find favour. Now, Sir, I would beg leave only to answer one or two objections; for some things that have been said against the passing of this bill, I do not think material. One objection that seems to me to carry the greatest appearance of weight, was made by one of the counsel for the prisoner: he said, It would look strange in after ages, that the same parliament should pass the bill for regulating of trials in treason, and this bill of attainder. Sir, I desire you will please to observe how this matter stands; and, in the first place, as previous to that, I take leave to observe a few things: it is a proposition generally agreed to, and not to be denied, that that which is designed for the preservation of any creature, ought not to be made use of to their destruction. Now this treason bill was designed for your preservation, to screen you against the danger of arbitrary power, and the malice of false witnesses; and this bill of attainder is brought to screen both you and the government from your enemies, both abroad and at home. And I think the treason bill is no objection upon these considerations: besides, the treason bill was only made to be a rule to inferior courts. The learned gentleman that spake last, told you, the rules of Westminster-hall were not rules, because they were observed there, but because they were grounded upon reason. Why, Sir, in answer to that, I will only take leave to tell him, that that which is reason in Westminster-hall, does not carry the same weight here. I think that matter was so well explained by the learned gentleman at the bar, that there need nothing be added to it. He told you very well, it is one thing what I trust to do by my servant, and another thing what I do by myself. It is very obvious to any man's understanding, if this power were lodged in the judges, what use they might make of this unlimited power; but no gentleman can mistrust any thing that shall be done by this house.—Another objection that was made by the counsel for the prisoner, was, says he, This is evidence, or it is no evidence; if it be evidence, then, says he, why do not you try him at law? If it be no evidence, why do you admit it here? Now, Sir, with submission, this carries the face and form of an argument; but if you take it to pieces, I think there is no convincing weight in

it: for, Sir, the reason why this matter comes before you, is, because by the absence of one of the witnesses, according to the formal part of the law, sir John Fenwick will be acquitted; but it is generally agreed, that the consequence of so great a crime going unpunished, may be dangerous to your posterity. This bill of attainder is brought into the House, that you may supply that want of form, you being convinced of the reality of his crime.—Another objection made by the counsel at the bar, was as to captain Porter, whom he reflected upon; says he, shall a man that hath owned himself guilty of such a villainy as the murder of the king, of a sudden have such credit as to sway with you? I would take leave upon this occasion, to repeat to you what my L. C. J. upon the bench did observe at Charnock's trial: The same thing was urged and pressed home by Charnock; and my L. C. J. was pleased to take notice, that it consisted with the wisdom and justice of all states and governments to allow of such evidence, because without it they could never come to the knowledge of any treason or conspiracy; for, he added, whom will you have an account of these things from but the actors of them?—And therefore, when they are penitent, and willing to atone for their crime, by doing all the service they can to the state, and justice to mankind, we ought not only to receive, but encourage them.—When the danger the government would be in, if you did not pass this bill, was urged; it was answered, but what danger will you and your posterity run in not passing of it? I think the matter appears so plain and clear before you, that when all the other parts of the question are passed over, I should think it a reflection upon the House, to enter upon a particular answer to it. I had not said what I have said, that I think any part decisive, but to clear myself to the world for the opinion I am going to give; and perhaps what I have said, may give occasion to some others to say something that may be much more to the purpose; but for the reasons I have given, I am for the bill.

Mr. Sloane. Sir, I as little care for meddling in matters of blood, as any man, and should be glad to avoid giving my opinion in this case; but I think it is incumbent upon every gentleman that hath the honour to sit here, in point of trust; I think it his duty to them whom he represents, to the king and kingdom in general, to give his opinion when he is clear and satisfied in it; and if I was in the least dissatisfied, I should venture the displeasure of the House to absent; but upon the whole case, and the proof that hath been given, I am very clear that sir John Fenwick is guilty of this treason that he is accused of; and that it is treason without any strain, and well warranted by precedents.—I would first take notice of what is said to your jurisdiction in general; I remember it was said this was an incroachment upon Magna Charta; for by that, no person is to be tried for his life, but by the judgment of his

peers. Those gentlemen that have made that objection, have intirely forgot the other parts which is the next sentence; *Nec super ibimus, nec super eum mittimus, nisi per regulare iudicium parium suorum vel per legem terræ.* What do they make that to be? It is true, in the ordinary course of justice, persons must be tried, a commoner by a commoner, and a peer by a peer; but there are several sorts of trials and laws in the land: and when you come to consider what is meant by *per legem terræ*, you have the commons *lex terræ*; you have the statute law, and *lex loci*, the laws of particular manors; and there are several sorts of trials besides that by jury; there are trials by battle: the defendant in case of appeal may try it by battle, and he that is killed loses the cause. Then there is a law above all these laws, and that is the law of parliament, which my lord Coke calls *lex parliamenti* and *lex parliamentaria* in another place, which he says is, *ab omnibus inquirendat* but *a paucis nota*; and it is not fit it should be known how far they can go (and so it is in chancery), and that is a law that is unlimited, and that is one of the laws saved by Magna Charta. I say, therefore, that without any incroachment upon Magna Charta, or any law whatsoever, you enter regularly upon his trial.—I would answer another thing that was said against a trial in parliament; and I must confess, I did wonder to hear it from that honourable ancient member, that if he was to be tried, he should rather chuse to be tried in Westminster-hall. Why, sir, before I should have given so sudden a judgment as that, I would have considered what my case was: If I had had such a case as count Coningsmark, a bad cause and a great deal of money, I would rather be tried there; or if I could be tried as sir George Wakeman was; but if I had a good cause, and would use no corruption, instead of twelve men that might be corrupted, I had rather be tried by 4 or 500 gentlemen that are beyond it. You see how trials went below, the trial of my lady Lisle, that could neither see nor hear; and there came a person to her house that was proved to be in Monmouth's rebellion, and she was burned for it.—Then as to the case before you, I would offer my reasons why I believe this gentleman to be guilty; here is capt. Porter, he hath positively sworn, that he had another meeting at Mrs. Mountjoy's, and there they did consult, and agree to send Charnock over to France; and Charnock was directed to go with a message to invite a foreign power over here. Now the question is, whether he is to be believed? and I would go upon the same reasons for believing a witness, as they do in Westminster-hall; and will go as far along with those gentlemen, as to the credibility of a witness; but if he be to be credited in Westminster-hall, why is he not so here? And therefore, if they had brought any testimony against his credit, as made him guilty of perjury, or forgery, it had been an objection against his testimony; but it was so far from that, that they did not

offer to prove one word of that ; but what was said was said from the counsel, and that is to go for no evidence. The counsel did indeed alledge against his credit several things, but did not prove any ; and if they had, they would not have taken away his testimony in Westminster-hall : that is, that he was concerned in the late intended assassination, and treason : this was the same objection that was made below ; and they brought witnesses to prove that and some other things, but they did not weigh any thing ; for if it should be an objection that he was in the conspiracy, then you can have no evidence of any villainy, for they will never trust honest men with it. Therefore I do take it, that Porter stands before you as a very credible good witness, without any imputation whatsoever. Then, sir, say they, he is not upon his oath ; that is an objection to your jurisdiction, and though they say they own your jurisdiction, yet when they say so, they speak against your jurisdiction ; and by the same reason you can go upon no impeachment whatsoever ; for you can in no case give an oath. Then, sir, they tell you, he is but one witness, and that it is in the case of treason, and there ought to be two witnesses ; and therefore though you have jurisdiction to do any thing whatsoever, yet you have no jurisdiction to go upon this cause. Now, sir, because this seems to be the most formidable objection that is insisted on against the proceedings in this case, I beg your leave that I may fully answer it.—And taking it to be true, that the fact is proved by one witness, I conceive we may proceed in this cause, though they can't in Westminster-hall ; and I do take it, that there is a great deal of difference between one and the other ; and I do not take your proceedings upon this bill, being there is but one witness, to be any strain, but what you may extend the legislative to, without going beyond what hath been done. I therefore beg you to consider what the law originally was as to treason, and how it came to be altered. Before the statute of 25 Ed. 3, it was uncertain what was treason, and what was not ; then the statute came and reduced it, that as to all inferior courts, these are your treasons, and no other shall be adjudged so ; but the parliament reserved to themselves a power, that if any case should happen like them, they were to determine it themselves. So, sir, that at that time, and after that time, one witness was good in case of treason : as now it is at this day for robbery, felony, or any other fact but treason. And till 1 Ed. 6, one witness was good in all treasons : Then comes two statutes in Ed. 6's time, and the first takes notice, That since the 25 Ed. 3, by several statutes treasons had been made which were unseasonable, and therefore repeals them, and makes several new treasons : Then comes a Proviso at the end of it ; ' Provided always, ' that no person whatsoever, after the 1st Feb. ' then next coming, shall be indicted, arraigned, condemned or convicted for any ' offence of treason, &c. unless the offender be

' accused by two sufficient and lawful witnesses, or shall willingly, without violence, ' confess the same.' Now that Proviso relates only to the treasons particularly mentioned in that statute. Then comes the next statute 5 Ed. 6, and pursues the same words ; But now this did not mean any facts whatsoever that were left to the judgment of the parliament, because these facts were not within their cognizance. They are not parliamentary words ; indicted, arraigned, convicted, but only used by the courts below. Why, sir, if it be so that one witness is sufficient, here you have not only one credible witness, but he is propt up extremely well by collateral circumstances ; and though I do not allow that below they can proceed upon one witness with pregnant circumstances ; yet for the reasons given, considering how this evidence is propt up, I think it is sufficient before you : For there was another witness against him, and it hath been proved what that witness could have said if he was here ; and it is plain that men have died upon the same testimony. I must confess, when I was for reading of Goodman's examination, &c. I was not for reading them as conclusive evidence, nor do I think them so in any sort, either the conviction of Cook, or Goodman's examination before a justice of peace ; but it is a stronger evidence in this case than any other, because the witness is not dead, nor is he withdrawn by the means of any body but the prisoner, or his friends ; which, as I take it, appears upon the evidence ; and if so, I think it comes to the case, That if any one gets my deeds, if he will not produce them, they shall be presumed to be what I say they are. I must confess, the acting of his wife or any agent might not be evidence, if it appeared they did it officiously without his knowledge ; but being Clancy said he came from sir John Fenwick, and it was for sir John Fenwick's advantage, I will believe it was by his privity : And for myself, I think it no strain, if in this case we take him to be a good second to captain Porter, though it ought not to be admitted in Westminster-hall.—Then it is said, That you have no jurisdiction to proceed by attainder in this case, where the person does appear, and he is in the hands of the law, and ready to take his trial : I quoted you an instance the other day, 12 Car. 2, where they attainted persons that were dead, without examining one witness ; and I have viewed all the books since, and there is nothing appears, but the bill ordered to be brought in, one reading, and another, and some petitions for making of savings : There is one rank of people that were dead ; a second rank, which, as you were told from the bar, were the king's judges : some of which, it is true, were tried by the law : But how ? Not by the direction of the parliament : It was before they came into the hands of the parliament : and the parliament takes notice they had been tried. There was another sort that was never tried, but absented ; and though they might have come into the

hands of the law and been out-lawed, the parliament took cognizance of them, and attainted them of treason. Sir, I do take notice, that there was a fourth sort of people convicted at that time (for if we were confined to the rules of Westminster-hall, no doubt we could not give a lesser judgment than that for treason); there were the lord Mounson, sir John D'Anvers, and others; and the statute recites, that they were concerned in the murder of the king; yet in regard so many had actually suffered, they did not give them the judgment of treason but to forfeit their estates, &c.—This is to shew you the jurisdiction the parliament have over offences, and how they can alleviate the punishment according to the circumstances as they appear before them; therefore I think this is a plain proof that we have a jurisdiction to go on with the bill; and at the same time, I say this, I would put it out of the case, whether the prisoner be a little man or a great man, that is now in judgment before us; and I would put it out of the case, what a good thing his discovery would be; I do not think that a good argument: neither do I think it any argument if this man escape, what danger we shall be in: But I do give my judgment from the argument of his guilt, and our jurisdiction.

Mr. Pelham. Sir, the learned gentleman that spake last, seemed so very clear in his opinion, when he began to speak, that I was in hopes he would have given me and every body satisfaction in this great point, especially when he began with Magna Charta, which says, That every man shall be tried by his peers, or by the law of the land: I do take it to be part of the law of the land, that no man should be condemned for treason without two witnesses; but after that he did lay his finger upon the sore, he told you, the great objection was, that the courts of Westminster hall are so governed and tied down, that they cannot pass any sentence for treason, but upon two witnesses; and he told you, they ought to be tied so: Indeed he did say we were not tied so: But I own to you, he did not give me any satisfactory reason why we should not be tied so. It is said, we are not tied, and it is impossible we should, for no act can tie the legislative power, and several gentlemen have said, that though there are several statutes that declare there shall be two witnesses in cases of treason, yet they do say, that in case of attainder by parliament, one witness may be sufficient. Why may it not be thought, that these acts extend to the legislative, as well as the statutes of Ed-3, by which it is presumed, that the parliament may proceed upon one witness? And I take it, that there being no such hint, it is a presumption that the *lex terræ* does crave an observation of it by the legislative power.—I did presume yesterday to tell you, that Mr. Algernon Sidney did stand upon it as his natural right, that they could not proceed against him, there being but one witness: I did not bring his case as parallel to this, or think that his authority should influence you; but he was a man

that had that love to liberty, and the good of his country, that he would not have said so, even to save his life, if he had thought it inconsistent with either of them: But I have looked upon his trial since, and there he does declare, that the being condemned by two witnesses, is the law of God, and the law of man; the just law that is observed by all men, and in all places; it is certain he reached even by these words, the power of parliament; when I do say power, I do not mean, but that when such a law is passed, all are bound by it; but in some sense we may say, you cannot do what is not just for you to do; you can do but what is just and agreeable to the trust reposed in you.—The gentleman says, he thinks it a strange opinion of him that said, he had rather be tried by a jury than the house of commons: Indeed, if he could be sure of such a house of commons as this, he might retract what he had said: But I have seen that done in the house of commons, which hath not made me extremely fond of that trial. I have sat here when 6 or 7 noblemen have been declared enemies to the kingdom without any evidence at all, and the reason was somewhat like what it is now. The power of parliaments was brought in as an argument then; and it was said, it was only in order to an impeachment, but no impeachment followed; yet these noblemen went with that brand in their foreheads; and if any disturbance had been, they had been exposed to the fury of the people: And though we are sure of this House of Commons, and may be of all in this reign, yet I know not how facts may arise, and what parliaments we may have; and upon that account I am very unwilling a precedent should be made, at least contrary to the usage in all manner of courts whatsoever.

Sir Tho. Littleton. Sir, I shall not trouble you long in this debate, that hath taken up so much of your time already, in the consideration of some matters we have been upon; though I did think your time not very regularly spent, till this occasion offered itself: I hope, therefore, now it will take up less of your time. I see the great matter that was insisted on before, is insisted upon still; and I do think we may say it among ourselves, though we would not let the counsel, that we are tied up in this case by the rules of Westminster-hall; but I believe if that was the case, and the question was no otherwise, than, whether or no we are tied up by the rules of Westminster hall? I believe it would receive a determination, that we are not bound up to those rules.—But I will take leave to tell you what I think is proper for us to ground our judgment on: I think one great reason even of those who are against the precedent, why they did admit sir J. F. to have counsel, and to examine witnesses, if he had any, and to cross examine the witnesses, and why they were willing to hear evidence on both sides in the nature of a trial; the great reason was, because that in a case of so great consequence as this is, they would have the best information they could obtain. Why did they

desire to be informed, but that afterwards they could lay their hands upon their hearts, and give their judgment upon their private opinion, whether he was guilty or no? They say we are not to give our judgment upon our private opinion, I always will. (It was not long ago we were not to have our religion upon our private opinion neither :) And when I am justified in that, I will rely upon it. Whether this be strictly legal evidence, I do not lay so much weight upon it, as whether it hath satisfied my conscience; and I believe there is not a man in the House but is so (upon what he hath heard,) and doth believe that sir J. F. is guilty; and if we believe he is guilty, I would be glad to know by what rules in the world any man can give his vote against this bill, being of that belief. And I tell you why I think every man believes so; because every man in the kingdom that hath not heard so much as we have heard, does believe him to be so; and I cannot think that their representatives only should be of another opinion.—What evidence have you had? You have had capt. Porter's evidence, and that would be good even in inferior courts; and besides that, you have the evidence of what Goodman did swear before the grand-jury; you have heard what he did swear, and the grand-jury did believe him; you have heard likewise what he did swear in another cause to the petit-jury, and they believed him, and convicted the prisoner upon it: And though this be not legal proof, strictly speaking, will any body say that I have reason to disbelieve this man, and think he had sworn false?—Ay, but here is but one witness, gentlemen tell you. I will put you a case where I believe this house would attain a man without any witness. Suppose two persons had seen sir John Fenwick kill the king (I believe we should not have pulled him in pieces in a barbarous manner, but he would have had a trial) and suppose before his trial they had been conveyed away, if before they had sworn this to a grand-jury, and they had found the bill, I believe this house would have attainted him for it.—Sir, I do not think that we should stand upon these little niceties, nor be bound by the little formal proceedings of other courts, when the government is at stake. We are sent hither to take care that the public safety do not suffer any mischief from the enemies of it: We have had plot upon plot, and I have heard so much said on behalf of the Lancashire plot without doors, that I wish we do not get an ill name upon ourselves before we have done. We have this power to exert upon extraordinary occasions; and here is a man that hath endeavoured to subvert the government and well-being of them that sent you hither. I hope you will use it now; and if they knew who were not of that opinion, I believe those that sent them would hardly send them any more.

Mr. *Howe*. Sir, as to the argument, that if it was known how we gave our opinion, those that are against this bill, the people would not chuse them again: I am not afraid of that; I

have been told so often, and yet I find the people I live amongst, use me better and better every day; and I believe, sir, they will desire to use me, when they will lay other men aside. I must in some measure support what seemed to be reflected on an honourable gentleman, in that he said, he had rather be tried by 12 than 400. I am of his opinion, and this is my reason for it; I have my lawful challenge in case of the 12; and if there be any on the pannel I have offended, I can desire they may be withdrawn, and that cannot be done in any case here.—But gentlemen put the stress of their argument upon that which nobody denies, and prove it handsomely; and well they may; for it is self-evident, the power of parliament they insist on, when nobody pretends but we have a power to do what we please; but I must say of their power, what Bracton says of the king's power. 'Hoc tamen non potest facere, quod non potest justè facere.' It is said, We are not tied up to the rules of Westminster-hall; we are not so; but I beg leave to tell them, that what is reason and justice in Westminster-hall is so every where. And I do take these particular points we speak of, to be grounded upon reason and justice, and so far we are to pursue them.—Two evidences was not given as a restraint upon Westminster-hall, for fear they should do something that is ill, for they are answerable for every thing they do ill; but they were allowed to the people of England, that they might have a fair trial; and it was thought conformable to the laws of God, the law of reason, and the law of all countries, that no man's life shall be taken away upon any particular occasion. And for to say, that a man's life may be taken away by two witnesses in one place, and by one in another, is to say, that there is no certain rule to prove a man guilty of a crime that may forfeit his life, which is not admitted in any country whatsoever.—But truly, sir, we are going a little further; for the gentlemen before told you, there was no need of two witnesses, one would serve; but now they go a little further, for they tell you, there needs never a one at all; for I do say, if every gentleman here is to be guided by his private opinion, there is no man but before he heard this cause did conceive in their opinion some judgment of his guilt. And, sir, I think no man but would have told you, that would have been an unjust judgment.—But they do say, That the bill of treason that was made last sessions of parliament was to limit Westminster-hall: and that I will trust that with myself, which I will not trust with my servant. Why truly, if I, or my servant, was to commit an error, or a great crime, I had rather my servant did it, than myself: but I do not think that my servant should be bound up from doing an unjust thing, and myself should have the liberty to do it. Another thing that law provided against was, that people should not be hanged without sufficient evidence, and these things have been long complained of: but I never thought that the evidence of one witness, and

no witness, would be supported in these days. —But, sir, what have you done? We have prevented people being executed by an arbitrary power, and in an unlawful way in Westminster-hall: but if you give this example, you have brought the same proceedings into this house, and that they may be perpetually executed here, and so the subject will be never the safer for the bill of treason.—And I do believe likewise, That it is better that a very heinous fault, or a mistake, should be committed in Westminster-hall for ten years together, than once perpetrated in this house: and my reason is this, because Westminster-hall have a law to be tried by, if they transgress that law; and there is a way by turning out of judges, and other things; and this house hath no superior power; and when they do a thing, they make it a law; so that this house (as it hath often been observed) can make this nation unhappy, because this house can only establish arbitrary power and misery upon this nation by a law.—Sir, as to the evidence, to say something to it, since every body hath spoke to it; for my part, I do confess to you, the longer I sit here, and the more I have heard of this trial, the less I have been convinced within myself, that these witnesses can know any thing of sir J. Fenwick's guilt. I have heard captain Porter give his evidence; but that is no sufficient proof to me: I have heard what evidence Goodman did give to the grand jury; but whether they did ask such questions as I should, if I had been of the grand jury; or whether they did confront him with evidence, I cannot tell. Therefore though the grand jury was convinced by it, it is no reason to convince us; because we might not be convinced by the same evidence.—But to go further; there is very great reason to believe that Goodman was not then at this place, and that not one word that Goodman says is true. I have such reason for what I say, that if Cook's trial had been before this house (not to arraign Westminster-hall, though I think we are a superior power, and I may say what I please of that trial); I say, if Cook's trial had been before this house, and what I have heard be true, I do think they would hardly have found Cook guilty upon Goodman's evidence: for there were three as positive evidence as could be, that he was not at the place when he swore he was. And I observe a little failure in captain Porter's evidence in that point; for I do not think it proved by captain Porter, that Goodman was by when this discourse was: for he says, he spake of this thing at Mrs. Mountjoy's, and dined there. [*Members.* No, no! It was at the King's-head.] Well, there was but one place where it was. Now whether captain Porter heard them talk of it before Goodman came in, or whether Goodman be a good witness, he having been there but the latter part of the time, which seemed to me to be the time they should have given over their talk of the business, they having been so long together before; but it does not appear to me

that Goodman can be a good witness.—But I take it, that it is not just nor reasonable to find a man guilty upon one witness, and circumstantial evidence. I did mention a case where there was a positive witness, and a circumstantial witness, it was in my lord Delamere's trial; and yet that was not thought a convincing argument by the lords to find him guilty; and I hope no consideration will oblige us to do that, which I am sure we should blame them for doing.—The consequence of this, gentlemen say, they do not fear. I believe, if sir J. F. had been told, when he was major-general of king James's army, that I should come here to sit upon his life, he would have laughed at it, and thought it impossible; but the contrary has happened: And I have seen parties hang one another with such violence, I pray God we may keep from it: I do not know; we are all concerned in some measure, it having been the unhappiness of this nation, that at one time or another every body hath been concerned, that they may have a proceeding of this sort against them; and this surmounts all that at present gentlemen can do; for it extends beyond all pardons, and will reach beyond the act of Indemnity. God knows who may be served so, notwithstanding all the act of Indemnity.—Sir, there is one thing that is said further, which the gentlemen at the bar conclude with as a substantial argument, that we do not aim at sir J. F.'s blood (God forbid we should), but at his confession: You will hear read the bill once, and twice, will commit and pass the bill, (sir J. F. not confessing), and still this is not to aim at his blood.—But it happens, perhaps, that this man knows no more of this matter; and this man is racked in a manner to death, from reading to reading, because he does not confess; and at last he comes to be hanged, drawn and quartered (instead of high-treason) for not confessing it.—This I take to be the dangerousest part of all the arguments that have been urged: For this I must tell you, That according to my private opinion, I do believe that sir J. F. does know of no more persons concerned (nor do I believe he knows all that he says) than he tells you. He hath not been a man that hath kept company with great men: He hath generally relieved the poor Jacobite officers: There are five people, as I take it, he hath told you he did converse with: I would fain know in what plot any man converses with above five of the plotters? There may be a plot that may be most dangerous, and yet a person that knows of this plot, may not know above two or three others that are concerned in it.—But the great argument is, Take care of your government. In the first place, they must suppose the safety of the government depends upon his execution, or why do they use it as an argument? But I wish they would shew me the government would be one penny the worse, if the bill does not pass. Do you want examples of punishment to deter men. No; you had lawful proof against four or five persons, and they have been executed;

Here are examples made, that nobody for the future may presume to plot together, and not be executed.—What is the reason of this bill then? Why, there is a plot going on. Sir J. F. hath been imprisoned this six months or more; and will you hang him because there is a plot going on? What consequence is that? Do you think that he knows any thing of it, or that he can discover it? It hath been started since his confinement, it may be, and he knows nothing of it: So that as to what is pressed of his confession, I know no one thing would be gained by it, that could be useful to the government; for I believe all hath been discovered already that he knows, and that plot hath been utterly disappointed, and they have been fain to make a new one. Will you proceed in a bill of attainder, unless the matter be of the greatest consequence? The preamble of the bill for attainting the duke of Monmouth, gave a substantial reason for it; That he was in arms, and could not be brought to justice. That implied, That if he could have been brought to justice, they would not have attainted him.—I think I need not give you more arguments in this matter; I wish I could hear those that have been given, well answered. I shall say no more, but I know this, that my private opinion shall never guide me in this case. It is not the same thing with the case my worthy countryman put: In the case of religion, my private opinion does not affect other persons; indeed it does the papists, where they will murder others that are not of that religion.

Mr. Norris. This is a very solemn debate, and it is upon a very solemn occasion. It is a case of blood; it is a case that in my life-time, I thank God, I never had to do with yet; and in this matter wherein I am now to be judge, I will use as much caution as any gentleman within these walls. I am so conscious to my own inability in what I have to say, that I cannot expect to convince any body; but what I say, is to discharge my own duty, and satisfy my conscience in that. I doubt not but every gentleman considers the station that he is in, and the trust reposed in him by those that sent him hither: we are intrusted with the lives, liberties, and properties of every man in England; and we are answerable for them to those that sent us hither, to our posterity, and to ourselves. In this matter, many things of great weight and importance are before you: here is the life of a man, the preservation of the king and government, and the power of parliaments to be considered. Sir, as I shall be cautious of taking away the life of a man, so I shall be careful of the preservation of the king and government, and the power of parliament; and though I do not think it requisite, nor never will give my consent to support the government or honour of this House at the expence of innocent blood; yet I shall not be afraid of giving my opinion in this matter, to bring a criminal to punishment: besides the treason he hath committed, he hath crimes of a nature almost equal to treason; and for which, because he hath

evaded the cognizance of Westminster-hall, he is now brought before you; and there are several instances, where this House hath taken notice of offences of a less nature, and for a less reason than this is brought before you.—To quote precedents is a little dry subject; but however, I will instance in one, that (I think) does assert the power of parliaments in this case, which has not been mentioned yet; and that was (as I remember) in 3 Rich. 2, of an agent that came from Genoua, who was, by a misfortune, killed upon a quarrel that happened in the streets; he that killed him was brought to his trial; it could not be brought within the statute of 25 Ed. 3, but he was brought to his trial, and it was found only *se defendendo*; but he being a public minister, it was thought fit that the nation should take more notice of it: and he was attainted afterwards by parliament, and there is a record of it: they did not think fit to make a general law, but they made an example of the man that committed this fact.—A great many gentlemen have supposed this, and supposed that, and what ought not to be supposed; but I will make an easy supposition; I will suppose that we are the Commons of England in parliament assembled; and if so, sir, we have a discretionary power to do whatsoever we see is for the good of the kingdom; and if we are to be circumscribed by the rules of Westminster-hall, and we are to do nothing but what they would do, to what purpose do we sit here; if we are intrusted with this power, and may exert it, I think here is a fit occasion for you to exert this authority.—Sir, give me leave to take notice, that the strain of argument that was used some years ago, is very much altered by the same gentlemen; (I will mention it) I think it was 1678, when the bill of Exclusion was brought within these walls; the arguments ran then (for I have seen them in print) those that were against that bill; What will you do? say they; Will you do this thing? Pass a judgment against a man without hearing of him? Hath he been brought to your bar, to answer what you have to say against him? How do you understand that he is guilty of the crimes you accuse him of? And they did not use those arguments against them that were for disinheriting the duke of York: But the answer then was, Do you dispute the power of parliaments? Is there not a discretionary power in the parliament? I do take notice, that those gentlemen that used that argument for the bill of Exclusion, now use it a quite contrary way. Sir, I think the power of parliament is not to be trifled with.—It hath been urged, and said a little while ago by a gentleman, That he does not believe captain Porter is a good witness. I will give you a good reason why I do think he is a very good one, and they at the bar think so too, because they would have given a great reward to have taken him off; and for the same reason, I believe Goodman to be a good witness too: Sir J. F. was satisfied, that Goodman did know how far

he was concerned, and he hath been prevailed with to be out of the way.—Sir, here are a great many circumstances that agree so well together, that (I think) no person can doubt of sir J. E.'s guilt; and, I think, it is in this case in the body politic, as in the body natural, when a man is almost past the cure of physicians, when a man hath a gangrene, or a rotten member, which the physicians by the ordinary means cannot cure, the remedy the college of physicians themselves in that case would use is, they would say, 'Immedicabile vulnus ense recidendum est.'—I am of opinion, that the legislative hath this power, and that this is proper occasion to exert it; and to compare small things with great, it is like thunder and vengeance in the hands of Providence, that is not used but upon extraordinary occasions; and then it ought not to fail, for that makes a man trifle with, and despise that power that is not effectually able to exert itself; and if the sword of justice be drawn, if they find it rusty and will not cut, they will have a mean opinion of your power for the future.—Gentlemen are afraid of precedents in this case; for that reason I am for committing this bill, because I would make this a precedent; and I will tell you why; Because it may happen in future ages, that ministers of state, and persons concerned in the government, may be faulty, (I think I may suppose that); and as the law stands now, he is but a bungling politician that cannot ruin the government, and yet not come within the bill of treason to be hanged for it: And therefore for the keeping an awe upon ministers of state, and because I would have this House always have it in their power to punish future offenders, as they shall see cause, as well as this unfortunate gentleman at the bar, I am for committing this bill.

Mr. Finch. Sir, the question now before you, arises upon a case wherein you have a man accused of high-treason, and for that there is but one witness, which by the rules of Westminster-hall is confessed by every gentleman is not legal evidence. I remember the other day, when this evidence was offered, and an objection made to it, the answer was, That we ought to hear it (though in Westminster-hall they could not do it), because we sit here as judges, and we can distinguish what is legal evidence, and what is not legal evidence, and can give its just weight to every part of it. I do observe now, in this debate, some part of the evidence, which no man can say could have been given according to the rules of law, is insisted upon, and weight laid upon it.—And here they have taken into consideration the power of parliaments; and the method of parliaments has been insisted upon. As to the power of parliament, Whether the parliament can do it? And whether, if the parliament pleases to do it, they are tied up, as gentlemen are pleased to express it, to the rules of Westminster-hall? That the parliament can do it, it is a hard matter to gain-say, That any thing is out of the reach of the supreme power of a

nation, the legislative authority can do every thing: Yet, though gentlemen have said this, and others have observed, That there wanted no authority to prove this, being self-evident; yet give me leave to instance in some particulars in this case, with the authority of the judges upon it, where the parliament have proceeded according to the rules of Westminster-hall.—We read in Hen. 8th's time, That the lord Cromwell, earl of Essex, was attainted in parliament; and history tells us, That he was attainted by a law of his own making. Now, says my lord Coke, That seems strange; but enquiring of an ancient person that lived in those days, he told him the meaning of it; that lord had consulted with the judges, Whether or no, if a man was attainted by parliament, and was not brought to be heard, such attainder would be good in law? The judges started at the question, but could give no other answer than this; Truly, if such attainder be made, we know no law to find fault with it, for it is done by the legislative authority. It fell out, that the instance of condemning a person in parliament (not according to the rules in Westminster-hall) fell out to be the nobleman's case; for he himself was so attainted immediately after.—Give me leave to instance in another kind of authority, the authority of parliament touching these attainders, and what has been the consequence of them; If you will look into the record of Rich. 2d's time, I do not mean the record that hath been quoted, nor the case of John Imperiall, for killing the Genoua ambassador, which was declared treason in parliament ten years after the man had been tried in Westminster-hall for it; but I mean the 11 Rich. 2, how many were attainted by the proceedings of those times; I do not mean by acts of parliament, but those attainders were in an extraordinary manner, not according to the rules of Westminster-hall: And 21 Rich. 2, the whole parliament, and its whole proceedings were reversed, and the parliament annulled: In that year were the persecutors of the 11th year themselves attainted: And 21st year of Rich. 2, the act that repealed that parliament repealed the pardon too; but in order to come to the attainder of those persons: that being done, was not enough; for the lord Arundel had a pardon the 17th of Rich. 2. Upon that they made a law to repeal his pardon by patent, that they might come to the attainder of that lord; and that lord was attainted by act of parliament. But I must observe one thing a little further, that that very parliament, that doubtless knew their own power well enough, and that their attainders were firm, being made by the legislative power, yet they had a little jealousy themselves of their proceedings; for they passed an act to make it capital to go about to reverse any of those laws; and another act, that all the lords and bishops should be sworn. Now see what fell out after: Rich. 2, was deposed, for consenting to those laws; and Henry 4th, in the first year of his reign, abrogated the whole parliament,

and repealed all those laws. These turns have been upon these extraordinary proceedings of parliament.—Give me leave to give you another instance, and that in another case, as odious as possible could be. In the murder of Edw. 2, there was Roger Mortimer attainted in the first year of Edw. 3, and the record says, That it was notorious to them all: and what then? They adjudged him to be attainted in parliament. When time had a little worn off that extraordinary zeal (which truly was commendable, though it had transported them a little too far beyond the rules of justice), and they came to consider what precedent they had made for posterity, it had another face; for in 28 Edw. 3, was that attainder reversed, because he was not brought to answer as he ought to have been. There was also an act for attainting the earl of Arundel, which in the same 28 Edw. 3, was reversed, because he was not brought to judgment by due process of law.—But now we are told, we are not tied here to the rules of Westminster-hall. Gentlemen do not enough distinguish in this matter; the forms of Westminster-hall, say some; the rules, say others; and others say, there is no difference between the form of proceedings, and the rules, of Westminster-hall; but I hope no gentlemen do think but the parliament, though they have a power to act as they think fit (as instances have been given), yet the parliament itself are tied by the rules of common justice. Now I would have gentlemen that say we are not tied by the rules of Westminster-hall a little to consider the matter. Are the rules of Westminster-hall no other than what are necessary for the executing of justice? If they are no other, how can we be said to go according to justice, when we go beside those rules? I desire them to consider of the consequence of this proceeding; there is no danger, I hope, of this parliament: but if we shall say, that the rules of Westminster-hall are not such as are necessary for the proceedings in a course of justice, we shall shake those barriers of our liberty and property, I am afraid, a little more than gentlemen think of at present: and shall we declare they are not necessary, when our ancestors have thought them so, and their wisdom hath derived them to us, and the wisdom of the nation in parliament hath established these rules?—I can't say what consequence may follow upon this. This parliament can never do any thing to endanger the lives of the people of England; but heretofore parliaments have been damned with several brands, set upon them by succeeding parliaments: as for instance, one, I think, in the 38 H. 6, 39. That parliament was wholly repealed, as packed, and passing laws through rancour and malice, and having passed no good ones. Now, suppose a parliament should come, that should not be so tender of the liberties of the people as this; and they should be so bold as to shake those laws that are made for the rules of justice, if they have so good a parliament to guide them in it: will not this be an inducement to such a parliament as that,

to shake all our laws and liberties? But I can't trouble you any longer, my head will not give me leave. I am against the bill, and have offered you my reasons.

Col. Wharton. I hope gentlemen, in a matter of this moment, will have patience to hear one another; and since every gentleman is to give his vote in this matter, I desire to give my reasons for my vote: I am of the opinion of another gentleman, that we have not touched the sore yet; yet I do not think, that the rules for Westminster-hall are rules for us. The gentleman that spake last, as he always does, made a very florid and elegant speech, and brought you several examples of attainders that have been condemned from one parliament to another, in several reigns: but I do not wonder at that, when the crown went from one to another. An instance was given in the case of the lord Cromwell, which was spoke to from the bar; and sir Thomas Powys laid a great stress upon it, that this was condemned as a wrong judgment, because he was not heard: I believe that may be a reason why many of those attainders were condemned; perhaps it might be a custom of our ancestors to pass bills of attainder without hearing the party. This person hath been heard, and fully heard; and I believe no person, that hath been attainted, hath had so fair a trial; and therefore parliaments having condemned bills of attainder, because the persons have not been heard, that will be no reason why any parliament should condemn us. A gentleman told you, that the law of God and man was, not to condemn a man but upon two witnesses; but there are many instances to the contrary.—It is told you, that Porter, here before you, is not a good evidence, because he is not sworn; and that you are to go by the rules of Westminster-hall. Says the gentleman that spake last, you are to go by their rules, but not by their forms: I must confess there is a great difference between them two; for a form is only the manner and method by which we proceed in doing of any thing; but the rule is the foundation we are not to err from; but I can't agree we are upon the same rules as Westminster-hall is: the rules of Westminster-hall are, when a man is brought upon his trial, the jury are all to be upon their oaths; by which oath they are to make a true judgment according to law. This is not the case here: if I was a jurymen, and was to try a man, and one witness swore against this man, and no other witness; though I did in my conscience believe him to be guilty, yet in that case my conscience is discharged, and I must find him not guilty: but no man can say this is the case here.—What are we now a-doing? Here is a bill to attaint sir John Fenwick of high-treason: if I reject the bill, I do declare him not guilty; and if I do think him guilty, I do declare against my own judgment; for my judgment here is not bound up as a man's judgment upon a jury: for his judgment is bound up to proof, according to law; and my judgment is bound up by my own belief: this is

the proof I must go by ; and I think every man is bound in justice and duty to his country, as he believes sir John Fenwick to be guilty, to be for the committment of this bill ; and till any gentleman will convince me, that this is not a rule I am to go by, I must continue in this opinion.

Mr. Boyle. The disorder that worthy gentleman was in, makes me the more concerned for fear of falling into it myself. I hope, in this debate, gentlemen will be very cautious of using it as an argument, what application our votes shall have without doors, and with those we represent, when we are to give judgment, as far as in us lies, for the life and death of a man : and therefore I must observe, that the eagerness that is justifiable upon impeachments, may not look so well now we are judges upon a bill of attainder. You have gone over the whole course of the evidence, and I believe that this debate will shew you pretty plainly, what is to be the fate of this bill ; for I believe all the arguments will now be used that can be : as to what hath been said of extorting a confession, I take it to be quite out of the case. I am sorry to be engaged one way or another : I would not, if I could help it, out of the house, be upon a jury of life and death ; yet in that case, I should know the law, or be told it by the judges : But in this case, we are both jurymen and judges, and know not what rules we are to go by ; but set up a court of equity, which hath no bounds but our own consciences. —As to sir John Fenwick, I know him not ; as to his cause, I am sure I am against it ; but how far I think him guilty or not, I think is not the single point to be considered : I must confess, there have been several people accused of this conspiracy, and have been named by the evidence at the trials ; and I believe they are much alike guilty, being upon the same evidence ; but as to all that hath been opened before you, and proved, it can amount to no more than this : There is but one evidence, which by the law would not be a good evidence to convict him in another place : and therefore I do agree with the gentleman that spake under the gallery, that this is a very extraordinary case ; for one witness is not sufficient at law to convict him, and the law would be very different hereof. I am to judge according to my own opinion, and not by the rules prescribed by the law ; but though this proceeding is not strictly according to the law of the land, yet if it was such an extraordinary case that required you to dispense with those forms, and come to this extraordinary manner of proceeding ; I think, for my own part, it might be supported by the necessity of it : for it is impossible that it should be otherwise in practice. Thus when the government is at stake, and nothing will preserve it, but the breaking through the settled forms, then the government will break through them : and whatever rule you prescribe, it will always happen so.—There is a very extraordinary case and that was in the conspiracy of the state of Venice, above 100 years ago, I think,

set on foot by the Spaniards : Then the state, to get the whole matter out, promised a pardon to as many as were concerned in it ; and after they had promised it, and treated with them about it, they thought it necessary, for the preservation of the whole, to break their faith, and they were all put to death. This was upon point of preservation of the government.—But sir, as to precedents, give me leave to say, I do not give that authority to them, unless I know all the springs and secret histories, and transactions that were their guide in making those precedents ; and as to precedents that have been quoted, when the parliament has declared what was treason, and what was not treason, or have declared constructive treason, they may be grounded upon the statute of 25 Ed. 3. But I think there is no statute upon which they can ground the condemnation of a man upon one witness.—In the case of my lord Strafford, upon constructive treasons, it was there said, that it was a fire that had lain hid for 240 years, and that it never broke out before, but to consume him and his posterity. It was answered by Pym, If that was the case, it was not for want of law to justify such a proceeding, but all that time had not produced such an offender.—I do not doubt, but if any one will consider the late conspiracy ; and if that was the question, but it was as extraordinary as any thing can happen ; for it was to subject their country to a foreign power, which is very extraordinary, and several persons were concerned in it : But there is one extraordinary part which I do not remember this gentleman is accused of ; and that is, the assassination. Treason itself is a very extraordinary crime ; but give me leave to say, that extraordinary part is not alledged against this gentleman ; and this bill does not seem to be brought in for that, wherein he is concerned in common with some others, but for the subsequent matter alledged in the bill. This bill is grounded not so much upon that he is guilty, as a great many more are, as upon several circumstances which have happened to nobody else. Give me leave to instance in a case, now in my head (I beg your pardon that I ramble, it is from the awe I have upon me from this assembly), in Catiline's conspiracy ; and if that was our case, no doubt there would be another sort of argument for it ; there they consulted what to do with Cethegus, and the other conspirators : he was at the head of an army, which only expected his orders to lay Rome in ashes ; the question was, Whether they should break the Porcian law ; and for the safety of the senate they were put to death before the assembly rose.—Now to come to this part of it : Though sir J. F. is a great offender, yet I think his case is not so extraordinary, as to make you proceed upon this bill. I do take his living or dying not to be of that consequence as this bill of attainder. I know not how he comes to be so considerable when in hold ; for when he walked about town, I never heard he was feared or regarded at that time.—But to come to the allegations in

your bill, upon which they are to ground your judgment: The first part is a new conspiracy, that is, for intending to create a jealousy between the king and these noble persons. As to them, you have already passed a vote in their justification; and I think their actions may justify them to the world, as much as any vote of the house of commons; but whatever that may be, I think it was a foolish piece of conspiracy, as well as an ill one, for one when he was in danger of being hanged for one plot, to venture upon another: and I think, there was at that time two witnesses to bring him to his trial, and that is an allegation in the bill. And as to the protracting of his trial, it is natural, and so justifiable, whether innocent or no, and what every body attempts; and nobody can wonder at it; but in one case or the other it can be no sufficient ground to attain him.—The next thing that is said is, that he hath been the occasion of the withdrawing of the evidence. Now I must observe, that is not alledged in the bill, and is proved but by hearsay: But suppose it was true, and alledged; if any man concerned in treason shall endeavour, by friends, or otherwise, to get off an evidence, can that amount to that which is designed to be punished by this bill, to high-treason? It is the part of those that are intrusted with those matters, to be in expectation of such practices. What are gaols for, but to keep them in custody? And the people employed in those businesses are to take care of it. Are we to supply a defect of what ought to have been done in another place?—So that I do say, that a precedent in an extraordinary case is no precedent to be used in a little case. It may be urged, but it is but a pretence, when you have passed this bill, which is the record, the matter will appear no otherwise than are the suggestions of your bill. A man hath aspersed great persons, which is a great fault indeed, (for he is not charged with the withdrawing of the evidence) therefore attain him upon one evidence. I think by this bill you will open a door for a precedent of all treasons of the same nature. Sir, there have been many precedents mentioned; I will trouble you with none, because most gentlemen have read the argument of Mr. St. John's in this case. I must confess, unless there was that necessity as is pretended, which I do not see, I do not see how you can justify passing this bill of attainder, either by the law of God or man, in any nation allowed. I must confess, I have no manner of concern how this question goes; what I have said is more to satisfy my own judgment, than work upon other people. I am not satisfied there is that necessity that is pretended; and therefore as my judgment is now informed, I can't give my vote for committing of this bill.

Mr. Smith. Sir, I own myself to be very unfit to speak in this argument; but since I am to give my vote in a matter of this consequence, I beg leave to give my reason why I give my vote, as I intend to do. I know the matter before us, both in the nature of the

crime and punishment, as well as the consequence of it, requires a very deliberate consideration; but, at the same time, I do take the hazard and danger of this government to be a matter of great consequence too.—Though there have been several precedents instanced in relation to attainders; and though I have observed, that most have acknowledged, that they might be justified upon extraordinary occasions; yet when they have asserted that, they have told you, they were upon a wrong foundation, and so were laid aside. Now, I think it no great matter to say, that those attainders that were made in rancour upon contended titles, were reversed when the opposite party got the power, no more than if any action, be it never so justifiable, should be reversed when king James comes again, which I hope will never be. Is it any argument, that when Hen. 4, came to the crown, and deposed king Richard, that he reversed all the attainders in his time? There might be reasons might sway with persons for reversing particular acts of parliament, which might be very good, or might be not so, there was such a change of government at that time; but they take notice, it was made a particular article against Richard 2, as if when the power was come to other hands, they would not have deposed him if they had not had that argument: Neither do I take that argument to be of any weight, That attainders have been reversed, because the people have not been heard; when this gentleman hath had as full a hearing as ever any person had upon any Bill of Attainder, or impeachment whatsoever; and he hath had the advantage of counsel in this case, which, as has been told you, was excepted out of the late act of parliament, and of the most able counsel too.—It is said this is a matter of no great consequence, because it concerns sir J. F.'s life singly; and he is not thought to be so considerable, as by his escape to bring the public in danger. Now it hath been always one principle I have laid down, that if a plot be discovered, and not thoroughly prosecuted, it strengthens and grows upon you, and ten to one if it does not subvert the government.—Now, God be thanked, that we have prevented the design upon the king's person, and several have been punished for it; but I think we are not got to the bottom of it, and that we ought to provide against it in a much other manner. Can any one think that sir Wm. Parkyns, or sir John Freind, and the rest that are discovered, were the only persons concerned in this conspiracy? I take it, that there have been much greater men in it; and when I see such a struggle both to get people out of gaol, and send people out of the way, and all arts used that can be, I must suppose, when such extraordinary courses are taken, that there is something extraordinary still to be done; and I would not have men by bribing of witnesses think to secure themselves: It hath been used as an argument to lessen the matter, that this was a little after the act of indem-

nity. Can any thing aggravate a thing more? Sir, these very arguments turn against them. We are told here, that we must not consult our own private judgments in the matter; and we are told, at the same time, if there were two witnesses that we did not believe, we must not find him guilty. We are told of a judge, that though he knew a person to be not guilty, yet it was a commendable action in him, that he condemned the man: But that hath been very well answered already, and I shall not meddle with it further; only this I will say, that I never will in any case be a jurymen or a judge, where the convictions of my own conscience shall not govern me, but an evidence that I do not believe. And because that story was told you, I will tell you another, that I think more commendable: And that was; a man was tried for a murder, and there was positive evidence against him. The jury went out, and stayed a great while: There was eleven against one for finding him guilty; but at last the one almost starved them, and they brought the man in Not Guilty. The judge sent for the gentleman, and desired to know his reasons for differing with the rest: And, at last, upon assurance that nothing should be done to him, Why, says he, would you have me find the man guilty, when I was he that killed the man, and he was innocent? Then, sir, if you take the evidence as it is; I think, first, here is captain Porter; I do not find any body excepts to him; and his evidence hath been approved of by several juries, and several persons executed upon it, and nothing material hath been objected against it. I will not say, That sir J. F. hath owned a great deal of this himself; he hath given every body satisfaction how far he stands guilty in his opinion; but it is brought so far home, that there was sir J. F.'s own letter was to convey him abroad. Here hath been attempts upon other persons; you hear what hath been done by the solicitor. They say, he was not his solicitor at that time. Here are very pregnant circumstances. One gentleman said, you ought not to make use of Goodman's evidence here; and yet he could make use of every thing to disparage him; for he could say, there were three positive witnesses against him.—Now when it is so notorious what parties there are for king James, and we find persons plotting in every part of the kingdom: when you have an open invasion before you, and when designs are laid against the king's life every day: if this be not a time to exert an extraordinary power, I submit it to you.

Sir *Rd. Temple*. Sir, I shall not trouble you with any thing that hath been offered to-day. That which calls me up, is the danger of the precedent you are about to make, and the arguments that have been used to support it; which, I think, are more dangerous than that. I must confess it is a new doctrine to me, That the laws that are made by the parliament, are to be no rule and guide to this house. Sir, the birth-right we have is in our laws; and I

did ever think till now, that the laws were not only made for Westminster-hall, but for all the subjects of England; and especially, that they were to be a rule to the parliament that made them, till they should think fit to alter them.—Here have been great mistakes between the power of parliament and the jurisdiction of it: the power of parliament is to make any law, but the jurisdiction of parliament is to govern itself by the law; and this, give me leave to say it to you, hath been the opinion of all your ancestors, and the method they ever used. Shall we make a law here in a particular case against all the laws of England? It is 'ultimum remedium et pessimum;' you may use it in a case of absolute necessity, but otherwise it may be a precedent to overturn all.—There are several things in making this precedent, that overthrow all the laws and liberties of England: first, you are passing judgment upon a man upon one witness. I have heard a strange debate to-day, that there was but one witness in treason, before the statute of Edw. 6. You know, that in case of treason, there was by the common law required two witnesses: for if there was but one, the party might demand trial by battle, and that was the common law of England.—There is another thing that is extraordinary: here you are going to pass an act without any trial at all: for to say this is a trial before you, the commons, is a mistake; you never did assume a jurisdiction of trying any person, nor can you: you may for your own information hear what can be offered, but it is not a trial, where witnesses are not upon their oaths. There is no manner of power or jurisdiction can be pretended for you to try; in that is a second thing. All the bills of attainder you have had, have been in three cases, where the persons have been either dead, or fled, or have been without the compass of the law, and could not be brought to answer: and you have had some bills of attainder after trials had in Westminster-hall; but never a one of those have been called trials, but they have been generally reversed; and for what! They tell you, that they have been reversed by one party, and another party: it was in the same king's reign, in Rich. 2's reign, they were forward and backward, as the court party or the country party were uppermost.—There is another thing in this, that I think of a most dangerous consequence; and that is, that you are for making way, for what I know, by this precedent, for a rack, for so it is said; this is to force a man to be an evidence. Why, give me leave to say to you, it is a new way not known in England, that you will hang a man unless he will confess or give evidence; but I think it is something more than a rack, for here is hanging, drawing and quartering in the case; and I do not think this proceeding will make him an evidence with any credit or reputation to this house, nor am I of opinion, that he can discover any thing worth such a precedent.—Now give me leave to say one thing as to the jurisdiction of parliament. It hath passed

here for current, that the parliament hath a power to declare what they will treason, though so by no other law; it is the greatest mistake in the world: I heard a great debate upon this, upon my lord Clarendon's Case; and it is plain, that statute relates only to cases brought from inferior courts to parliament; for it says, that if any other case supposed treason, which is not in that statute specified, doth happen before any justices, the justices shall tarry, without going to judgment of the treason, till the cause be shewed and declared before the king and his parliament, whether it ought to be judged treason, or other felony? I speak to the jurisdiction that the parliament has by that statute: it is, that if the like treason, for at common law there was a great many treasons, should fall out, and be brought before inferior courts, of which they doubted, whether they were treasons or no? then they should be brought before the parliament, to judge whether they were treasons or felony: But how shall they judge? By the laws in being. And who is this judgment in? Not in the parliament by bill, but only in the house of lords: Much less is it, that you may judge that to be treason in this house, that was not so by the common law before. So that, give me leave to say, therefore there is no such power reserved to the parliament, to declare any thing treason that is not treason before.—I must say, it is of the last consequence, that we should make a law in a particular case, to take away from him all the liberty that belongs to a subject. Some gentlemen talk of the great favour he hath had at this bar: I know not what to think of it; I am sure you allowed the king's counsel such privileges as I never saw before, and that was, to offer that for evidence that every body acknowledged was not so; and I do not think any body would think it a great favour to be heard in this manner, especially to things not in the bill.—It is said, every man must go according to his private opinion, it is not said judgment neither; the instances that have been given are of a quite different nature: A man is not to give his judgment against his knowledge: I think that judge ought rather not to have tried the cause at all; but if we sit here to judge, we sit to judge him according to the law of England, and then we must judge him according to legal proof. Will you sit upon a judgment that is not only not tied to the rules of Westminster-hall, but is not tied to the laws of the land: and attain a man without a legal trial, without legal evidence, and upon one witness, when the law says, you shall have two; and after all, say it is a reasonable proceeding? I know not how it came about, that the act of grace was passed; it did not rise from this house; If it hath any ill consequence, let them answer for it that were the cause of it.—They say the government is at stake, because the plot hath not been found out to the bottom. That is not our fault: This man hath been long enough in custody; if he hath trifled with the government, I am

sorry he hath imposed upon them; but if it be so, I think there is nothing in this case, of that consequence, as to make you make this precedent.

Sir Wm. Strickland. Mr. Speaker, I would not make use of any ill precedent: And yet if the present occasion, and the necessity of the kingdom required it, I would make a precedent. I am glad the several ill precedents are avoided in this case, and I would be bold to say, whether this gentlemen suffers or no, no man can say that he hath been hared to death by counsel.—Sir, I should be as tender in point of blood as any man; but I do think, if the safety of the king and kingdom is concerned, it is not one private man that we must have respect for, so as to let the public suffer by it. I do think, that upon this occasion there have so extraordinary things happened as have hardly happened in former ages; that one who is known to be in a conspiracy to bring over a French power with a Popish army, to destroy our lives and liberties, after his trial has been deferred by his equivocations and pretences to make a great discovery; when he comes to make it out, he accuses the best of your friends; and this is only an artifice to get time till they could get the evidence out of the way; think, if you do not take notice of it, and let the legislative supply that defect, it may be of ill consequence, and may encourage any one to commit the worst of mischiefs, upon hopes, that if they can get the evidence out of the way, they shall go unpunished.

Sir Fr. Winnington. I shall trouble you but a little while, it being late; but gentlemen saying it is an extraordinary case, I shall give my reasons why this bill ought not to be committed; for every member here now is a judge, and he must take the blood of this gentleman upon him in judgment, either to condemn or acquit him; and I must confess, I have very much admired, to hear that doctrine preached, that every man, as he is satisfied in his private conscience, ought to judge this man guilty. I desire to know by what authority we sit here? We sit here and have a legislative authority, and it is by the king's command we come together; but at this time we are judicially trying this man for his life; and therefore I humbly conceive, that we ought to proceed 'secundum allegata et probata;' and for any man in his private opinion to say he is guilty, he does not act by the commission he sits here. For to tell you of the Lancashire Plot, or that a man shall not be chosen hereafter, seems to be argument to enflame, but nothing to the question.—Now, sir, I will humbly offer to your consideration, and the judgment of the house, why I think we cannot judicially condemn this man, for I think the question of commitment to be the same as of his life and death.—I do agree upon all the precedents good and bad that have been cited, and doubt not but in extraordinary cases, it is in the legislative power of the parliament to look after the safety of the kingdom; but I shall offer why this does not

come to that case.—I humbly conceive in this case, for I will not speak to the rules of Westminster-hall, but upon the right reason of the thing; for if it be reason in Westminster-hall, it may be so here, and that ought to overcome every thing: But whereas gentlemen say you have one witness, I do not apprehend you have one good witness, and I will give you my reason for it, for you must take capt. Porter upon his parole, and consider what he says upon his word; and then I do appeal, if you take what he says upon his word, whether ever they did know that a bill of attainder proceeded against any man upon bare affirmation? No; in that case you should have turned it into an impeachment, if the thing looked probable, and then you had the witness upon oath; and the ancient method of bills of attainder used to be first by the impeachment of the person, and then to turn it into a bill of attainder.—Then see what it is that is insisted on by the king's counsel, and recited in the bill, that there was a bill of indictment found by the oath of two witnesses, that is, Porter and Goodman: Under favour, I think they are not to be counted as witnesses in the point; and I offer this as a reason; and, I think, it is natural justice in all courts of the world, that if a man be accused as a malefactor, he hath the liberty to cross-examine the person that accuses him. Now we very well know, that in case of bills of indictment, when they are found by the grand-jury, they never admit the prisoner to put cross-questions, because the bill of indictment is but the accusation; and if an accusation be enough, who can be innocent? Why, then, if it be so, then this oath that was given to the grand-jury, is not such an oath upon which you can put such a value.—Then, Sir, go to the paper of Goodman, which you would read, and consider the validity of that; Goodman being now absent, the prisoner hath no opportunity to cross-examine him; and I beseech the house to consider the ill consequence of it: Any minister of state may come and get an examination before a justice of peace, or secretary of state, and the man is conveyed away, and a bill of attainder is clapped upon his back, and this shall be read as evidence against him: He is but half a witness, and a witness upon an accusation, not upon a trial.—Then come to sir John Fenwick's particular case; sir J. F. is indicted, issue is joined, and he hath notice of his trial; and one of the witnesses goes away, no man can tell upon what account he went; I may believe why, in my private opinion, but that is not our judicial knowledge: Then if that be so, was it ever known, that when any man was indicted, and issue joined, because his trial was deferred, therefore a bill of attainder must be brought against him? Here are plots against the government, and it may be forty may be taken up for it; and as to twenty, there may be two witnesses, and the others may have the good luck to have but a single witness against them; will you have acts of attainder against all the rest? If this had been an extra-

ordinary case, wherein the government had been particularly concerned, it might have weighed with you; for no man can shew me any precedent of a bill of attainder, but where there was open act of hostility, or men of great relation and power were concerned to subvert the government. But what is sir J. F.'s case? He is in custody, and the plot is detected; if he was run away, you might still suppose he was plotting against the government, because he was fled from justice. Gentlemen say the government is concerned; so it is in every felony and particular treason; but must there therefore be a bill of attainder to punish it? When there is a bill of attainder, it must be from an immediate danger that threatens the government established, that such a man is attainted. But I do not see that sir J. F. hath any of these circumstances. All men agree, That this is an extraordinary way of proceeding: Then the question is, Whether sir J. F.'s case be extraordinary? or, Whether he be more than a common malefactor that is in a wicked conspiracy? I do not see that this case of sir J. F.'s is so extraordinary, that if he be not hanged, the government must fail.—And, under favour, a precedent, when it is once made, I know not what time may produce from it: It may be, after the death of his majesty, that came to restore our liberties, we may have wicked members, and members chosen as in Hen. 6th's time. It may be the condition of every subject in England. The power of parliament we must govern by reason and common justice; and if there be not so urgent necessity to use this extraordinary remedy, because it may be dangerous to posterity, therefore I am against this bill.

Sir Tho. Littleton. The worthy gentleman took notice, that the Lancashire Plot, and some words I used, were used only to inflame; I can't so well guess at his thoughts, but I have heard him several times bring his wife and children into his speeches, to no purpose at all.

Sir Fr. Winnington. I have a wife and children, and that gentleman none; therefore I think I may make use of that expression.

Sir Tho. Seymour. Mr. Speaker, I have attended your debate with the best attention I can; and I have heard a great many arguments, and some very wild ones too. I hope, how frightful soever things have been opened, they will not lead your understanding out of the methods and rules of justice. I will not take upon me to tell you, what is nothing to the question, as, that treason is a very great crime, or, that the parliament hath an unbounded or unlimited power, and are not tied to the rules of Westminster hall; I think that is no part of the subject matter before you.—That nothing bounds or can limit the parliament, is what every body does admit; but it is the right application of that power which is now to be considered of: For you may judge the prisoner, and others will judge you. The world will judge you, if you do not apply that power aright.—For my part, I shall avoid as much as

can be, the saying of any thing that hath been said; and therefore I hope you will believe that my discourse must be very short: But that which does move me in this question, is in short this, that I do not give my judgment to condemn any man otherwise than the law directs how, and upon what terms I must give it. If the law hath said, that treason is not to be treason, unless it be proved by two witnesses, I am never to give my judgment in that case, when there appears but one.—And this I take to be the state of the case, not to enter into matters of precedent of attainders; for those are only instances of so many facts that have been done. And in all those instances that have been urged and quoted, when times have been sedate and quiet, marks have been put upon them, as was hinted by a gentleman that spake very ingeniously upon this subject at the beginning of this debate; I say, marks have been put upon them for you to avoid, but not to imitate. I take it, that the law hath determined that there shall be two witnesses to the proof of treason, and there is no treason that hath not two witnesses to it.—There is but one attainder that we meet withal in sacred history and that is the attainder of Naboth; he was attainted, and we know what induced that attainder; he had nothing to object as to the formality of the proceedings there was set up against him: And though Jezabel's letter had disposed the rulers to deal by him as they did, yet there were two witnesses that did appear against him.—I take it, that two witnesses are requisite for the knowledge of the truth, that you may make a right judgment whether they swear right or no. I will give you but one small instance more: I must tell you, Susannah had been but in a bad condition, if one witness or circumstantial evidence would have made her guilty.—A gentleman here says, it is Apocrypha: but that which weighs with me is, that there may be inconveniences on one side, and there are no inconveniences on the other. I know not what may be the consequence of this precedent, nor where it may bring you: I know the consequence, if sir J. F. be not executed upon a bill of attainder; for nobody will believe there is a necessity for this extraordinary remedy to be applied for an offence, a year and a half after he hath been indicted and arraigned for it, and they might have proceeded to his trial; and I know not whether it is his fault that they did not; for it was not in his power to prevent it: and if you, upon every occasion, come to supply the defects of them that are remiss in the government, it will make them more so.—As to the matter of precedents; Why, it may fall out, that by this precedent an innocent man may be punished, and then we that make this precedent are guilty of his blood; and if he suffer never so remotely, it will be required of us, if they proceed from this precedent. Now, if sir J. F. be not executed, unless in a legal way, what is the consequence of that? Is it that sir J. F. shall go unpunished? Though

they are deprived of one evidence that would make it treason, he may be punished for a misdemeanor, and imprisoned for his life; and I had much rather he did languish in that condition, and I am sure it is much safer for you, for no inconveniency can arise that way; and I take it that when those that are our guides dispute which is the way, we are to take that which is the safest.—The learned have disputed, whether this matter, as now it is charged upon sir J. F. be treason; I will not take upon me to determine it; they differ about it; and when they cannot determine it, will you by a question determine it absolutely?—Upon the whole, there hath been so much said by the counsel for the prisoner, and so little said by the counsel against him, and so few arguments urged against him, that I must still retain the opinion I had, that there is not evidence enough for you to proceed upon this bill of attainder.

Mr. Boscawen. Sir, I desire to give my reasons for my opinion in this matter. I have no personal disgust against sir J. F. The great argument for sir J. F. against this bill is, that this is an extraordinary proceeding, and therefore should be against an extraordinary person; and in the next place, that it is against the rules of law. The rule of the law is, that there must be two living witnesses: as to that matter, gentlemen generally agree, that it is within the law of parliament to attain people by bill of attainder; but they say they have been often misapplied; which I do easily, believe, because some have been attainted, and have not been heard; and some have been in tumultuous times: but this gentleman hath had a fair trial, and a debate in this house; but I would fain know, though they confess bills of attainder may be, how it can possibly be, if the lawyers at the bar say true, that it must be upon oath, and you give no oath? To say it may begin in the house of lords; under favour, I take it, that a bill against a commoner cannot begin in the house of lords. And if you cannot have witnesses upon oath, you must have as much evidence as the nature of the thing will afford; that is, you must have witnesses to convince your consciences in the thing; for if all this great assembly are satisfied in their consciences, that he is guilty of inviting an army of French to come into England, I am astonished to think, that you should not pass this bill against him. I think, as to this witness, Porter, they have not endeavoured to blemish him; but their argument seems to run more upon Goodman's not being present. I would know, if there are two witnesses, and I do not believe them in my conscience, whether I can pass this bill? But I appeal in this case *res ipsa loquitur*; the thing is so plain. How many have been attainted and suffered for the same crime, that have acknowledged sir John Fenwick to have been present! There were several members of the house sent to examine sir John Freind and sir W. Parkyns in Newgate, and they were sent with this intention, that the house would

intercede with the king for a pardon for them, if they discovered the full of the plot (it was not the death of sir W. Parkyns and sir John Freind that was aimed at, but the preservation of the public); and when they were examined, they did acknowledge, that they were privy to the calling in of the French, and that sir W. Parkyns was to have a troop of horse; there was to be 2,000 horse: but he would not redeem his own life with the blood of others. Now I do take it, that there is evidence against sir J. F. sufficient, in a parliamentary way, to attain him.—The gentleman says, the consequence of throwing out this bill would be nothing, and that sir J. F. is a little man: I agree he is, but it is the consequence of bringing in a French army that is to be considered. Would you pave the way for them to come over, and make their entrance easy? I hope the people of England are concerned in the case, as well as their wives and children. If you let him go, what will be said? I have not heard one say, that he believes he is not guilty; there is none but think him guilty; and yet will you let him escape? What encouragement will this be to your enemies? He hath not denied the matter himself: nay, he hath not brought one gentleman to vindicate him, that he is a man of a behaviour not to be believed to be guilty of such a thing, which was done in other trials. I desire you would consider what the French king said of his brother king James; how could he think to bring in popery with a protestant army? I am sure the bringing in of a French army must be for the destruction of the people of England, and the protestant religion, and will bring your people to go in wooden shoes. It is the example of this thing you are to consider. It was said at the destruction of Carthage, that the commonwealth was always to be minded. I think you ought always to be mindful for the preservation of England; and I believe he is guilty, and I am therefore for the bill.

Lord Digby. I shall trouble you but with a word or two. I suppose, as long as we act by the known rules of justice, and the laws of our land, we shall not need to fear any censure in our own kingdom, or any where else; but it is a very uncertain thing for gentlemen to be judges in the case of life and death, without any rule to walk by; a great many will not allow us any rule at all: I always took our rule to be the law of the land, and that even ourselves are bound by the laws our ancestors have made, until we think fit to repeal them; and I am confirmed in this case by one particular argument from the bill of treason that passed last sessions, in which there is a clause, that it should not extend to future parliaments. The only argument for exercising of this power, is the extraordinary case of this gentleman. When a gentleman speaks of the power of parliament, I take it to be the just power of parliament: I think a man may say, a parliament cannot do what they cannot justly do. But all gentlemen allow, that this power ought not to

be exercised but in an extraordinary case wherein the government is nearly concerned. I believe very few but think, that if it had not been for the vindication of some particular gentlemen we never had had this matter before us; and then I will leave it to gentlemen to consider, if the government can be in so much danger if sir John Fenwick does escape?

Mr. Brotherton. Mr. Speaker, I perceive the question, Whether this bill shall be committed, arises very much upon a supposition that seems to be granted, that there is no other law to try this person by; and it hath been hinted, that before the statute of Edw. 6, one witness was sufficient: Now, if I shew you that here is a law in being, and hath continued for several hundred years, whereby a man may be tried, and that by one witness, I think it is something that hath not been spoke to yet.—Sir, I ground my reason and opinion upon the authority of the law, and upon the historians of all times, who agree in the thing, and come down to my lord Coke, which is printed by authority; and he is express, that where there is but one witness (he treats of what witnesses are necessary, and he tells you two witnesses were required by the common law of treason, if the person was tried by a jury;) but, says he, if there be but one witness in case of treason, he shall be tried before the constable and marshal. And in treating of the statute of Hen. 8, which does appoint how treason beyond sea shall be tried; says he, that is only where there are only two witnesses; but if there is but one witness, he shall be tried before the constable and marshal; because, says he, the statute of Hen 8, does not take away that trial before the constable and marshal; and for that, Sir, there are several precedents in this case, of persons that have been attainted by a court-marshal; and if the accuser was vanquished, he was to suffer the same judgment the defendant was if he was found guilty. I am upon a gentleman's life, and never was so before, and desire to be never so again; there have been several precedents, I say, in this case, and my lord Coke is express in the point; and I desire any gentleman to shew me any law that hath repealed this. In case of murder; suppose a man be wounded upon the land and die upon the sea, and I could shew several cases where the common law cannot try a man by jury, but he shall be tried by the custom of merchants before the statute of Edw. 6. If a man was wounded in one country, and died in another, he could not be tried. That which I aim at is to shew you, that though the common law should fail, yet they need not come with a bill in this case. If two Englishmen beyond sea fight, and one kill the other, it cannot be tried by the common law; how then shall it be tried? It must be tried by the court-marshal. It was sir John Amesley's case in Rich. 2d's time; and Wells's case, and lord Herbert's case in H. 6th's time, who, there being but one witness, was accused before the constable and marshal.—[Mr. Brotherton was

here interrupted by the great noise the house made upon the novelty of the argument, and did not go on further with it.]

Mr. *Paget*. Sir, I attended to the debate of this day, and have not hitherto troubled you myself, because I did expect to be better informed by this debate. I think the substance of the debate of this day hath been, not so much to shew us by what rule we are to go, as to shew us that we have no rule to go by but our judgments. Sir, I never had the honour to sit in parliament before this time, and therefore cannot quote precedents of what hath been done in former parliaments; others have taken a great deal of pains to shew you, that it is in the discretion of gentlemen, and they are only to be satisfied in their consciences. I am not fond to hear myself speak, and therefore I hope I shall be favourably heard at this time; and I do think I have the more reason to speak at this time, from something that fell from a very honourable gentleman at the bar: If I do mis-repeat him, I hope he will excuse me, for I do not do it with an ill design: But I think his words were to this effect; that he did not know, but if it was known in the country, that gentlemen did give their judgment against passing of this bill, it might hinder the election in future parliaments. Sir, since there seems to be so great stress upon our determination in this matter, I hope I may at this time shew you my reasons why I cannot come up to agree in this bill; and I shall submit it to them, whether they will do me the honour to chuse me again? I must confess, I do think this is as nice a case as I can pretend to give my opinion in; and as it is so, I shall desire the best assurance of the truth of this matter, before I give my opinion for the passing of this bill.—Sir, you have had before you one evidence: I will admit him to be as much as a single evidence can be: as to the paper of Goodman's examination, I have heard that and other matters too, which I shall not repeat. But I do remember, that, in the debate of yesterday, it was not insisted on to be evidence: and if not so, I shall only take the matter as depending before you upon one evidence only.—Sir, it is true, I believe this house, as to its legislative proceeding, is not tied by the methods of inferior courts: but I hope I shall be excused, if in the methods of prosecution and conviction of offenders, after they have been prescribed by the wisdom of the parliament, I hope I shall be excused, if I believe this house cannot take away any person's life upon less evidence than inferior courts could do.—And, Sir, I shall not enter into any very long vindication of myself, and my zeal and willingness to serve the government; I never was employed in any other government; and I think my actions have been such that nobody can instance in any one thing that hath looked otherwise; and when I have said this, I shall trouble you no farther about that: but there hath been so much stress laid upon this bill, that whosoever speaks against it, seems to speak against the

government; because it is said, the passing of it is so necessary for the support of the government. And I was the more willing to offer you my reasons, because, as the nature of this debate has been, I cannot satisfy myself where my judgment and opinion shall rest: for if it be so, that you are not tied to have as much evidence as inferior courts, and, as they say, one evidence is enough, and my judgment is to be guided by papers; then they, without any evidence, may be enough to satisfy: and if you take up with less evidence than inferior courts, I cannot come to declare how little evidence may take away a man's life.—As to the prisoner, I know him not; but I think this bill is for all that he hath to lose, and is for all the best Englishman can lose upon the like occasion.—Sir, I shall be very tender in giving my opinion for the bill, unless it was very clear to me that it was reasonable. Truly, I have heard very little of the whole plot, or of this matter that hath been examined, or for which others have been executed; my life has been generally in the country, and I have not had the curiosity to buy the trials; and as this is the first person that hath been called before me, to give my judgment on, I hope I may be excused for taking this liberty, upon such evidence as appears before us, to tell you, I cannot give my consent to this bill.

Sir *W. Lowther*. Sir, you have had a very long debate in this house, and long discourse from the bar; and though the counsel was directed that they should not dispute the privileges and authority of this house, yet, as far as my judgment carries me, their whole discourse was against it; and most of the gentlemen that have spoke against the bill, it hath been, because it hath not been adequate to the proceedings in Westminster-hall, because there hath been but one witness. Sir, if there had been two witnesses, this house had not been troubled with it: it is a case of a very extraordinary nature, and so required an extraordinary proceeding.—It hath been questioned by some gentlemen, Whether one witness be sufficient in this case or no? Which I wonder at, since a great many have been convicted upon his evidence, and every one of them has confessed; which shews it to be a notorious truth.—There is another inference they draw from the proceedings here: because a great many of those precedents of attainders have been reversed, and those with notes of ignominy. If they did consider the times they were made in, and the times they were reversed in, there might be a great deal of cause for it: we find that it was contrary factions that reversed them, and that makes it never the worse. And truly, Sir, I do not know but where circumstances are so notorious, but they are tantamount to a second witness, as I have heard in Westminster-hall, and in cases of life too. If a man be murdered, and two in a room, and one comes out with a bloody sword, the law does presume that man murdered him, though there is no particular evidence that he

murdered him, but only this circumstance; and yet the man's life is concerned in that case. So that upon the whole, it appears to me that he is guilty, and, I think, nothing can be plainer. —There is another circumstance, that he fled for it; and that is a presumption of a man's guilt: for a man loses his goods, if he flies for felony.

Mr. *Harley*. It would be very unreasonable and impertinent to trouble you long after such a debate: I shall avoid repetition of what hath been suggested to you much better from other persons than would have been from me. I own it is a case of great concern, and it is my misfortune that I should ever sit upon a thing of this nature; but I will discharge my conscience always, and give what arguments occur to me, why I am against this bill. Gentlemen have been pleased in their arguments to enter upon the debate of your power and authority, and have made that a part of their argument: but I think, with submission, we need not dispute that at all: it is admitted, that there have been bills of attainder passed formerly, and your authority is not under dispute; for the legislative in all nations have a power lodged in them, for the safety of the whole.—But your proper enquiry is, Whether this is such a case as you ought to exercise this extraordinary power; *omne regnum sub graviore regno*: Though you have this absolute authority, yet it is to be executed by the rules of reason, and by the rules (for such there are) of eternal justice; and I look upon this as one that is inviolable, that no man can forfeit his life, in such a case as this is, without two witnesses. I must adhere to that, because I have heard nothing in this debate that can make me quit that maxim: And it is such an ancient land-mark, that I will never draw a curse upon me, and my posterity, for removing of it. I beg leave that I speak with this earnestness to you.—Gentlemen have been pleased to make it part of their arguments, the great danger the government is in if this bill does not succeed.—I will not use many words, but I think that argument ought not to be taken in the gross, but to be examined, Whether this argument, of the hazard of the government, is of equal poize for you to break the eternal rules of justice? I won't quote the case before; every gentleman knows it, (though there was two witnesses in that case to put an innocent person to death) where it is urged, the Romans will come and take our state and nation: But with how much reason that was urged, every body knows; and how far the government is now in danger. Let us consider, Is this gentleman out of your power? Is the government in danger of a man that is your prisoner? Is he in open rebellion against you? If this law does not pass, if you have not your hands in his blood, is he not under the power of the law? Did not he tell you so himself? Every gentleman ought to have a zeal for the government, and I wish it was visible in every thing else; but if that be so, give us leave also to speak with zeal for our liberty, and ancient

constitution. The argument is turned two ways: On one side you are told, that this probably may make him confess something; and by others, he is to be made an example of punishment. This is the first beginning of a bill of this nature: but the same reason that leads you to this, must lead you to all the rest: The same reason that is urged for this bill to make him confess, will lead you to bring in a bill to make him a good evidence: this every body must allow to be the consequence of it.—How does this bill come before you? It comes before you upon a villainous, scandalous aspersion of some great men; though I know them not all, yet I have a great value for them, and I would make their case my own: but if they were the nearest relations I had, I would be against this bill upon their account; and let any one examine the reason of it.—Sir, I will not run into precedents; but, only because it hath been told you, that the precedents were made in one reign by one faction, and then the attainders were reversed in another reign by another faction: There is one occurs to my mind, which hath been touched at, and is at least of instruction to me. There was a case in Ed. 3's time; there was the deposition of a king, a king barbarously murdered, and his son upon the throne; and there was the notoriety of the fact, for which a great man was attainted in his son's reign, and no different title; and four years after, a bill was brought in against the earl of March: And one of the articles against him was, that he had procured that attainder of that noble lord, under pretence of some letter, or paper, that was signed by him; which, if it was so, says the record, was no evidence.—I say this before gentlemen, to shew them how things have turned, and precedents that have been made very unanimously; but in bad times have been turned to shed the best blood in England. It grieves me to my soul to hear of Mr. Cornish, whose attainder you have reversed, to hear that quoted as a precedent in this house: It is not whether two witnesses be the rule of Westminster-hall, it is the rule of right reason; and it is a maxim in your law, make what law you will against the law of God, it is void: And this is the law of God, and right reason.—You must provide for the government; and when you cannot do it by course of law, then armies must do it, when the courts are shut. I hope gentlemen will not put a hard construction upon what I have said; I have done it to discharge a good conscience.

Mr. *Chanc. of the Exch.* Sir, I am for the commitment of this bill, because in my conscience I think sir John Fenwick is guilty; and because I think the power of parliaments may interpose in this matter: And if they have such a power, I think they may justly exercise it in this case. Gentlemen say, they will not dispute the power of parliament; and yet in their arguments they tell us, we are not to proceed otherwise than according to the forms of inferior courts. And if the parliament is not to proceed without two witnesses in the case of trea-

son, give me leave to say, there is no room left for a bill of attainder, unless you will take the business of inferior courts upon yourselves: And I am confident, several gentlemen, if there were two witnesses, would use it as an argument, what have you to do with it? Refer it to the ordinary courts of justice; and I am sure that would be very reasonable. But I do think that parliaments have that power, and they have always used it; and I believe it is for the advantage of your constitution. The inferior courts are to go by the letter of the law; and whoever can avoid that, is to escape punishment there; but the legislative is not to be dallied with: And if the offence be of that nature, that inferior courts cannot reach it, they can go beyond all forms to preserve the government. This they have done, and upon that principle you sit here. Was it by the forms of common justice below, that you declared the throne to be vacant, and king William to be lawful king? Is it upon the ordinary rules of Westminster-hall, that his title does depend? No, it depends upon this maxim, that the parliament of England are intrusted for the whole, and may constitute a government for the preservation of the whole. And upon the same right principle that I gave my vote to declare him rightful and lawful king, by the same principles I declare his enemies to be traitors.—You are told here, it is according to the law of God and nature, that there must be two witnesses in cases of treason: I do not pretend much skill in other parts of the world, I think it is our particular happiness to have this way of trial: I think in any other part of the world, if he had dealt thus with the government, he would have had another manner of proceeding against him, than to be condemned by king, lords, and commons: But that is your constitution; but it does not hold in other parts of the world.—Some gentlemen lay the stress of their argument upon the ill consequence it may have in another reign: I would avoid ill consequences in another reign as much as I could, but our immediate care is the preserving of the present constitution.—But if gentlemen are apprehensive, that by such an example, if king James should return, others may be punished; if we may judge what he would do, by what he hath done, he would go another way to work; if he came to London, he would proceed as his party did at Dublin, and attain all the protestants in one common bill; that is the precedent he hath set, and he will follow. And therefore in order to prevent that, and in order to punish our enemies, and to preserve our constitution and prerogative of parliament in all points; and because I am convinced in my conscience he is guilty, I shall give my concurrence for commitment of this bill.

Col. *Granville*. Sir, I would not presume to trouble you at this time of night, was the debate upon a less subject than it is; but since you are going to pronounce judgment in a case of life and death, and that this house is above any rules, and we have no precedent for it, but

every gentleman is to find out private rules to walk by; the rule that I shall take to is, that I would deal with sir John Fenwick as I would have mankind to deal with me: if I was in sir John Fenwick's place, and were indicted of high-treason, and were not allowed any trial, nor the benefit of making my defence, according to the known laws of the land; I should think my blood unjustly spilt, let me be never so guilty.—The laws are what are set up for the defence of every man; and when once we break through them, whatever our end may be at that time, and though it may in some manner seem to justify us, because it is to come at an ill man; yet pray consider, the best of men may be come at as easily as the worst of men. And what makes me cautious is, that my hands are guiltless of blood yet, and I will take care how I begin to dip them in it. And that which will make me cautious in any case of this nature is, what I read in the story of the late time, that when once a set of people had begun to dip their hands in the blood of my lord Strafford, nothing would quiet them till they had stained their hands with royal blood. The laws are the common defence between the king and the people; but the king is safest when the laws are most strictly observed.—I shall not pretend to talk of your power, which hath no other bounds but your justice and discretion; and what you think so, will, I hope, meet with approbation abroad. And in this case I shall always be against what is called a trial to-day: But I do not think it any: for I do think we are an unfit court to determine this matter. We sit in so many capacities, it is hard to distinguish in what capacity we are here: some are accused; it is hard to be accused, and to be a judge at the same time. I am sure I am as much concerned as if I was accused myself; and it is for my innocence and honour that I think myself bound to speak against this bill. For as no resentment shall make me do any thing that is unjust, so I fear nothing that he can say: and I will never go about to stop his evidence, by cramming a bill of attainder down his throat.—Besides, it is an unfit thing for any gentleman who is obliged to be of counsel for the king; it is hard for him to be so, and sit here as a judge: I think also to proceed in this manner, is a disrespectful thing to the king himself; for in this case you turn the throne of mercy into the seat of judgment. The king, who should have all the ways to ingratiate himself with his subjects; you make him, by this proceeding, to pronounce the sentence himself upon the life of a subject; and it is hard to offer a bill to the king in such a manner, by which you oblige him either to reject it (which was always looked upon as an hardship) or to pass sentence upon this gentleman, which perhaps his gracious temper and his mercy make him averse to.—Sir, it is too late to give you other arguments; you have heard a great many better than I can give: but I think this bill is unjust in itself, and dangerous in its consequence; and therefore I hope you will not commit it.

Sir *Herbert Crofts*. Sir, I did not think to trouble you in this debate, but only for the arguments that have been used by some that spake lately, who seem to lay a great load upon men, according as they give their vote in this matter, because it is in relation to the blood of a man. I have considered the point, I hope, with as much caution as any man within these walls, and hope to act with as strict a conscience as any man whatsoever; and shall be glad to be informed from those gentlemen, that have laid the stress so hard upon religion, how they can shew me, that I do not as strictly, as to all points of religion, give my vote for passing of this bill, as they would excuse themselves from it. I must agree with those gentlemen, that you are no ways bound or limited to the rules of Westminster-hall; and therefore what was said upon that, I did not think worth taking notice of; but when we are told, we are bound up by the laws of nature and religion, and the law of God, in this matter, this touches me so nearly, that I must desire those gentlemen to shew me in scripture the law they quote.—If it be the law of nature, and the law of God, that every man that dies must be convicted by two witnesses, as an honourable person observed, I wonder it is not observed by all Christian nations and governments, that they are not all governed by this law; if there be any direction from the law of God, that no man is to die for treason without two witnesses, but he may suffer for murder and felony with one witness. Now, I say, I must desire the gentleman that asserts it, that he would be pleased to shew me it in scripture, and I will be entirely of his opinion; but till I hear that very plainly proved, it is not within my reading or remembrance, and therefore I desire it may have no weight. And now I am up, I shall give my reasons, why I shall give my vote for this bill.—The reason that governs me, is the preservation of the government, and the commonwealth under which I live; and which I think I am in the station wherein I stand bound to preserve by all the rules of justice imaginable. Now if your law hath bounded inferior courts, but hath not bounded you in this matter, though you have said inferior courts shall not determine and give judgment in such a case; yet, I think, you are not bound up so here: but if the matter be proved to my satisfaction, I may give my judgment according to the evidence that comes before me, without that restriction.—But, sir, this ought not to be done, it is said, but upon extraordinary occasions. You were told some time since of the case of the duke of Monmouth; but it was said, that he was attainted because he was in arms, and could not be come at otherwise: but I think this is a parallel case to that, if not much stronger: for here is a person that hath been accused, and fully proved to have been in rebellion, and in treasonable practices with your enemies, to bring an invasion upon you, and to subvert your government; and though he hath not been proved to have been in that

single act of the assassination, yet there is such a correspondency between one and the other, that I do look upon him as equally guilty of both. Therefore this having been so fully proved, and the person that stands accused being out of the reach of the common course of the law; what remedy have you, but to fly to your legislative power, to attain him upon the grounds and allegations of your bill, that one witness is withdrawn? And I am very well satisfied, and I think we may presume it is by his own, or his friends encouragement and procurement. And I do take this to be as reasonable a ground for your bill, as any thing in the other case; and I know not what is an extraordinary case, if this be not one: is it not an extraordinary case, for a plot to be laid for the total subversion of this constitution, and our religion for ever, and we cannot come at it to punish it another way? But it hath been said, the safety of the government does not depend upon him: if we acquit him, we are to acquit every one alike: I hope the government does not depend upon him alone; but if you clear him, there is the same right to clear any criminal whatsoever. Sir, since I am brought up upon giving my judgment in this matter, (though I come as unwillingly as any body to it) I must go according to my conscience; and till I can see something of the law of God, that has been hinted at, made out, I must go according to the law of my reason; and that is, that I must be for the bill.

Lord *Norreys*. I will not pretend to tell you what the authority of this house is, it is what they please to make it; but I am sure they will ground it upon good reason; but I think the reason chiefly given for the commitment of this bill, leaves you a latitude to do what you please, and give no reason at all; for it is only to say, I am convinced in my conscience this man is guilty; no matter upon what proof, no matter whether any proof or not: you may believe it from his life and conversation, and the company he keeps, or from his interest; and that may be argument enough to find a man guilty. But till I know a reason better grounded than this, I cannot be for the commitment of this bill.

Sir *Christ. Musgrave*. I am sure at this time of night I am unfit to speak in so great a matter: I must confess I should not have troubled you, if it had not been in the case of blood.—You have had a great debate before you of the power of parliaments, and that hath been sufficiently argued; and I have not learning enough to give you any precedents that have not been already quoted: but every body does agree in this, that what power you have of this kind, is not to be exercised but upon extraordinary occasions. Now I would be glad to know, what this extraordinary occasion is?—Every body allows, that treason is the greatest crime a man can be guilty of; and the charge of this gentleman is high-treason: but therefore, in this case, must you exercise this authority? Pray, wherein does this case differ

from any other case of high-treason, that any other person will be practising against the government? All the difference I can make of it, consists in two points; the one is, that he hath prevaricated with the government; and the other, that gentlemen say he hath been a means of procrastinating his trial, in which time an evidence hath made his escape. I will allow you, that it is a very great crime for any one to asperse so great men as he hath done; but I would be glad to know, whether there being such an ingredient, it be sufficient to attain him upon high-treason upon that account.—Then as to that of a witness being gone, gentlemen have said, they are apt to believe, and there is great presumption that he hath been the occasion of this witness being gone. Is that an ingredient sufficient, though at present it hath not been proved to you? But if it had been proved, I should not however think that is treason. Then if this be the only difference between this gentleman and any other person that shall be practising to subvert the government, I would know, if there be but one witness against any man, for conspiring against the king, if they may not have recourse to this precedent, to proceed against him by a bill of attainder? For the argument is, Whosoever is endeavouring to subvert the government, provided there be but one witness, you are obliged, by virtue of your legislative power, to bring a bill of attainder against him. And what then? Of what use is the great care and wisdom of your ancestors, and yourselves, that where a crime is so great, and the punishment so great, there should be two witnesses?—I was mightily surprized to hear gentlemen tell you, that two witnesses is a form in your law, and a form in inferior courts. I never could believe that was a form; for according to your law, no man shall be declared guilty of treason, unless there be two witnesses against him; so that it gives, in a manner, a determination to the crime; that I take to be the case.—A gentleman told you that he was fully satisfied by the proof, that this gentleman is guilty: But how can a man satisfy his own conscience, to condemn any man by a law, that is subsequent to the fact? For that is the case; and pray see the danger of precedents: It now will appear upon your journals, that you have caused to be read a deposition of a person that was absent, taken before a justice of peace, when the person accused had no opportunity to interrogate him; and likewise, that you have heard a witness as to what a man swore in the trial of another man: All this will appear upon your books.—And truly, I would be glad to know, if another age may not be apt to think, that you took these to make good the defect of another witness; and then I must appeal to you, if you have not admitted of a testimony, which according to no law is admitted.—They say you are not tied to the rules of Westminster-hall, nor their forms. Is there any law in being, that says, a judge may hear a witness as to what was sworn upon the trial of another

person, to condemn him that was not party to that trial? If there be no such law, then the rule is founded upon justice and common right, that nothing shall be brought against a man when a man was not a party when the oath was made, and he had no opportunity to examine him.—I thought it my duty to tell you, that when you have made this precedent, if any person shall be accused of treason but by one witness, there will be the same reason to proceed thus against him.

Then (being a little before eleven a-clock at night) the question was put,

Whether the bill should be committed? and the house divided: Ayes, 182. Noes, 128. So it passed in the affirmative, and the bill was committed to a Committee of the whole house.

Nov. 25. The house resolved into a Committee of the whole house, upon the said bill, and several words being offered as an amendment to the said bill, to import sir John Fenwick's being guilty; at last the words that were agreed on, were these, 'Of which treason the said sir John Fenwick is guilty.' It was also proposed to the consideration of the said Committee, whether the lords spiritual should stand in the enacting part? But upon looking into the several acts of attainder, it appeared they were unconcerned in all those acts of attainder, in the enacting part; and so the Committee was satisfied in that point, and they were left to stand in the bill by general consent; and the bill was ordered to be reported to the house; and afterwards, upon the report, the house agreed with the Committee in the aforesaid amendment of the words, importing sir John Fenwick's being guilty.

Nov. 25. The said bill against sir John Fenwick was read the third time.

Mr. Methuen. Mr. Speaker, I have not troubled you in any of this long debate, and do it unwillingly now: but I do think it every man's duty, in a case of this great importance, freely to own his opinion, and give his reasons for it. The greatest part of the debate hath run upon two things; the inconveniency of bills of attainder, and the having them too frequent; that it is necessary to have them sometimes, that any person might not think they are not out of reach, if they could evade the laws that were made to protect the people.—I think, in general, that this bill, as every other, ought to have its fate upon the particular circumstances before you; and whoever gives his affirmative to this bill, ought to be convinced, that sir J. F. is guilty of high treason; and also, that there are extraordinary reasons why the nation does prosecute him in so extraordinary manner; and I do think one of these is not sufficient alone. If between the indictment and arraignment, or trial, Goodman should have died, and there had been no other reason for attainting sir J. F. only the defect of his evidence, I should not have thought it a sufficient

reason, though we should have had an opportunity of being informed of his particular evidence, and believed him guilty; and if sir J. F. does not appear guilty, I do not think any reason of state, though he hath prevaricated, and behaved himself to the dissatisfaction of every body; therefore, I think, there must be both these.—You have heard the evidence; I shall not repeat it, but rather come to these things that distinguish sir J. F.'s case; only thus, you have received the evidence against sir J. F. and given him liberty to make his defence, and have fully heard him; which I think hath altered the reason of a great many precedents cited from my lord Coke, and other authors.—That which distinguishes this case is, the great danger the nation was in from this conspiracy, and the sense the nation hath had of it; and I find, by the general opinion of all persons, this danger is not at an end. There seems likewise to be an opinion as general, that sir J. F. could have contributed to your safety by a discovery.—The next circumstance, that sir J. F. knowing of this, and the expectation the nation had from him, for that he could have contributed to your safety, hath made use of that to put off his trial; and at last, has made such a paper, as does shew an inclination to do you all the prejudice he can, and tended to the creating of new dangers; and by this means sir J. F. against whom there was two witnesses when he was indicted, hath delayed his trial, so that now there is but one; and there is a violent presumption, that this person is withdrawn by the practice of sir J. F.'s friends.—There remains yet with me as great a consideration as any of these: the public resentment of the nation for such his behaviour, is the only means his practice has left you; and it seems necessary for your safety, to come the next best way to what he could have done. Against the evidence that hath been given, there have been great doubts raised; not so much whether it be such evidence as may incline us to believe him to be guilty; but whether it be such as you should hear in the capacity you are in; and whether, after it is found, such as it is, that is not such as would convict him upon another trial. Whether you ought to credit it, and that should influence you to give your vote for this bill of attainder; this is a doubt that I find weighs generally with them that differ from me in opinion about this bill; and therefore I desire leave to speak to that particular.—It is said, that you are trying of sir J. F. that you are judges, and that you are both judges and jury; and that you are obliged to proceed according to the same rule, though not the methods, of Westminster-hall; *secundum allegata et probata*.—But the state of the matter, as it appears to me, is, that you are here in your legislative power, making a new law for the attainting of sir J. F.; and for exempting his particular case, and trying of it, (if you will use that word, though improperly); in which case the methods differ from what the law requires in other cases; for this is never to be a law for any other after-

wards. Methinks this being the state of the case, it quite puts us out of the method of trials, and all the laws that are for limiting rules for evidence at trials in Westminster-hall, and other judicatures; for it must be agreed, the same rule of evidence must be observed in other places as well as Westminster-hall, I mean in impeachments, and it has always been so taken.—This notion of two witnesses has so much gained upon some gentlemen, that we have had some gentlemen say, that this is required by the law of nature, the universal law of nature, nay, by the law of God. And I think, if it was so, there would be no doubt but it will oblige us.—But therefore I go to the bottom of the matter: that any man deserves to be punished, is because he is criminal: that this or that man deserves it, is because he is guilty of a crime, let his crime be made evident any way whatsoever; for whatsoever makes the truth evident, is and is accounted in all laws to be evidence.—Now as to the rules for examining any person, whether he is guilty or not, and the evidence that is allowed in all nations, no two nations agree in the same evidence for the trial of criminals, nor in the manner of giving the evidence against them. Your trials differ from all other nations; not only that you are tried by a jury, which is particular to you; but that the witnesses are to be produced face to face before the offender; and you have made laws, that there shall be two witnesses in cases of high treason; and herein you are the envy of all other nations.—Sir, the evidence that is to be given against criminals, differs in the same nation where the offences differ: there is a difference between the evidence that will convict a man of felony, and the evidence that is to convict a man of treason; and the evidence to convict a man of the same crime, hath been different in the same nation, according to the reason of the law. No doubt, by the common law of England, that evidence was sufficient, which was sufficient to incline the jury to believe the person guilty. This before the statute of Edward 6, though that was made upon great reason, and appears to be for the public good, by the general approbation it hath received; but I do not think in your proceedings here, you are bound by it.—But, sir, it is said, shall we that are the supreme authority (as we are part of it) go upon less evidence to satisfy ourselves of sir John Fenwick's guilt, than the other courts? and shall we resort to this extraordinary way in this case?—Truly, if it did shake the manner of trials below, I should be very unwilling to do it; but I do take it clearly, that it cannot: but on the contrary, I think there is no stronger argument for your resorting to this extraordinary way, like to that of the caution which your law hath provided for the innocency of all persons. For if we consider all those laws that have been made, it is plain it must be in the view of our ancestors, that criminals might not escape: and the laws are made for your ordinary trials, and for those things that happen usually; and your government hath

this advantage, that they can keep to that which others cannot: for in a very wise government (as was observed by a person that sat in this House the last time this was debated) the ways of punishing crimes of this nature are extraordinary, when persons are condemned: they are not only unheard, but they are condemned before they are accused; and that is thought necessary there, which will not be endured here: and yet that government hath continued so long, and no endeavours have been to alter it, though so many noble families have suffered by it, because they are convinced, as to their constitution, it is necessary.—The next argument is from the precedent we are about to make; and whatever the other precedents have been, what you do now will be a precedent for you and your posterity; and whilst that is used to make you cautious, and tends to make you consider well, whether it is according to the duty to your country to pass this vote (which no doubt is the only question before you), it is a good argument.—Sir, if this precedent shall appear to posterity to be a precedent concerning an innocent man, or a person whose guilt was doubted of, or one whose guilt did not appear, and this bill should be carried by a prevailing party, I do agree it was a very ill precedent: but if the case be, that this precedent will appear to posterity, upon the truth of the thing, to be a precedent made of a man notoriously guilty; of a man that had deserved this extraordinary way of proceeding, this extraordinary resentment of the nation; and that nothing could have hindered this man from the common justice of the nation, but his having endeavoured to elude it in this matter; and if it appears that you would not be put off so, but made an example of this man, I shall not be sorry it should appear to posterity; but I believe posterity will (as I think they ought) thank you for it.—Sir, I do say for my own particular, while I am innocent, I should not think my life in danger to be judged by 400 English gentlemen, and the peerage of England, with the royal assent; and when I reflect, I cannot be of opinion, that the government could have procured a parliament to have passed a bill of attainder against my lord Russel, or Mr. Cornish, or Mr. Colledge, I do not think all the power of the government could have prevailed with the parliament to have done it: and here I see that a great many gentlemen have opposed every step of this bill, for fear of making an ill precedent; yet those gentlemen do believe in their own consciences, that he is guilty; and I cannot think that any person can be in danger by such a bill, when gentlemen oppose this bill only upon the prudential part, though they still confess him to be guilty.—All the conclusion I make to myself is, that I do believe, I am convinced in my conscience (which I think is sufficient, when I act in the capacity I now do) that sir J. F. is guilty: but there are reasons so extraordinary to support this bill of attainder, that I do not see how any person, that is so convinced, can refuse to give his affirmative to this bill.

Sir Godfrey Copley. Sir, I am very sensible a great deal hath been said upon this subject; but I think there is something in duty incumbent upon every man, especially upon me, who cannot concur with the general sense of the House, to give my reasons for my disagreement; and I will make no use of arguments but such as I cannot answer myself. A great deal hath been said upon this debate by gentlemen learned in the law: and many of these, though they have said they would not speak as to the power of parliaments, yet the greatest part of their arguments have touched upon your method of proceedings, and to shew you how they interfere with the rules of Westminster-hall; so great is the force of custom and education: but I acknowledge some have brought us arguments quite of another strain.—This is a matter of so extraordinary importance, that I think it proper to consider what rules we have to go by; but I take the punishment of offenders and criminals, to be the necessary support of all governments whatsoever, without which no government can continue; but all societies of men have supposed to themselves some rules, whereby it may be known, whether offenders are guilty or no.—It is the custom of our nation, to have two positive witnesses to prove treason. Now it may be imagined, that I make use of this as an argument, that we are tied up to these rules: No, I am not of that opinion, that we are bound by the rules of any society whatsoever. The parliament have power to abrogate all laws that they have passed, if they think good; and so certainly cannot be tied up by any rules now in being. But, sir, there are the eternal rules of equity, and justice, and right reason, and conscience; and these, I think, are unalterable, and never to be swerved from; and therefore I shall take the liberty to see how far agreeable our proceedings are to these rules.—Sir, I do look upon it, that it is a rule agreeable to what I speak of, that no man shall be accused by he knows not whom; and that no man shall be accused, but that the evidence against him, and he, should be confronted, and brought face to face.—I am one of those that believe sir J. F. to be guilty; and there is clear proof of it by one witness; and you have added to this an indictment that is found: but I must needs own, that I think that to be so far from giving any addition or strength to the evidence, that when that is brought in, I look upon the scales to be lighter than they were before: for if any record or writing that is sworn to behind a man's back, shall be brought here to supply another part of the evidence: (and if not so, why is it brought here?) and if that be to be interpreted to make up a part of the evidence, I do, by parallel reason, argue, that the like may make up the whole at one time or another; and may be so far made use of, that any profligate knave, that gives information before a justice of peace, or a secretary of state, this may rise against any man whatsoever when he is obnoxious to the government; or a person may be accused for his good service in this reign, and this may be set up

against him, and he run the hazard of his life. —Then, sir, as to the necessity of this matter, I must confess, that those that brought this matter before us, are much wiser than I: and therefore I will not examine what reason they had to do it: but it is so little agreeable to me, I wish it had not come here. But is it to be supposed, that your government is in hazard of any man that is fast in Newgate? Can any man think, that sir John Fenwick can do any thing in his condition to hazard it? Can you expect that a man that hath been six months in prison, and nobody came at him, that he may make such a discovery as may be worth your while? but suppose you had a man of invention and practice, what a spur do you put to it? May not a man of parts, when he hath no other way to save himself, may not he frame such a plot, as may make the best subjects in England tremble?—Why then, sir, I do say, by this you are in a very dangerous way to suffer by the invention of any man: and suppose he should be so ignorant, as to know nothing; or so great a blockhead, to be able to invent nothing, would you hang him either for ignorance or insufficiency: I must confess, I dread the consequence of this for the nation in general, and for our posterity. It is not sir John Fenwick's life I argue for: I do not think it worth a debate in this house, nor the consideration of so great an assembly; but I do say, if this method of proceeding be warranted by an English parliament, there is an end to the defence of any man living, be he never so innocent.—Sir, I remember I heard it mentioned on the other side of the way, by an honourable person, who never lets any argument want its weight, that king James attainted a great number of persons in a catalogue, in a lump. Sir, I am not afraid of what arbitrary princes do, nor an Irish parliament; but I am afraid of what shall be done here: I am concerned for the honour of your proceedings, that it may not be a precedent to a future parliament in an ill reign, which I am satisfied you would not do. I had some other thoughts, which I cannot recollect, &c.

Mr. *Foley* (the Speaker's son). Sir, the worthy gentleman that spake first upon this debate, calls me up: he said, that he thought in this matter, every one ought to give the reasons of his opinion: and in giving the reasons of my opinion, I do solemnly protest, I do it with the same sincerity as I would do, if I was upon my oath, and of a jury.—The worthy gentleman said, that if there could be any danger from this precedent, that an innocent man might lose his life, he would not be for it. I desire that he would consider, whether there be almost any instances of any innocent men that have lost their lives, but what has proceeded from precedents that have begun upon guilty men. The same gentleman told you, that if we did not believe sir J. F. to be guilty, no other consideration ought to move us to be for this bill.—Now the reason I am against this bill is, because it does not appear to me, from the evidence that hath been given at the bar, that sir J. F. is

guilty. And I do think, that which is not legal evidence is no evidence; and I do think, that all the lawyers that have spoke in this matter, have allowed it to be no legal evidence. And I desire gentlemen will consider, if it has not been thought reasonable, that men should be convicted upon such evidence, why now it should be said to be necessary? I think the saying of my lord Strafford upon his trial was this: if the pilot was to direct a ship in a dangerous sea, and there was no buoy to direct his course, if he there split his ship, it was excusable; but if there was a buoy up, then he was accountable for it.—Now, comparing our government to the sea, there hath been many rocks and sands, and many men have lost their lives by them: but the treason bill seems to be set as a buoy to avoid that mischief for the future. Now if we split upon these rocks, I shall think we are but ill pilots.—Upon a former debate we were told, we are not tied up to the rules of Westminster-hall, and it was sufficient to justify a man in giving his vote for this bill, that he was satisfied that sir J. F. was guilty: see the consequence of that, in things that I have as much believed as I do this, I have found myself mistaken.—When a jury acts according to legal evidence, that they have no reason to mistrust: when a jury finds according to legal evidence, they are in no manner of blame: and if this man be innocent, when you have taken away his life, and his estate, and ruined his family, all that you have to say for it is, that you have acted according to the best of your own understandings, guided by your own private opinion.—Were this the case of sir J. F. only, and I not to give my vote, I reckon him so despicable, and because I believe him to be a traitor, and I think the worse of him for the part he hath acted since he was in custody, I should not concern myself about it. But when I speak against this bill, I speak on the behalf of all those that may hereafter suffer by such a precedent as this. Those precedents that have been urged, do not come near this point. And though the power of the parliament is above that of other courts, yet there hath been no precedent that comes up to this, that we should pass a bill to attain sir J. F. because he will not give evidence, or there is no evidence against him. If sir J. F. be to be hanged, because there is but one evidence against him, any man in the world may; and then I think every man's life depends upon it, whether this house do like him or not. Consider what a reverse of opinion this will be, to what former parliaments have given in cases of the like nature. I think if this bill does pass, every man's life will be as precarious as his election.—We have been told, how much danger the government will be in, if this bill does not pass. I have as much zeal for this government as any man; but all the government is concerned, is, that a man that you think a traitor should live. And I do think the government is no more concerned in this life, than in the living of any Jacobite in England. But on the other hand, I think the lives and liberties of

the subjects of England are concerned ; and, by this bill, you will make all their lives and liberties precarious.—I am not for bringing the blood of sir J. F. upon me, or my posterity ; nor can I consent for to make a precedent, that a man may be hanged without evidence.

Lord *Cutts*. The worthy member that spake last but one, told you, that he thought the life of sir J. F. was not worth the consideration of this assembly : I do differ from him in that. If the Scripture tells us, that the most insignificant creature does not fall without God Almighty's consideration, I think the life of a gentleman may be thought worth ours. The worthy gentleman that spake last, told us, that he did believe in his conscience sir J. F. to be guilty : but because he hath found himself mistaken formerly, when he believed things with the same appearing certainty, therefore he may be mistaken now. I hope gentlemen will not press an argument upon our judgments, from precedents that are only mistakes : I do agree, that any man may be mistaken in a thing which at that time he thinks himself most certain of : but till that mistake appears, I say, it ought not to make him doubt of any thing that he does clearly and distinctly perceive : if otherwise, there is an end of all religion and law ; and it shakes the foundation of the most certain belief a man can entertain.—As it appears to me, some gentlemen seem to lay a greater stress on some things than they deserve, and are not pleased to answer some arguments : and therefore I desire leave to speak to two or three points in short. I shall not say any thing of the authority of parliaments, it speaks itself ; nor of the different consideration of our proceedings, and that of inferior courts ; that seems to be agreed : but I shall apply myself particularly to mention some things upon sir J. F.'s case, and in that take care, as near as I can, not to trouble you with any thing I have said upon this subject.—I cannot but observe, that every gentleman that speaks against this bill, begins with an introduction, that he believes him criminal ; which does somewhat astonish me : I hope they will explain themselves a little. But to the point : as to sir J. F.'s case, I did take the liberty in a former debate to observe, that it was not only a conspiracy against the lawful king of England, and had such parts in it, but also in bringing in a tyrannical and foreign power upon you. But there is one consideration I did not mention then, because I thought what I said carried so great weight, it needed it not : I do say, not only as a Christian, as an Englishman, and as a subject of this government, against which he hath committed a crime of the highest nature ; but I will say, as a man of honour, that he hath acted contrary to the rules of honour. I think sir J. F. had made a much better figure, if he had appeared in arms, in Flanders, where he might have charged this prince at the head of his troops, than basely have contrived his death in this manner.—Sir, I have only one thing more that I desire to speak to ; for what I say is more for

my own information than to desire any man's opinion further than he agrees with it : I say, most gentlemen have likewise owned, that if they thought this an extraordinary case, they would be for this bill. I do say, as it appears to me, I do think, if ever there was an extraordinary case, this is one ; and if ever any government was in danger, this is, or may be, upon your resolution to day. A great deal of stress hath been laid upon this argument, that sir J. F. is in hold : I take that to be nothing, for they keep a combination together still. It is by rewards and punishments that all governments are supported. Robberies, that were so common in France, that you could not walk after it was dark, by punishments they have been brought to that, that you may ride from one end of it to another with a purse of gold in your hand. And if you think it a trifling matter, that wicked men that have such inclinations should escape, I do not doubt but you may have plots every day.—I do not doubt but this gentleman knows a great deal that he hath never laid before you. I would not be thought to press it as an argument that he should be condemned, because he would not confess ; but I will be bold to say, if he does know of a great many persons that have been concerned in this business ; if he knows of a rising that was designed, when this conspiracy was to be executed (and it may be executed still, if things shall be ripe for it) ; I say, though you keep him in hold, it will be an encouragement to them to go in the cabals, in buying of arms, &c. I think the matter before you is no less than the fate of England, and the fate of Europe, and of all your posterity ; I am sure it is : and give me leave to say to you one thing that is matter of fact, there are those stories insinuated abroad, and those matters of facts asserted, with relation to a conspiracy, and reviling this house, that are not fit for me to repeat. But your enemies last year, before the breaking out of this conspiracy, had the same sort of meetings, and the same sort of discourse, as they have now. I will end with protesting to you, that I deal with sir J. F. with the same candour and honour, as I shall always desire to be dealt with myself.

Sir *Godfrey Copley*. That noble lord misunderstood what I said, as to the small value I put upon sir J. F. ; I did say, that sir J. F. considered in his single capacity, I did not think it was worth the while of this House to act in their legislative capacity upon him.

Sir *Ch. Cartwright*. I think this bill is of very great moment, and ought well to be considered before it passes ; for when it is passed it will be too late to retrieve the ill consequence which may attend it ; there is so much roguery in the world, I think it hard matter to arrive at the truth. It is not long ago there was a plot contrived by one Young, and others, against the bishop of Rochester ; and so cunningly contrived, that if a bill of attainder had been brought in against the bishop of Rochester, before the truth had been discovered, I do

not know what might have been the consequence of it. I suppose nobody questions the truth of this plot; but God forbid that every body that hath been named for it should be guilty. It may be true, that there was such a meeting that sir J. F. is accused of being at, and yet sir J. F. might not be there; and I do not think it sufficiently proved, and therefore I cannot give my consent to this bill.

Mr. Manley. Sir, I have, as well as I could, attended to this debate in this matter; and I did not trouble you in the last debate, because I was willing to take all the opportunities I could to inform myself. It is to me an extraordinary thing, not only for the matter, but manner of your proceedings; which, considering all circumstances, appears to me to be not only not common, but unprecedented; and as we are all in this matter judges, so I hope we shall apply ourselves to consider of it with that temper, as may lead us to give a right judgment. And if I had never so great obligations upon me, and dependencies, though from the crown, I would lay them by, at least they should not influence my judgment in this matter. We are to pass judgment in a matter of life and death upon this person; and it is urged we should do it, because the common course of justice will not reach him for the crime objected against him, which is high-treason; and the species of that treason, as it is laid in the indictment, is, &c.—Sir, the evidence that hath been given to support it, hath been the affirmation of a single witness at the bar; indeed other things have been alleged in the bill; but, as hath been said in Westminster-hall upon another occasion, they look like pepper and salt to me; for in themselves they are not crimes (I speak with submission to your judgments), at least to bear company with an accusation of high-treason.—As to the evidence; first, capt. Porter tells you, That sir J. F. was at a meeting at the King's-head, and at Mrs. Mountjoy's afterwards, when there were treasonable discourses amongst them, and Charnock was directed to go into France; but the end of that is not proved; for the witness that told you of those meetings, did not tell you, as I observed, that Charnock did go to France; and what he said upon other occasions, is no evidence to me. And though we are not tied up to the rules of Westminster-hall, I am so young a member, I know not what methods are observed in parliament, that I may in some measure make them a rule to me.—The law of England requires two witnesses upon the greatest reason; and it is not only the policy of England, but the general consent (in this case) of the whole world, and it is grounded upon the law of God. It was objected by an honourable gentleman the other day, to a gentleman, that he said the law of God required two witnesses. A gentleman who is very near allied to one, from whom he might have early informed himself, made us a challenge, to shew him where it was to be found: if he will look into Numbers and

Deuteronomy, there are three particular texts very plain in it. The reason of this is illustrated in the story of Susannah; her safety depended upon it: and the Jews, when they prosecuted our Saviour, though they wanted no malice, nor nothing to animate them to put him to death, yet St. Matthew tells us, at last there was two witnesses found against him: and this being the law of the land, and the law of God, must be my rule; I must have this matter proved against sir J. F. as full as the law of the land, and the law of God requires. The other evidence brought to maintain this bill, is what is sworn by Goodman before a justice of peace, and the account of the evidence given by Goodman to the Grand-Jury, which, I must confess, I declare I am very far from being convinced ought to have weight with us: but, I think, they must lay a great weight upon it, who give their vote for this bill; or otherwise they must give their vote upon the testimony of one witness.—The reason for this extraordinary proceeding is, it is urged, there is a necessity for it; the plot will be lost else, say some; sir J. F. says others, will escape else. As for the plot, I wish to God there was no such thing; but it is probable the best way of ending this plot would be, if his majesty in his wisdom thought fit to interpose with his mercy and grace at this time; and better than for the legislative power, in an extraordinary manner, to take off a person against whom there is not a legal evidence. Gentlemen say, they are convinced in their consciences; but I will appeal to their consciences, whether there be legal proof against him; and shall we then interpose, in an extraordinary manner, to take away his life?—No man pretends to answer, but that this proceeding may be dangerous to posterity: if he had any security this might be done without that danger, it might be some encouragement to gentlemen to come into it, but since it may be dangerous, are not we, who are entrusted by the people, to have an equal care for the liberty of the people? We are to take care of his majesty's life and government; and the reason is, because upon him, and his government, the public safety does depend. It is *salus populi*, is the great reason that the law takes such care of the king; and as we are to do nothing to the detriment of the king, so we are to do nothing for the king that may be of detriment to the people.—An honourable lord hath been pleased to say, we are not yet out of danger: I am sorry to hear it, and could not think it, when so noble a lord is so near the king, and hath so great a share in taking care of the public safety. But sure, nothing can happen from this person; there hath been care taken he should have no conversation with any body: If I thought there was a hazard to the government, or to the king, and no way to secure us, but taking away this gentleman's life; such a reason as that would make me go counter to my own reason and judgment. But I cannot be of opinion, that a man of sir John Fen-

wick's size, who in his best circumstances, indeed, is a gentleman by birth, and hath a gentleman's fortune, but is now in a great measure without his estate; so his fortune cannot do any hurt, and his alliance, I suppose, is not considerable enough to do any neither.—Then as his circumstances do not make him so considerable as to do us any hurt, let us take care, that we do not in any case, by his blood, wound ourselves. Gentlemen lay but little stress upon the dangerousness of the precedent: I do lay more; and it is chiefly upon that reason I cannot come up to be for this bill. I would not that so good a parliament should lay the foundation of any, by which, in after-ages, the best men in England may suffer. It is said, an ill parliament will not want a precedent, but will make use of their power; but they will fall sooner into, if led by a good parliament.—Sir, this is a matter I would not have presumed to have troubled you in: for I cannot think any thing I can say, will have any weight with any one that is not of my opinion: but as an Englishman, as I have the honour to be of this House, when a thing of this nature comes before us, and I am to give my opinion as a judge in it, I was willing to give my reasons for my opinion. I think this bill is unprecedented; and you will give me leave to say, it appears to me to be unreasonable; I think it contrary to the fundamental rules of reason and justice; I doubt it may be dangerous to our constitution; and I fear future ages may have reason to repent what we do; and therefore I am against this bill, and hope it will not pass.

Sir Wm. Strickland. Sir, I do assure you, I shall not in any thing of this bill, or any thing else, run counter to my conscience or judgment; but I do think, and I think few deny it, I do think in my conscience that sir J. F. is guilty; and thinking so, I ought to condemn him. I do think, if we should spare this gentleman for want of form, as they call it, now we are in our legislative capacity, and there should be any ill effects of it; and other people, by thinking they might avoid punishment by the forms of Westminster-hall, should have the like imagination against his majesty, and they should take effect; I should think myself in a great measure guilty of that misfortune. I think the kingdom is concerned, and the king's preservation, in this bill; and I hope you will pass it.

Mr. Dolben. I am against passing of this bill; and I shall, with as much brevity as I can, lay before you my reasons why I am against it; and probably I should not have troubled the house with them, but that I think it necessary to justify my opinion in a case of this importance. I do admit that the fact that is charged upon sir J. F. is an overt-act of high-treason, within the 25th of Edw. 3, though I must take leave to say that a judgment upon a case, at least as strong as this, has lately been very much arraigned and controverted: but it is not my intent to dispute the nature of this fact; for I am persuaded,

that to consult how to procure an invasion of this kingdom with foreign forces, is an overt-act of compassing the death of the king; and I do think this charge does amount to such an overt-act. But I beg leave to reflect, how far overt-acts of this nature, which fall directly within any species of treason mentioned in the 25th of Edw. 3, how far such treasons are cognizable in parliament, and within the intention of that statute; indeed, that they are cognizable by the absolute power of parliament, there is no doubt. Sir, that the statute doth first enumerate several species or branches of facts, which it says shall be adjudged treason, that is, in the courts of judicature; and then afterwards it goes on, and says, 'If any other case supposed treason, not specified in that act, doth happen before any justice, the justices shall tarry without any going to judgment of the treason till the cause be shewed and declared before the king and his parliament, whether it ought to be judged treason or felony.' Now, Sir, with submission, this is a great argument, that the intention of those that made this law was, that these treasons, which were directly under any of these particulars enumerated by the statute, that they should be left, and be appropriated to the decision of the inferior courts; but that facts of another nature, which did not come under the particulars enumerated in the act, as extraordinary offences, and misbehaviour of magistrates and great men, and the like; these indeed should be reserved for the consideration and judgment of the parliament, who are only a match for powerful offenders, whom the common justice of the kingdom cannot grapple with. And as this seems to be the intention of the makers of the act, so I think the instances generally have been pursuant to that institution; for I know of but one single instance of any one that ever was attainted by bill for any treason that is contained under any species enumerated in the 25th Edw. 3. It is true, where persons have been out of the reach of the law, in open rebellion, or fled from justice; in these cases the parliament have thought fit to attain them; as in the case of sir John Mortimer, and others who made an escape out of the Tower; and the case of the regicides, and likewise the case of the duke of Monmouth, who was in open rebellion: but I say, that I have not found in my reading, upon the best search I could make, where any that were in custody were attainted by bill for any treason within 25 Edw. 3, and that was the case of Ferham; but I think there is no precedent of any man, who is not only in custody, but hath been indicted, arraigned, and issue joined, and he hath put himself upon his country for his trial: and the person accused was to be convicted, or acquitted, by the verdict of twelve men; I never heard of any instance, when after all this proceeding a person was taken off from his trial, and debarred the benefit of the judgment of his peers, and the benefit of his challengers, and destroyed, and

cut off extrajudicially by an act made on purpose, *ex post facto*: I never met with any instance like it, unless it be that of my lord Strafford; and I believe nobody will cite that, if they reflect upon the preamble of the act for reversing his attainder: for in the preamble it is said, that the turbulent party did attempt the procuring of that act, on purpose to condemn him. This shews the opinion of our predecessors in relation to proceedings of this sort; they esteem it contrary to the fundamental rules of justice and right, which parliaments, as well as other courts, must be governed by. Roger Mortimer was attainted, and afterwards his attainder was reversed; and the reason declared, because he was attainted against the good laws and customs of the kingdom. Ferham's, that I mentioned before; and declared for the future, that it should be, &c.—Another attainder there was of sir Thomas Haxey; but that was reversed, and declared to be against all law. Then there are the attainders of H. 8's time; I shall not particularize them; but besides that, all the history of those times, and law-books, condemned them, as proceedings against all law and justice. There is the statute of 1 Edw. 6, c. 12, seems directly levelled against those attainders in the preceding reign; for it says, that the proceedings in king H. 8's time, were grounded upon laws that were extreme and terrible; and therefore that there might be no proceedings of that kind for the future, it reduces all treasons to the ancient standard of 25 Edw. 3, and goes on, and enacts that no man shall be convicted or condemned for treason, but upon the testimony of two lawful witnesses.—Now, I take that to be a general law, and to extend to all convictions and condemnations for treason; and cannot but declare my opinion of it, that it must extend to bills of attainder, since these are the principal and most powerful convictions and condemnations; and if that statute does extend to bills of attainder, then pray consider, whether this bill of attainder now be supported by such evidence as the statute requires? There was indeed one lawful witness produced: but instead of the other, they have only produced a record between parties not concerned in this bill, and the depositions of a person, whether living or dead, *non constat*; and I believe nobody will say these depositions will be equivalent to a second witness.—I do believe a great many gentlemen are of opinion, that those rules of evidence are not to guide you here: But I beg pardon that I cannot possibly be of that opinion; I rather incline to my L. C. J. Vaughan's notion, that though we are not bound by the forms of law, yet we are bound by the rules of law: every body allows we are bound as to the nature of the fact: every body will take himself bound by the statute of 25 Edw. 3, to form his judgment as to the fact: Why are not we then bound by these acts? Likewise as to the evidence, and the proof of the fact: if 25 Edw. 3 be binding to us, so as to prescribe us a rule to judge the fact by, why are not the statutes

of Edw. 6 binding to us as to the evidence of that fact?—But say some gentlemen, if there be not two witnesses, that is from sir J. F. or his agents. Sir, no gentleman will say, that there hath been any proof of that: the very bill does not charge him with it; But taking it for granted, what shall follow upon that? Shall it therefore follow, that sir J. F. shall immediately be put to death? No, God forbid! I think there is no parity between the crime of seducing away a witness, and the judgment of death: But I think this a more reasonable and natural inference to be made, that because sir J. F. hath seduced away a witness, therefore it is just to make a law, that the depositions of that witness should be of as good force and effect as if Goodman was here to give it *viva voce*; for then you will not take from him the benefit of his trial, nor the benefit of his challenges, which is the birth-right of every Englishman.—And one thing I will say further: These bills of attainder are like Sisiphus's stone, they have rolled back upon those that have been the promoters of them. It is known, that my lord Cromwell was the first man that promoted them in H. 8's time: and the advice that he gave his master for the ruin of others, proved fatal to himself.—Sir, this is the last time we shall have the opportunity of considering this matter. I must take leave to declare, that my opinion is, that if I consent to the passing of this bill against sir John Fenwick's life, upon any other grounds than such as are entirely agreeable, and justifiable by the laws of God and man, I am guilty of the death of sir John Fenwick. I am not satisfied that I can give my consent to this bill upon those grounds, and therefore I beg leave to be against it.

Sir Edw. Seymour. You all know I have borne my testimony against this bill, being not persuaded that it is just: Now we are come to the finishing part of it: and I shall lay before you those reasons that prevail with me, and submit them to the judgment of the house; and if I am more tedious than I used to be, I hope the occasion is such, that you will pardon me: for I will endeavour to contract myself into as near a compass as I can.—I shall not trouble you with any arguments that have been laid before you already; nor shall I enter into the examination of precedents; a great many have been laid before you, and a great many of them have been reversed, most of them; and the reasons why they have been reversed, because the persons condemned have not had the due benefit of the law: And if that be a good reason for reversing of such an attainder, it is a good reason why you should not do it. I cannot but take notice, that the beginning of this bill in the house of commons, is the first step of this kind that hath been made in parliament, except that of the duke of Monmouth: and the reason of it I take to be this, because you hear not upon oath; you condemn not upon oath: You, nor the party under accusation have that advantage against a forsworn evidence, as there is in the other house; the me-

thod has been to pass such bills in the house of lords, and transmit them hither, upon which you then judge. I think, in this case you have no evidence; and instead of two witnesses, you have no witnesses at all; for as to Goodman, 'De non apparentibus et non existentibus eadem est ratio.' As to Porter, he hath been examined: But when you consider that he was a person engaged in this conspiracy, and that he had no repentance of his crime till he was discovered, and then he comes to be an evidence; how far that shall sway, every man must allow; that I must submit to you: But thus much I may say, every man must allow me, that in far less cases no man that does swear for himself, or upon his own account, is to be admitted as an evidence. If a robbery be committed in an hundred, though a man be but to pay a groat towards it, he shall not be an evidence; how much more then in a case, when a man comes to swear to take away another's life to save his own? For he is not in the condition of a freeman: who gives his evidence without check or controul, but he is drudging on for his pardon, as the counsel told you, which depends according to the evidence he does give or not give.—For my part, I cannot go so far as some gentlemen have done, to say sir J. F. is guilty: For where there is no law, there is no transgression; a man that is guilty, must be guilty according to the law: and the law hath required and said, that there shall be no treason but what is proved by two witnesses; and here it appears that you have not one. The same law that calls it treason, says it shall be so proved: Then if you pass this bill, you make that treason which before was not treason.—Sir, the law does require two witnesses, and there is divine authority for it too: It hath been hinted at, the place in Numbers, 'No man is to die upon single evidence;' and it says, 'These are the statutes you shall observe throughout your generations and dwellings.' But I will go a little further, because a worthy gentleman declared, there was no such law of God. He will find, in the 19th of Deuteronomy, a case just as it is here; for the case of high-treason was idolatry at that time; and the law says, 'Whosoever shall set up idols shall be stoned to death; but it says, 'No man shall be condemned to die by the mouth of one witness, but by two or three witnesses he shall suffer:' I think this is positive enough. I shall not trouble you with more instances, though I could repeat several. Sir, the law enjoins forms strictly, even to the least circumstance: If a man be condemned to die, and after he is condemned to die, another take away the life of that man, it is murder. I will go further: If the officer that is to do execution, if a man be condemned to be hanged, drawn and quartered; if the officer shot him, it is murder in him; so that men are not left to a discretionary power to act according to their consciences. I take the reason by which this bill is supported, to be destructive to all human society; for if that be

admitted, that a man shall act according to his conscience, and not according to the rules that are prescribed him, I know not who is safe; for how can an innocent man make his defence upon that principle? It is a safe consideration for them that take upon them that way of judging, because they are bound by no rules; but what hath not that done almost within memory! Felton, that killed the duke of Buckingham, what was his justification, but he was persuaded in conscience he did well in so doing? Ravillac, that killed Hen. 4, in France, he justified the same by his conscience, and said he had done a good thing; and I may say this argument of conscience hath acted all the villainy of the last age, and I am afraid hath gone a great way to disturb the happiness of this. For if this be a rule to this house, how is the king bound? I thought he had been bound by law; but if this shall be admitted as an argument, it is enough to say, if this house be arbitrary, the king is. I do not reflect upon this reign; but it will be enough to say, though he act against law, and turn twenty colleges out of doors, his conscience persuades him to it. We see how unbounded liberty the lords take, they are become masters of all our estates; and I would be very loth for my estate to depend upon the feeble tenure of a lord's conscience. If then this be the case, as it is, according to this method, I desire to know into what condition we shall bring ourselves?—You have been told, it is expected from you by your country, that you should exert this authority and power: Sir, I would have been glad that in cases more reasonable we had exerted this authority and power of parliament; I wish it had gone to the preventing the debasing and abusing your coin; I wish it could be exerted, that we might not see ourselves cheated under countenance of an act of parliament; but contrary to that, you are fond of being sprinkled with the blood of sir John Fenwick. As long as the government is not in danger, I believe the country would be glad that their blood might run secure in their veins, and not be tapt upon every occasion to serve a turn; for if you break the laws, what man can promise himself security? We know the consequence, if this bill does not pass; sir J. F. may live in misery all his time.—But what this precedent may make, no man can foresee. This bill is against the law of God; against the law of the land; it does contribute to the subversion of the constitution, and to the subversion of all government; for if there be rules to be observed in all governments, and no government can be without them, if you subvert those rules, you destroy the government; and therefore, for these considerations, nobody will think it strange, if I give my negative to this bill.

Mr. Chanc. of the Excheq. Sir, the gentleman that spake last, hath carried the reason against this bill a little further than some others; for it seems now, we are not to reject the bill for want of one witness that is legal in Westmin-

ster-hall, but it seems there is no evidence at all; and by capt. Porter's not being pardoned, and yet drudging for his pardon; as to all that have been condemned upon his testimony, he hath arraigned the evidence as not sufficient, and hopes that will be the judgment of the house upon this bill. I think if the house reject this bill upon that argument, it will go further than many mean that oppose it.—Another thing he says, he compares the convictions that I have upon my judgment, and of every body else that speaks from the proofs that are made, that he is guilty, to the whimsey of two or three madmen; whereas we go according to the evidence brought at the bar; we do not go upon the whimsies of Ravillac and Felton, but upon the proofs that have been made here; and though there are not two witnesses, yet upon what appears in proof, I am convinced, that he is guilty; and upon that conviction, I think, according to the duty I owe my country, and the constitution of England, when a bill does come to punish the man whom I think guilty, I think I ought to be for the bill. As to what is said out of Deuteronomy, that the law of God was against it, if you will argue *à fortiori*, it is literally true in the case of murder; but whether murder or treason, there is the life of a man concerned; and it is not the punishment, whether to be hanged, or hanged, drawn, and quartered, that makes any great difference; and give me leave to say, if you go to make precedents from the Jewish law, then, I say, the law of England is against that law, in case of murder: and by the same reason you may desire leave to bring in a bill to repeal all those laws.—Sir, if this was the eternal law of God and man, where was this eternal law in England before Edward 6th's time? If it be the eternal law, that there must be two witnesses, why does it not hold in England even in some cases of treason to this day; I mean the treason of clipping and coining? So, that if gentlemen will argue the nature of these faults are what the law of every country ordains, and that is the law.—And the way of evidence and proof too differs in every country; and I may affirm, that there never was any government in which there was not a power lodged somewhere to be exerted upon extraordinary occasions, beyond the legal way of prosecution.—I don't care to travel into the several countries to see how their constitution is, but I believe there is not one place in Europe in which it is strictly necessary there should be two witnesses to take away the life of a man; but it is generally so as it is here in all ordinary cases, but in this very law: this last law does not go upon two witnesses, but you have a proviso in it does absolutely exempt proceedings in parliament: I do not infer from thence, that you should not have two witnesses, if you proceed by way of impeachment, I think you ought; and so for having witnesses upon oath, &c. When these proceedings are in parliament, there is a direct proviso, by which the parliament is exempted from those

rules. Upon the whole matter, I think this man is guilty; I think the precedent would be more fatal, to say, that a parliament can't proceed in such a case, than that a guilty man should suffer. I think this bill comes before you with more circumstances and reason to justify it, than any that hath been brought here before; here is a bill found against him by his country, the evidence of his friends having tampered with one of the witnesses, confirmed by a jury, &c.—A learned gentleman says, he would come up to make this paper evidence; but can't come up to make such a law, by which every man that is concerned in that deposition would be affected: but here is something particular in this case, a man that hath been abroad, and hath not used the like artifice, I think you ought not to use the like power to punish him, that is not guilty of the like crime. And therefore I shall conclude; but I must take notice of one thing: it was said, that this was the first precedent of this kind begun in this House, but that of the duke of Monmouth: but I believe, if this bill of attainder is not to be begun in this House, it is not to be brought in at all; for I believe there is a statute, that the life of a commoner is never to be meddled with by the lords originally. I will not trouble you any further: I do in my conscience think that sir J. F. is guilty, and therefore I am for this bill.

Mr. Pelham. I did not think to have troubled you this day: I did rather intend to have left it to others that can speak better, or have not spoken upon this subject; but that which hath been mentioned by several, as if they did think that we who mentioned the law of God upon this occasion, did it as if we did think the law of God was binding to you at this day: I never thought any such thing, otherwise than as to the morality of it, so far forth as it is grounded upon reason and justice, and tends to the clearing of an innocent man; and so far we and all mankind are bound by it; and that law having been afterwards confirmed in the New Testament by our Saviour and his apostles, at least approved of by them; and this having been confirmed by the law of England likewise; I do not think this is a fit occasion for you to pass by so fundamental a law as that is: and I conclude with this, that I cannot satisfy myself in my conscience, and should think some misfortune might follow me and my posterity, if I passed sentence upon sir J. F.'s life, upon less evidence than the law of England requires.

Sir H. Crofts. I shall endeavour, as much as I can, to give you little trouble in this matter. But because it hath been hinted and remarked so particularly upon me, I must beg leave to discharge my duty, as well as my conscience, as to what I said here the other day.—Sir, I do very much forget myself, if I did assert, that there was no such place in scripture that required two witnesses: the thing that I said, was this, that if any gentleman could shew me any rule from scripture that re-

quireth two witnesses, more in the case of treason than in the case of murder and felony, I should be glad to see it. I do say, that the scripture shall be a rule to me, as far as the scripture requires; but I do take the Jewish law not to be so absolutely literally binding upon us here. And as to the text out of Numbers, that very text of scripture is particularly and literally applicable to murder; and if that be binding now, we have been very much misguided by our predecessors, and I think we are bound to take it in hand, to repeal all laws that are against it.—Sir, he is pleased to deny us, in some measure, the liberty of being guided by our consciences; truly, I don't know what he would have gentlemen go by; truly, let him go by what rule he pleases, I will go by the rule of my conscience, and will not do any thing against it upon any consideration or consequence whatsoever; nor will I part from the liberty and power of parliaments, for any rule or law of inferior courts whatsoever.—Sir, you are told, you ought to be guided by the rules of law, that is, not the forms of law, but the rules of law. Sir, I say, if these rules were made to bind parliaments, it was reasonable they should be bound by them; but if they were made only to bind inferior courts, they were far enough from being intended to put a cramp upon the proceedings of parliament; and if you shall subject yourselves to them, you give the lawyers such a power, that I do not doubt, but their books will be of greater authority than your journals; therefore, in consideration of that, and because I would leave that which is the right of parliaments to my successors, I shall not submit to that.—Therefore, I say, I come clear to the point, whether sir J. F. be guilty or not; only I must observe a little back, that as to those instances that the worthy member was pleased to make use of, of Ravillac and of Felton; shall those extraordinary cases, that which men did in heat of blood and private malice: shall these be brought to bear a parallel with what is done in parliament for the justice of the nation? I do not doubt but there are men enough, in their consciences, at least with pretence of it, will justify the destruction of your government and religion, and every thing else: all those men that deny the right of your government, have conscience and justice enough to subvert it, if they could; and therefore I do not so much wonder, that many men without doors have argued in that nature.—But I say, my conscience is the rule I must go by; and to me the question is only, whether sir J. F. be guilty or not guilty, and am called to give my judgment in it; and I think I am bound by the law of nature, by the law of the nation, and I see nothing in the law of God that prohibits me, to give my judgment according to the evidence, and the opinion I have in my conscience of the truth of it.—If there be no such rule that requires two witnesses binding upon me: if I may go upon one witness; if I believe he speaks true, and that the person is guilty; then I am bound to act for the preser-

vation of the nation, and all our posterity: they that made this attempt, made it upon you and your posterity for ever: it is not so small a matter as some represent it; it is not the person, so much as the nature of the fact we are to consider; and we are not to let men escape punishment according to their greatness or their smallness, but according to the nature of the fact, and their guilt. I think I have that freedom, and I am so little bound by those rules that have been urged, that if both witnesses were here, and gave testimony against him, if I did not believe him to be guilty, I would lose my life rather than vote him so; but on the contrary, if here be sufficient evidence to convince me, though not according to the rules of inferior courts, I will not subject the freedom of parliaments to those rules.—Sir, you have been told formerly, and I think it a matter of that weight, I beg leave to urge it again, because it is a great reason that guides me in this matter; if you lay it down for a doctrine in this house (for a resolution here taken is as much a rule as a law, for it shall be brought as a precedent;) and therefore, if it shall be laid down as a rule here, that you will never attain any man, or find him guilty, but upon two witnesses, I think the government, and all you have, stands upon a tottering foundation: he must be a very ordinary statesman, that cannot lay his plot so, as you shall not reach him by two witnesses.—Therefore, I say, I think it becomes the wisdom of parliament, not to declare themselves bound in that respect; I would have them bound by justice, but not by the common rule of the law.

Sir Robert Cotton. Sir, I do find that gentlemen do very much insist in this case, that if a gentleman does believe that sir J. F. is guilty, he must give his vote for the passing of this bill: if that be so, I am glad that opinion did not take place in the last reign; if it had, I am of opinion I should not have been here now, and I believe my lord Warrington, who was very instrumental in promoting this revolution, would not have died in his bed. My lord and I were accused of a crime, which, I believe, if proved by two witnesses, had been treason. I have heard some gentlemen say in this house, they did believe my lord Warrington was guilty (though he was not guilty of the fact as it was laid). There was a man swore, &c. and there was some corroborating evidence; but as to Mr. Fley, and myself, there was none, but this particular person, and they indicted us of misdemeanor; though it would have been treason, if there had been two witnesses. Now if the same fact was treason when proved by two witnesses, and but misdemeanor when proved by one, methinks we are doing an extraordinary thing; we are going, after the fact committed, to make that which is but a misdemeanor, to be treason. And for these and other reasons, I cannot agree to the passing of this bill.

Lord Norreys. Sir, though I had always an apprehension of the ill consequence of this bill, yet never so much as now; for this gentleman

hath given arguments that shake me more than all that I have heard before; for he says, there are a great many men, if they may proceed according to their consciences, will subvert this government, and bring in king James and arbitrary power: and he tells you, that every precedent in this house is equal to a law, and will justify the like for the future. I am sure I am very unwilling to make a precedent that shall justify men in such ill actions, in saying their consciences prompted them to it.

[Then a question was put for bringing in candles; which passed in the affirmative, and they were brought in.]

Mr. Hamond. I do not think the power of parliaments in question in this case; but then, as all other powers, it must be founded upon justice, and never used but upon extraordinary occasions, and when criminals are not to be met with otherwise. The power of parliaments is not lessened, if this bill does not pass: but the question is, Whether this power shall be exerted in this case? What gentlemen say of being guided by conscience, hath no weight with me, further than that is governed by the law of the land: if it be to be admitted in the case of life and blood, why not in *meum et tuum*? Why was he brought to the bar then, if, according to our private judgment, we are to determine this matter? No man thought but he was guilty.—I beg leave to mention one thing that is come to my knowledge: After the trial and condemnation of Mr. Cook, I had an order sent me, that I might see him; and I went to him by virtue of that order; and the greatest part of the time I spent with him, he took up in declaring against the evidence of Goodman, and that he would receive the sacrament upon it, and give it in writing, as his dying words. I saw also three positive witnesses confront him at his trial; and when I heard him say this, it weighed so much with me, that I have very great ground of suspicion, that Goodman was perjured in the case of Cook.—Here hath been popular expressions of plots, and jacobites, that no man can apply to this particular case, or say, this a case wherein we ought to use this extraordinary power: He was in the hands of the law, and nobody can say, that the government must sink, if he does not die. If we go from the rules of justice, I believe it will give a great blow to the government.

Mr. Vernon. Sir, I rise up only upon what that worthy gentleman hath offered unto you; for I did not think to trouble you with any thing of that nature. But if you will give me leave to acquaint you with what I believe who have been later with him than this gentleman, and much oftener. Sir, he does tell me, that he is very far from denying what hath been sworn against sir J. F. and himself, concerning the consultation to bring over the French; for he hath a very particular remembrance of it: And if that gentleman was to speak with him now, he would satisfy him, I believe, in that point.

And since I am up, I think every man that speaks upon this occasion, should likewise give some account of himself, in what manner, and for what reason, he discharges his conscience here: I hope I may use that word, since gentlemen make use of conscience for his acquittal; and a man ought to have a very good conscience for his condemnation.—As to sir J. F.'s innocence, I wish he had given no occasion to have it called in question: And since he did fall under this accusation, I wish he, or his counsel for him, would have taken some pains to have made his innocency appear: But I do not find the question is, whether sir J. F. is guilty? But whether there be any evidence of his guilt? And I shall tell you, in short, my opinion of that: I take the proof of the fact to be, in general, such a demonstration, as the nature of the thing is capable of; and that is sufficient, and capable to convince a reasonable, honest, unprejudiced man, of the truth of what is asserted. And there is no manner of doubt left, whether it is so or no; nor appearance of any possibility, that it could be otherwise. I think there hath been that proof in this case, and nothing attempted to disprove it, and nothing hath been proved on sir J. F.'s behalf, that any wrong hath been done him: And therefore, in short, my sense is, that whereas some gentlemen think him guilty, but the matter not proved, I think him guilty, because it is proved, and there hath been no offer made to disprove it.

Mr. Bromley Warr. Some gentlemen have spoke of the power of parliaments; but I shall say nothing to their power, which I have learned from my lord Coke, is so transcendant and absolute, that it cannot be confined within any bounds: But the more just and honourable it ought to be in its proceedings, to give an example to inferior courts. And though their power cannot be denied, yet the exercise of it hath been often censured and condemned; and acts that have passed in one parliament, have been in the same reign repealed, and sometimes severely branded, 'Id possumus, quod jure possumus.' It is certain, here is a defect of legal evidence: We are not tied here to the forms of Westminster-hall; but certainly with submission, we ought to tie ourselves up to the rules of Westminster-hall, especially when they are founded upon common justice, which is the same, is not mutable, and ought to be universal.—By the law of the land, no person ought to be convicted in cases of treason, but upon two witnesses; the law of God is the same. However, if you will pass this bill, all persons must acquiesce; and there is no disputing of your power afterwards. It hath been an argument used to day, that the security of the government requires the passing of this bill; which I think to be a good one too, if they can make it appear, that unless you proceed in this way, the government is in danger: Though I must observe, it was not that consideration, but the vindication of an honourable person's reputation, that brought this matter first before you.

—It does not appear to me, that sir J. F.'s life or death can endanger the government. You have been told of a design that he hath been engaged in, and is carried on at this time: That an invasion from France seems to threaten us: The former design hath been happily discovered and defeated; and it is not probable that sir J. F. should have any great share in any that is carrying on at present: And, as far as I can learn, he is not so considerable a man in his own person or interest, that we need fear him.

—An honourable person said, if we do not pass this bill, they that sent us here would give us no thanks. It is not a good way of arguing; but, I believe, if those look forward, they will thank us. Sir, in the act for declaring the rights and liberties of the people, you have it said, that the late king James, by the assistance of divers evil counsellors, &c. How comes it to pass, that we never have attained any of them? And if we are for proceeding in this way of attainder, because it pleases them that sent us hither, I dare say, the attainting one of those men would gratify those that sent us hither, more than the attainting twenty such as sir J. F. It was pretty well known what share some gentlemen had in bringing in of popery and arbitrary power; and I will take the liberty to say, that there is never a gentleman in this House, but believes them to be the worst of criminals. —Upon the whole matter, I do not think you have any occasion to exert a power, that nobody denies: I see no security this will be to the government, and consequently, no necessity of it. I think you are making a most dangerous precedent, and that it will be of ill consequence to you; and therefore I am against this bill.

Mr. Smith. Sir, I will be as short as I can; and if it had not been for something in this day's debate, I should not have troubled you. As to what was said by the gentleman that spake last, of making examples of some that had been criminal in the last reign: how that came to happen, that no such examples were made, I shall not now entertain you; but I believe most of the gentlemen in the House know pretty well. But I take the matter before you is, What evidence you have to prove sir John Fenwick to be guilty? and whether there be not an extraordinary occasion at this time to exert the legislative power? I shall not enter into the matter of precedents, those are out of my province; but I have read some: however, it shall not pass upon me for a rule, because some bills have been reversed, no others shall be brought in; it is possible, that the reversing of them may be worse than the first bringing of them in.—But to apply myself to the evidence; I cannot but observe one thing, that seems this day extraordinary: we are told by some gentlemen they are against our proceeding upon this bill, because it does not quadrate to the rules of Westminster-hall; and at the same time, gentlemen take liberty to make exceptions here against that evidence that Westminster-hall has allowed: that they should take

exceptions to that evidence which the law of England allows to be good! For it is notorious, it hath been admitted in Westminster-hall: and gentlemen might as well have told you, that those men that suffered died innocent, as to have denied it. And I think there is a further strengthening of his evidence; for there is not one man, who hath died upon his evidence, but hath acknowledged himself guilty of what he hath charged him with.—As to the matter of the other evidence, sir, I do not say, that it is evidence that will come at Westminster-hall; but at the same time, give me leave to tell you, they seem to lay a little stress upon it, when they tell you, they believe it was false evidence, and instance in what Cook said to a gentleman of this House, after his condemnation; but I think thus far I may say, that when you sent some of your members to examine sir J. Friend, he did own all those persons to be at that place: and that is a much better argument for the validity of Goodman's testimony. But as to the matter before you, some gentlemen have made it a question, whether sir J. Fenwick be so considerable a man, as you should proceed in this extraordinary manner with? Though they all say, you may do it; yet at the same time, they tell you this was never put in execution, but they were in the wrong that did it.—Now, sir, the question is, whether you should make use of this power at this time? Say some, the plot is over: I wish it was: but when a conspiracy hath been laid so deep and general as this was, it is not the hanging of one or two that will make us safe; when it is apparent to you, here is all the artifice in the world, all the endeavours in the world, by sir J. F.'s friends, to remove Goodman out of the way; it is some argument that he had something to say to him: and when we see prisons broke open daily; we have known persons murdered in the streets for giving evidence. Very notorious is the case of Dods-worth: you have plots all about you; and yet can you think there is no occasion to make use of this extraordinary power?—I would have as great a conviction upon my conscience as I could; but it is very hard a man must throw his conscience aside in the case: it is very hard to believe, that if there be two witnesses produced, though I do not believe the witnesses, yet I am safe if I condemn the man; and if there be but one witness, I am to acquit the man, though I believe him to be guilty.—And though they go to scripture, to tell you there must be two witnesses, yet they do not go so far as to tell you there have been very extraordinary things done, even by God himself, for the preserving a community.—And there is the reason of it, that one witness may take away a man's life in one case, and not in another. There was a thing said, that was one thing that occasioned my standing up: a gentleman said, truly, it seemed to him to be a better way to put an end to the plot to have an act of indemnity, than the conviction of sir J. F. would be.—Sir, there seems very little reason for acts of

indemnity, when we have seen an act passed so lately, which has not restrained persons, nor brought them to a sense of their duty; and we have heard persons own at your bar, that the fact was committed just after the act of indemnity. Sir, I do heartily, according to my conscience, vote for this bill.

Mr. *Harcourt*. Sir, I am sensible it is very difficult to say any thing, and not seem tedious at this time of night; but I take it to be my duty not to be silent in this matter. All the arguments that I remember have been made use of in any former debate, or in this day's, may be reduced, in short, to these two heads; the danger of the government, and gentlemen's private opinion.—Sir, as to the danger of the government, if any body will convince me there is such danger, (I promise him, if it be worth his while so to do) I will be his proselyte, and vote for this bill: but to tell me, the government is in danger, and that the fate of England and Europe depends upon this bill, is certainly rather offered to amuse, than to convince.—It hath been asked, Can the circumstances that sir J. F. is in admit of any danger to the government, which hath power over his liberty every day, and may restrain him of his liberty during his life? A man, by the account I have had of him, of little interest, not worth nine-pence. (I have no acquaintance with him, and so I may easily mistake his circumstances.) But, sir, whatever his circumstances are, he is in safe custody, and no doubt there he will be kept; and to say the government is in danger by such a man, sure, that cannot be thought by any man living: and God forbid this should be the case of the government, that it cannot support itself without taking away this unfortunate gentleman's life, contrary to the rules of law!—For the argument of private opinion, it is almost as dangerous as the precedent you are making. I will not argue it from the case of the people, enthusiasts and madmen; but I will urge it in the case of men that sat in judgment. If opinion is to justify the condemning of a man, let us never more call the verdicts against Mr. Cornish, Mr. Sidney, lord Russel, and others, murders. Ask the jury; no doubt none of them are so silly, but in his opinion, they were guilty. But if opinion may condemn a man without proof, why not acquit him as well, where there is proof? Such a practice, I am sure, would never be endured. The properest method, I think, was proposed by the gentleman that began the debate; and I beg leave to follow the same steps, to consider his guilt, how it appears to us, and whether there be any reason for this extraordinary manner of proceeding.—The recital of that bill are the arguments for it; and those we send up to the house of lords for the passing of this bill: and first, it says, that sir J. F. was indicted by the testimony of Porter and Goodman, &c. It says, that several days were appointed for his trial, and at one of those days the trial had come on, if it had not been for the discovery that he pretended to make; but it does not say

it was put off at any other days or times, for that reason: but it goes on, and says, he hath made several reflections, &c. instead of making an ingenuous discovery; and then it recites how that Goodman is withdrawn.—I would beg leave to put gentlemen in mind of what was a great inducement to bring this bill in: it was said, that sir J. F. and his relations had done it; that they would prove that Goodman was withdrawn by his means. Give me leave to say, that there was no proof of it, unless the hearsay of Clancy, and the actions of my lady Fenwick, are to be evidence, contrary to the known laws of England, to affect this unhappy gentleman in the case of his life: I say, if any gentleman had been of another opinion, no doubt, he would have offered that amendment to the committee.—As to the discovery that sir J. F. hath made, it does not appear to me, whether it be true or false: it is one thing to give a vote to clear a gentleman's reputation, and another thing to carry it so far, as to give judgment, that the person that made those reflections shall die, and that before any proof of their falshood.—Here is an indictment found, and here is an evidence withdrawn; that is all I am satisfied in: and supposing the person guilty, it is no manner of inducement from these arguments, to proceed in this extraordinary manner. But I would consider the matter of the amendment made at the committee [‘Of which treasons he the said sir John Fenwick is guilty.’] I can't say that; and therefore I cannot vote for the bill. If he be guilty, it does not appear so by legal evidence; and therefore I am to judge him, as he appears to me, and an innocent man. The law requires two witnesses to convict a man of this crime. It is the greatest crime, and the law is so merciful, that it will not expose a man to such great penalties, without demonstrative evidence.—The first act of parliament that requires two witnesses is, 1 Edw. 6. The next is 5 Edw. 6. And upon that act, give me leave to take notice, that act goes a little further than the first; for the 5 Edw. 6. does not only say there shall be two witnesses, but it goes on, and says,—which two witnesses, (they are there called accusers, but mean the same thing,) shall be produced in person before the party at his arraignment, and shall there, before his face, maintain and avow what they have to say. So the parliament particularly provided, that there should not only be two witnesses, but that they should appear in proper person, in open court.—I beg leave to observe, that after the making of the first act, in the 2nd or 3d year of Edward 6, there was an attainder of sir Tho. Seymour, in parliament, without hearing of him; and that very self-same parliament, within two years afterwards, seems so to have resented that matter, that they made that provision, I have mentioned, in the 5 Edw. 6. and to secure, that that ill precedent should do no harm, they put in that clause. If this act passes, I wish we do not repent it in less time than that parliament did the attainder of sir Tho. Seymour. Let us

be guided by the reason, the justice, and the discretion of that act, though we are not bound in our legislative capacity by the power of it. I cannot but observe, that from the making of that act, no person has been attainted in any other manner, till the duke of Monmouth: so great a veneration has that law always had in all reigns, though a multitude of conspiracies have happened in them all. I do not think it so material, that there should be two witnesses, as that these witnesses should be heard face to face, and cross-examined. It hath been told you, that it is natural justice and reason that there should be two witnesses. A gentleman asked you, where that natural justice was before the statute of Ed. 6. ? Sir, the statute of 25 Edw. 3. says, that every person that is attainted, shall be 'provably attainted;' and somewhat may be from thence inferred more than that the crime should be proved, for so must every crime. But as to the proof required by that act, and the acts of Ed. 6, all those acts, by very learned opinions, have been thought declarative of the common law: but that is scarce worth the enquiry, since it is certain how the law stands at this day.—An hon. gent. took notice, that such evidence as we have had, and such proceedings as these, would not be reasonable in case of impeachment; but, distinguished between that proceeding and this. But certainly the reason is the same. It is true, the same persons that accuse in one case, give their judgment in the other; but in each case, such privileges as are just and reasonable, ought to be allowed to the party accused.—I shall add no more, but that we are making a precedent, which cannot be made without breaking through all the fences of the law; and when it is made, we know not who may suffer by it.

Sir Rd. Temple. As to the evidence you have before you, I appeal to any man, whether at the common law, if there was but one witness against a man, whether he was not at liberty of demanding trial by battle? Those acts that have been made since, are made certainly to provide, that in no case whatsoever, a man should be so much as accused without two witnesses of the treason.—As to what hath been said of the particular evidence before you; what hath been observed here, is a good objection in the courts below. I do not say it does disable a man from being an evidence, because he is not pardoned; but he is not so good an evidence as if he was pardoned; but that I stand upon is this: shall you come here, and make a precedent in this place to condemn a man to the highest penalties, upon less evidence than you will allow any body else to do it? That is what was never done in parliament before. Will you make a precedent in parliament, that at any time they may bring in a bill here, and judge a man to death for treason upon no evidence?—As to this bill itself, consider what a precedent you will make: there is nothing that any bill was condemned for in parliament, that

is not in this bill. All mankind must perceive, that you have but one evidence, and such a one as I have told you: and whatever any man's private persuasion is, it is the proof must govern you. Then this is a law *ex post facto*, and that hath always been condemned; you make that evidence, that was not so before. Sir, this is, besides, making a law in a particular case, against the common law of England, and the right that every subject has: it is making a law to hang a man without a trial; it is making a law here, that was introduced here upon a pretence to make him an evidence. Every one said, that they did not seek his blood; and if that be the secret inducement in this case, it is a dangerous precedent. The earl of Exeter, when he brought the rack into the Tower, every body knows the fate that came upon him afterwards.—Let any body shew me there was any reason for reversing any act of parliament; they are all against this bill.—Then to the necessity of it; I can't imagine any thing that hath been said to you upon that, is a ground for this bill. Pray consider first, how this matter came before you; it was for an honourable person's vindication, and it was not transmitted to you by the king, but by the honourable secretary: he told you, that if you had a mind to see these papers, and required it, he had leave to let you have them; but if it had been a thing of this consequence, that the government had been in the utmost danger, would it have been transmitted only at the request of a private gentleman, and left unto you, whether you would proceed upon it or no?—But it is observed, that the plot may go on still: pray if this gentleman be cut off, does that cure it? You are secure of him now, that he can't act in it; so that I have not heard the least ground to convince me, that the government would be in less danger if this gentleman was cut off.—Sir, we are told here of going according to our consciences; give me leave to say to you what was instanced in the other day: that in the worst of times, when they did not stick at murdering of the king, yet they stuck at this; they would not allow any man to suffer upon one witness; and they did not admit of depositions against my lord Mordaunt; and my lord Mordaunt saved his life by it. You have deposed king James for breaking in upon the law; and did any body believe that Mr. Hampden was not guilty of the treason he was charged with? He owned it before this House; and yet he was tried only for misdemeanor, there being but one witness against him; and they that strained all other laws, stuck at this, and would not violate this law; so that I think there is no necessity for making such a precedent, and I think it would be the worst of precedents.

Mr. Boscawen. I have observed upon this debate that some persons deny that it is justifiable at any time to proceed upon bills of attainder, and yet they don't dispute the power of parliaments; but at the same time say, they ought to go according to the rules of Westminster-hall.—Another says, it is the same thing

whether we proceed by way of impeachment, or bill of attainder: I think him much out of the way; for in that case, the lords only are judges, and you are the prosecutors; and you don't use your legislative power in that. —A worthy friend of mine said, he had often been mistaken in his own conscience, when he thought himself very much in the right. That might be so; and if there was any room rationally to suppose, that sir John Fenwick was not guilty, I should be of opinion to be of the more favourable side; but I take it, there is no room for any man to believe but he is guilty. —Now I would examine what grounds we have to believe him guilty. Upon trials, when they charge a jury with a prisoner, one part of their charge is to enquire, whether he fled for it or no? It is notorious that sir J. F. fled for this, which is no small argument of his guilt. Another is, that he was here at the bar, and did not deny the fact; if he had confessed it, no doubt but you would have concluded him guilty; and when he does not deny it, this is the next door to it. —It hath been told you, many bills of attainder have been reversed as unjust; it hath been as notorious, that the verdicts of twelve men, and when men have been tried by their peers, have been reversed too. I will instance in two or three. The first I begin with, was that of the duke of Somerset; but nobody could say but he was guilty of the fact, for he confessed it; but there was a powerful enemy, the duke of Northumberland. The next is the duke of Norfolk, who was attainted in queen Elizabeth's time; and they were not by parliament, and yet both were reversed. And I think, as this matter stands now, some gentlemen are of opinion, by the evidence they have heard, that he is guilty; but I think nobody hath said, that it appears to him, by the evidence he hath heard, that he is innocent. Now I desire to know, whether every man must not use his conscience, to judge whether there be sufficient evidence? I acknowledge there is no sufficient evidence to convict him in Westminster-hall; but there is more to satisfy my conscience, and the world abroad, than if Goodman was here; besides his not denying it, you have the evidence of the persons that died, who owned the same thing: and I mention that the rather, because they confessed it to persons sent from this house; and did not only confess themselves to be guilty, but acknowledged, that there was such a conspiracy; and sir Wm. Parkyns acknowledged in particular, that he was to raise a troop of horse, and that the French were to be invited over: is this nothing for the legislative power, that is to secure the peace and welfare of the government? —Gentlemen say there is a great deal of danger in this matter: some, if you acquit him, others, if you condemn him. If you are satisfied he is guilty, by this bill you set up a land-mark, that others may take care they do not come into this predicament: on the other hand, if you reject this bill, you will give advantage to your enemies; when

they shall see a man that is so notoriously concerned in calling in a French army, the worst of your enemies, to be scot-free. If he be guilty, what danger is there of the precedent? When a person in the like nature, that hath fled for it, that does not deny it; when living persons confess it, and dying persons confirm it, then there will be danger in such a person. —Upon the whole matter, I think there is no man that ever I heard, that does not believe him to be guilty; and it is strange you should want evidence, and yet every one think him guilty; and I think no man must be acquitted or condemned, but according to a man's conscience. —An hon. person said, Porter was no good witness: if Goodman was here, he would not be so much; and yet we must acquit him because Goodman is not here: and therefore, upon the whole, I think you will give your enemies a great advantage, if you acquit him; and if you condemn him, you will do yourselves right.

Mr. Cowper. Sir, being concerned in prosecutions of this nature without doors, I have hitherto declined concerning myself in any debate of this evidence, though unconcerned in the conduct of the evidence against sir John Fenwick; but being to give my opinion and vote as a judge, I shall crave leave to give my sense of this matter. —I would beg leave, in the first place, to make use of a distinction, which, I think, will serve to answer several of the arguments that have been made use of: I think there are two things to be considered; first, his crime, and the proof of that crime; and then the other matters done by him subsequent, &c. —The crime and proof of it that hath been given against him at your bar, is the ground by which, I think, before God and man, I ought to give my affirmative to this bill, by which you judge him to die. What he hath done subsequent, convinces me in my judgment, that we are here in a proper method and course of proceeding against him; therefore let no man say, that you have condemned him because he hath protracted his trial: no, you have condemned him for having been guilty of high treason, manifestly proved against him: then let them not say, on the other hand, will you condemn any man that is at any time guilty of high treason? No; but when a man is guilty of the worst of treasons, and this would have been manifestly proved against him in the ordinary course of proceedings, but that he, undertaking to atone for his crime, and serve his country, hath protracted his trial till one of the evidence is gone; and then, though he pretended to have a reserve, which he would make known to the king's person, yet when he thinks he is out of the ordinary reach of justice, he sets the justice of his country at defiance. These are grounds, not why he is to die, but to justify our proceeding in this manner. —Sir, I would beg leave, in a few words, to take notice of a few things said in this matter: gentlemen are afraid, that this will be made use of by pos-

terity to the disadvantage of honest men ; and you have been told, that precedents have begun with the punishment of the guilty, and then have been carried on to the punishment of those that have not been so. It is true, there hath been a very bad use made of very just acts in relation to the public : but what do gentlemen infer from that ? Must we have no such things as justice ? Must not the guilty be punished, because the same methods may be made use of for the punishing of honest men ? I am not afraid of what use posterity will make of it ; if there come times of violence when there are no parliaments, they will not want this precedent ; there are others that have been cited, that will much more justify those proceedings ; nay, this may protect the innocent. If a bill come to be proceeded in against another, he may say, sir J. F. was heard personally, and by his counsel ; that the evidence was produced before him, and confronted with him. An innocent man may say, there was that extraordinary in his crime, which is not in mine : he would have introduced a foreign army, and afterwards have aggravated his crime, by endeavouring to abuse the king, and creating a jealousy between the king and his ministers.—Sir, in the next place it is said, that here is not legal evidence ; which I think is a mistake : and, say some, though here is an evidence, that really convinces them in their consciences (I am not ashamed to make use of that word), yet they are not for passing this bill, because there is not a legal evidence. With submission, that is a mistake ; before 1 Ed. 6, one witness was a good evidence in high-treason ; but there was variety of opinions touching treason before that time ; but neither the first nor the 5th Ed. 6, in the penning or wording of them, nor in the reason of them, were intended to extend to the high-court of parliament ; so that for aught that hath been said, though one witness corroborated by circumstances, as this case is, and the confession of the party, would not be legal evidence below ; yet with submission, it is a legal evidence in parliament, even according to the strict rules of law ; because no law hath made two witnesses requisite in this case ; so that it is a convincing evidence ; I think it may be justified to be a legal evidence ; and as it convinces me, that I cannot resist the belief of it, I must be for this bill, notwithstanding what some gentlemen have said, by way of endeavouring to explode conscience as a rule not to walk by in this case. One instance given against it was, because a hangman has not a discretionary power to execute a man according to his conscience, and put him to what sort of death he pleases ; as if we had not a better, and more legal, and discretionary power in the high court of parliament than the hangman has.—But we are told of several instances, where mad, and hair-brained men have made use of their conscience to palliate their extravagancies. No doubt it hath, and let me tell you, religion hath been made use of as a pre-

tence to the worst of villanies in all ages ; and yet I hope they will not argue, that there ought to be no religion neither, for a guide to men's actions. When men come to be judges, I would know what rule they can have better than a sedate, well-informed conscience ? Below, when a legal evidence is given, yet the jury are not bound to go by that legal evidence ; they are when they have heard it, judges of the fact, and are to go by no other rule, than what is ridiculed here, even the rule of their own conscience. It was said early in the debate, by a member of great reputation, that this (except Monmouth's case) is the first precedent of a bill of attainder that began in this house. It seems the ancient way was, for the lords to give the witnesses their oaths, and when they thought fit, they sent down a bill, and the commons were to proceed upon it : but I think, with submission, this is a much better way ; and I had much rather give my consent upon hearing convincing evidence, and that the party has nothing to say for himself, than upon any bill transmitted from the lords, and no other evidence than that they thought fit to pass it. Some gentlemen have set a great weight, or rather mistaken the argument ; say they, sir John Fenwick is not a man so considerable as to endanger the government. Admit that those that have spoke for the bill, have not made that use of the argument ; but this is that I lay my finger upon in particular ; it is plain he was to be general, and knew a great many of the officers. I am satisfied he hath not made that atonement to his injured country, that he ought to have done. I am satisfied that unless this bill proceed steadily against him, you will have none of that discovery.—[Here he was interrupted by the noise of some gentlemen, shewing dissatisfaction at that way of arguing.] Mr. Cowper proceeds. Do not let gentlemen pervert this argument, and say, will you hang a man if he do not confess ? No : but when I have heard proof, that he is guilty of the worst of treasons, and hath aggravated his crime in that manner which he hath done, he deserves to die ; unless he will merit his life by a discovery of what he knows. I think it is of the highest importance to you, that can be, that you should come to the further knowledge of the other branch of the conspiracy ; the meeting of the French king's forces in England. I think you are in a proper method, and perhaps may have a better issue of this bill than his death ; but if not, he will but pay the debt which he owes to the justice of his country.

Mr. Paget. Sir, I cannot believe but I shall be heard, as to the little I have to say, with some uneasiness, after so long a debate. But, sir, since I did take the liberty to give my opinion, why I was against this bill before : I think it as reasonable to give you my reasons, why I do not stand convinced by the arguments I have yet heard. And that I may the better give you my reasons, I shall, as well as I can remember, repeat some of the arguments that

have been urged for the passing of it. If I mistake not, some of the arguments have run upon the power and prerogative of parliament; some upon what was proper evidence in this high court of parliament, other than what would be in other places; others upon the extraordinariness of the occasion. As to the first of these arguments; since gentlemen, much more experienced in rules of parliament, do not think fit to deliver their private opinion, what rules parliaments may in reason be supposed to have, I shall not say any thing to that. —As to the arguments, of what evidence shall be sufficient to adjudge a man to death in this house: I confess, I shall at all times be very careful how I give my opinion in matters of life and death; because I think the greatest caution is to be used in that case; and for this treason, I cannot consent to give my opinion in one case, that I shall think fit to retract in any case afterwards. If I understand the meaning of the house, it is not in favour to sir J. F. himself that gentlemen oppose this bill, but for fear of ushering in a precedent, that may be made use of against a better man. I confess, here is a worthy member that spake last, said something in his argument that hath some weight with me. I did apprehend by the general debate of the house, that the parliament had no rules at all, but what they would fix to themselves: but I have a good regard for his opinion: but if he says true, the evidence before you is not legal evidence in Westminster-hall; but it is legal evidence according to the rules of proceeding in the high court of parliament: but I think, truly, if they may be presumed to have any rules to go by, nothing is so plain to me, as that a rule of their own of so late date, as the act for regulating trials in cases of treason, should be a rule to them: and it is said in that act, that after such a day no person shall be brought to trial in any case of treason, &c. but he shall be condemned upon the evidence of two witnesses; and I must needs say, that act that was passed last sessions, is so much for the liberty of the people of England, that I think it will be very hard to repeal that substantial part of the law so soon after it was made. —As to the extraordinariness of the case, I am sensible what stress hath been laid on that argument, as if the strength of this government did in some measure depend upon your disposal of this matter one way or the other: and since that is the case, I shall speak tenderly of it; for I do as much abhor acts of treason against the government, as any man that hath spoke for this bill: I think as the crime is to be distinguished from all others, as being a more than ordinary crime, so I think the person that is concerned, must be extraordinary: and I think, with submission, there is some difference between principals and seconds in an act of treason. When you cannot come at a man being at the head of a rebellion, it may be reasonable to proceed by bill of attainder; but I think it is not to be used upon all occasions, or when you may

come at a person another way; which, I think, is the case of this gentleman. I am of opinion, that there does not depend more upon sir J. F. now, than when he was first taken. Why he was not tried, I shall not examine the reason; I suppose it was because he gave some assurance of his confession; truly, I have heard no other reason for proceeding against him now, but those papers which have been adjudged scandalous, and are so to all intents and purposes, I do think truly; but the liberty of the people of England is very much concerned in the revocation of that act, which was promoted for the liberty of the people; and none of the arguments that have been used can convince me, that I ought to give judgment upon less evidence, than is provided by that act.

Mr. *Sloane*. Sir, I hardly thought I should have needed to have troubled you with my thoughts in this matter, but that this honourable gentleman that spake last, has gone so far in his reason, as to speak to matter of law: he seems to extenuate the fault of sir J. F.; and gives it as a reason why he should not be attainted by this bill, for that he was none of the principals, but only an accessory; there is no gentleman of the gown but will tell you, that there is no accessories in cases of treason, but they are all principals, and equally guilty; and there is no evidence in this case to make him accessory, but he is either principal or nothing. —When I have made this observation, give me leave to tell you my own thoughts: as every man is to be saved by his own faith, so may my salvation depend upon my opinion, according to my conscience in this matter, which is for passing this bill. —The last time, I gave you my reasons why I was for this bill; and yet I have not heard them answered, though a gentleman said I answered myself; but I will state the case, and desire him to reply to me. I did say then, sir, and do so again, that I do not think those scandalous papers any reason to provoke you to pass this bill; and I do think, if he should be threatened, it would be a blemish upon his confession. Another thing I put out of the case, that he is a man so dangerous to the government, that if he escape, we are all undone. I do take him, that in his person, interest and friends, he is not so; and would not have that be a motive for the passing of this bill; but take it upon the evidence that is before us, and the nature of our proceedings; then I will say, we have great reason to proceed upon this bill, for the preservation of the government, and for this reason; whereas it is insisted on one side, that here are the laws and liberties of England at stake, and nobody knows whose case may be next. Sir, if we do not go upon good grounds and reasons, that we do not fear any body's following, God forbid we should make this a precedent! But pray turn the tables on the other side, and see what the case will be; that here is a gentleman that every body of the house does believe guilty; that he hath been in a conspiracy to bring in the French,

and depose the king ; and the man came before us, and we had no power to reach him ; what will be the precedent on the other side ? It will be easy to take off one of the witnesses by men of great estates, and then there is no coming at them, even by the parliament themselves : this parliament was of opinion, that they could not come at sir J. F. though they were of opinion that he was guilty.—But now, Sir, to that which is the question : it is allowed by every body, you may do what you please ; but without straining your legislative power, I shall offer my thoughts and reasons for it, upon these three points : that the fact is treason ; that he is plainly guilty ; and that we have a plain jurisdiction in this case, in the ordinary methods and proceedings of parliament.—Sir, the fact is treason, the meeting at several times, and conspiring and consulting to bring in a French power to depose the king. You have been told by several persons, and the counsel at the bar, that such meetings without some other overt-act, is not treason ; but I affirm the contrary, for that is an overt-act of compassing the death of the king : and sir Barth. Shower, who did insist upon it at the bar, did otherwise act his part upon it at the trial of Mr. Cook ; for he offered it at first, but afterwards he deserted it, as a thing he could not stand upon ; for it is the opinion of all the judges, upon a late resolution.—Then, Sir, the fact being treason, is no act *ex post facto*. We are not making that treason which was not so, but we are only judging of the fact that was treason before ; though if it was a doubt whether it was treason or no, the parliament hath a power by 25 Edw. 3, to judge that treason, that the courts below have no power of. The next thing is, whether there be sufficient evidence of his treason before us ? I will put it out of the case as no conclusive evidence at all, what Goodman hath said upon his oath (further than that there was such a witness that did and could swear such a thing, and that he was examined before the jury ;) and this I will take upon me to say (and I will give my reason for my opinion), that the parliament is not obliged to two witnesses by any law now in being. It hath been told you, that from the time of Edw. 3, one witness was sufficient till the statute of Edw. 6. Now I will prove to you, from the statute of Phil. and Mary, that, by the common law, and all the time between the reign of Edw. 3. and Edw. 6. one witness was sufficient for this treason. For that statute of Phil. and Mary does say, that any person that shall bring from beyond sea any false and counterfeit coin, or be accused or impeached of any offence concerning the impairing, counterfeiting, or forging of any coin current within this realm, shall, and may be indicted, arraigned, convicted, or attainted by such-like evidence, and in such-like manner as was accustomed before the first year of king Edw. 6. Now, what was the reason of that statute before the statute of Edw. 6 ? Those counterfeits were to be tried by one witness ; and therefore at this day all the counterfeiters

and utterers of false coin have been attainted by one witness. It is said again, that there is the law of nations, and the law of God, to the contrary. Gentlemen have said several times already, that in murder and felony one witness is sufficient ; which, saving some little parts of the judgment as to the forfeiture and attainting of the blood, is the same penalties. We are not in the land where that law was in force, for by that law, as to common felons, there was a restitution only : But I would put a gentleman that sits by the bar this case ; by the same law of Deuteronomy and Numbers, that he hath quoted, adultery is death : will you be contented that that should be so here ? They are either all of them in force, or none of them in force. I do say, that by the statute of Edw. 3. and ever after, till the statute of Edw. 6, one witness was sufficient to convict any man of treason. And I do say, that the statutes of Edw. 6 do not preclude the parliament from any method of proceedings. The statute says, that no man shall be indicted, &c. nor shall they proceed upon such indictment. From which words in the statute, I do plainly make it appear to any gentleman that will read it, it is confined only to the courts of Westminster-hall : For certainly, you cannot call a bill of attainder to be a proceeding upon an indictment. What I say, is only to discharge my own conscience, and to salve the tender consciences of them that hear me ; and therefore, I desire them never to say, that there ought to be two witnesses, before they answer what I have said upon that statute. Then, Sir, you have need but of one witness, and you have had captain Porter before you ; who, I think, notwithstanding all that hath been said, is a credible witness. A gentleman made some objections to his credit, and told you, he was not to be believed, because he was in the same conspiracy, and had been in such a villainous action : But, Sir, the same gentleman hath often confined you to the rules of Westminster-hall ; and he hath told you, it is a wrong place here, and that a man has not so good a trial here as in Westminster-hall. Why ? the thing that was spoke of, of his being concerned in the assassination, and of his being a fellow-conspirator with them, which is now urged as an objection before you, is no objection in Westminster-hall. I would only take notice of another objection this gentleman made to the witness, which he said he had from the bar ; which was, that captain Porter was not pardoned, and he was now drudging for his pardon : But that is so far from what ought to be quoted, that he that said it ought to be reprimanded for it. He made another objection against his being a good witness, and compared it to the case of an hundredor : but he did not remember, that the man that was robbed is a good witness ; and the reason is, because of the necessity of the thing, and that no others can be ; and the defendant in an hundred cannot be a witness because there may be others ; and that is the reason of this case. And for the precedents in R. 3rd's

and Hen. 4th's time, no gentlemen can insist upon them, considering the differences of the crown, and the one attainted the other: and they were not reversed upon the point of jurisdiction, but because of the different rights of the kings; and nobody had pretended to answer the case of the Regicides; they were not left to the law, I mean such as were actually tried before the parliament; but the parliament passed different judgment on them; and some of them were in custody. What was told you of Cromwell's case and others, they go upon the same reason, that they were not heard, though they were in custody.

Col. Wharton. A gentleman lately told you, we had lately passed an act for trials in cases of treason, and now we are in this proceeding, about doing something that is contrary to it: That is a thing that would stick with me, if I could not answer it; but I appeal to every gentleman in this house, whether that act hath any sort of relation to trials in parliament; for that is only to direct the courts in Westminster-hall. I have only this to say; I think the evidence very full before you. I think you have had one very good witness, and the counsel for the prisoner had liberty to confront him: If he had not been guilty, the prisoner at the bar would have denied it: I am convinced of the truth of it, and my conscience is to make a judgment upon it, and that is all we can go by.

Mr. Jeffreys. A worthy gentleman of the long robe hath taken pains to find out precedents to justify our proceedings; and another says, there is no act to circumscribe our proceedings. But since gentlemen differ so much, it gives me a great deal of caution. This I know, there is a law of the land by which persons ought to be governed: I take this to be an extraordinary method of proceeding, and I hope the lords will take more care of the matter than the commons.

Mr. Ed. Harley. Sir, I cannot satisfy myself to be for this bill; and in a few words, I shall give my reason for it. It hath been said; that the parliament is unlimited. I do agree, that we are not tied to the rules of Westminster-hall. I shall only mention the reason why two witnesses are required in cases of high-treason. If any will look into the history of England, they will find it hath been often the design of the crown to trump up plots upon the subject; and therefore these acts took particular care there should be two witnesses to prove the fact: This is the reason of the law, and, I think, upon it the liberty of the subject is founded; and therefore I cannot be for this bill.

Then the question for passing this Bill was put, and the House divided. Ayes, 189; Noes, 156.

Being thus carried in the affirmative, the Bill was sent up to the Lords for their concurrence.

PROCEEDINGS IN THE HOUSE OF LORDS.

The Lords took a very extraordinary method to force their absent members to come to town. They sent messengers for them to bring them up; which seemed to be a great breach on their dignity; for the privilege of making a proxy was an undoubted right belonging to that peerage; but those, who intended to throw out the bill, resolved to have a full House. The bill met with great opposition; and the debates were the warmest, and lasted the longest, of any that had ever been.

The substance of the arguments in the House of Lords, brought against this way of proceeding by bill of attainder, was, that the law was all men's security, as well as it ought to be their rule: If this was once broke through, no man was safe: men would be presumed guilty without legal proofs, and be run down, and destroyed by a torrent: two witnesses seemed necessary, by an indisputable law of justice, to prove a man guilty: the law of God given to Moses, as well as the law of England, made this necessary: And, besides all former ones, the law lately made for trials in cases of treason was such a sacred one, that it was to be hoped, that even a parliament would not make a breach upon it. A written deposition was no evidence, because the person accused could not have the benefit of cross interrogating the witness, by which much false swearing was often detected: Nor could the evidence given in one trial be brought against a man, who was not a party in that trial: the evidence, that was offered to a grand jury, was to be examined all over again, at the trial; till that was done, it was not evidence. It did not appear, that Fenwick himself was concerned in the practice upon Porter: What his lady did, could not be charged on him. No evidence was brought, that Goodman was practised on; so his withdrawing himself could not be charged on Fenwick. Some very black things were proved against Goodman, which would be strong enough to set aside his testimony, though he were present; and that proof, which had been brought in Cook's trial, against Porter's evidence, was again made use of, to prove, that, as he was the single witness, so he was a doubtful and suspected one: nor was it proper, that a bill of this nature should begin in the House of Commons, which could not take examinations upon oath. These were the arguments used by the Lords, as well as the Commons, against the bill.

On the other side, bishop Burnet being convinced, that Fenwick was guilty, and that the method of proceeding by way of attainder was not only lawful, but, in some cases, necessary, and having, moreover, by his search into parliamentary proceedings, on such occasions, when he wrote the History of the Reformation, seen further into those matters than otherwise he should ever have done, he thought it incumbent upon him, when his opinion determined him to the severer side, to open his reasons in

justification of his vote ; which he did, to this effect :

“ The nature of government required, that the legislature should be recurred to, in extraordinary cases, for which effectual provision could not be made by fixed and standing laws. Our common law grew up out of the proceedings of the courts of law : afterwards this, in cases of treason, was thought too loose ; so the law, in this point, was limited, first, by the famous statute in Edw. 3d's time ; and then, by the statute of Ed. 4th's time, the two witnesses were to be brought face to face with the person accused ; and the law, lately made, had brought the method of treason to a yet further certainty. Yet, in that, as well as in the statute of Edw. 3, parliamentary proceedings were still excepted. And, indeed, though no such provision had been expressly made in the acts themselves, the nature of government puts always an exception in favour of the legislative authority. The legislature was, indeed, bound to observe justice and equity, as much if not more, than the inferior courts ; because the supreme court ought to set an example to all others. But they might see cause to pass over forms, as occasion should require. This was the more reasonable among us, because there was no nation in the world, besides England, that had not recourse to torture, when the evidence was probable, but defective. That was a mighty restraint, and struck a terror into all people : and the freest government, both ancient and modern, thought they could not subsist without it. At present, the Venetians have their civil jurisdictions, and the Grisons have their high courts of justice, which act without the forms of law, by the absolute trust that is reposed in them ; such as the Romans reposed in dictators, in the time of their liberty. England had neither torture, nor any unlimited magistrate in its constitution ; and therefore upon great emergencies, recourse must be had to the supreme legislature. Forms are necessary in subordinate cases ; but there is no reason to tie up the supreme one by them. This method of attainder had been practised among us at all times. It is true, what was done in this way at one time, was often reversed at another ; but that was the effect of the violence of the times, and was occasioned often by the injustice of those attainders. The attainders of inferior courts were, upon the like account, often reversed : But, when parliamentary attainders went upon good grounds, though without observing the forms of law, they were never blamed, not to say condemned. When poisoning was first practised in England, and put in a pot of porridge in the bishop of Rochester's house, this, which was only felony, was, by a special law, made to be high treason ; and a new punishment was appointed by act of parliament. The poisoner was boiled alive. When the nun of Kent pretended to visions, to oppose Henry 8's divorce, and his second marriage ; and said, if he married again, he should not live long after it, but should die a villain's death ; this

was judged in parliament to be high treason ; and she and her accomplices suffered accordingly. After that, there passed many attainders in that reign, only upon depositions, that were read in both houses of parliament. It is true, these were much blamed ; and there was great cause for it : There were too many of them ; for this extreme way of proceeding is to be put in practice but seldom, and upon great occasions ; whereas many of these went upon slight grounds, such as the suffering some passionate and indecent words, or the using some embroidery in garments and coats of arms with an ill intent. But that, which was indeed execrable, was, that persons in prison were attainted, without being heard in their defence. This was so contrary to natural justice, that it could not be enough condemned. In Edward 6's time, the lord Seymour was attainted in the same manner, only with this difference, that the witnesses were brought to the bar, and there examined ; whereas formerly they proceeded upon some depositions, that were read to them. At the duke of Somerset's trial, which was both for high treason and for felony, in which he was acquitted of the treason, but found guilty of the felony, depositions were only read against him ; but the witnesses were not brought face to face, as he pressed they might be. Upon which it was, that the following parliament enacted, that the accusers (that is, the witnesses) should be examined face to face, if they were alive. In Elizabeth's time, the parliament went out of the method of law, in all the steps of their proceedings against the queen of Scots. It is true, there were no parliamentary attainders in England during that long and glorious reign, upon which those, who opposed the bill, had insisted much ; yet that was only, because there then was no occasion here in England for any such bill. But in Ireland, where some things were notoriously true, which yet could not be legally proved, that government was forced to have, on many different occasions, recourse to this method. In James 1's time, those, who were concerned in the Gunpowder Plot, and chose to be killed, rather than taken, were by act of parliament attainted after their death ; which the courts of law could not do, since, by our law a man's crimes die with himself ; for this reason, because he cannot make his own defence, nor can his children do it for him. The famous attainder of the earl of Strafford, in king Charles 1's time, has been much and justly censured, not so much because it passed by bill, as because of the injustice of it. He was accused for having said, upon the house of commons refusing to grant the subsidies, which the king had asked, ‘ That the king was absolved from all the rules of government, and might make use of force to subdue this kingdom.’ These words were proved only by one witness, all the rest of the council who were present, deposing, that they remembered no such words, and were positive, that the debate ran only upon the war with

Scotland: so that though 'this kingdom,' singly taken, must be meant of England, yet it might well be meant of 'that kingdom,' which was the subject then of the debate. Since then the words were capable of that favourable sense, and that both he, who spoke them, and they, who heard them, affirmed, that they were meant and understood in that sense, it was a most pernicious precedent, first to take them in the most odious sense possible, and then to destroy him, who said them, upon the testimony of one single exceptionable witness. Whereas if, upon the commons refusing to grant the king's demand, he had plainly advised the king to subdue his people by force, it is hard to tell, what the parliament might not justly have done, or would not do again in the like case. In Charles 2's time some of the most eminent of the regicides were attainted, after they were dead; and in king James's time the duke of Monmouth was attainted by bill. These last attainders had their first beginning in the house of commons. Thus it appeared, that, these last two hundred years, not to mention much antienter precedents, the nation had upon extraordinary occasions proceeded in this parliamentary way by bill. There were also many precedents of this method. And whereas it was said, that an ill parliament might carry these too far, it is certain, that the nation, and every person in it, must be safe, when they are in their own hands, or in those of a representative chosen by themselves. As, on the other hand, if that be ill chosen, there is no help for it; the nation must perish, for it is by their own fault. They have already too many precedents for this way of proceeding, if they intend to make an ill use of them. But a precedent is only a ground or warrant for the like proceeding upon the like occasion. Two rules were laid down for all bills of this nature; first, that the matter be of a very extraordinary nature. Lesser crimes had better be passed over than punished by the legislature. Of all the crimes, that can be contrived against the nation, certainly the most heinous one is, that of bringing in a foreign force to conquer us. This ruins both us and our posterity for ever. Distractions at home, how fatal soever, even though they should end ever so tragically, as ours once did in the murder of the king and in a military usurpation, yet were capable of a crisis and a cure. In the year 1660, we came again to our wits, and all was set right again. Whereas there is no prospect, after a foreign conquest, but of slavery and misery. And, how black soever the assassinating a king must need appear, yet a foreign conquest is worse; it is assassinating the kingdom; and therefore the inviting and contriving that must be the blackest of crimes. But, as the importance of the matter ought to be equal to such an unusual way of proceeding, so the certainty of the facts ought to be such, that, if the defects in legal proof are to be supplied, yet this ought to be done upon such grounds, as make the fact charged appear so evidently true, that though

a court of law could not proceed upon it, yet no man could raise in himself a doubt concerning it. Antiently treason was judged as a felony still is, upon such presumptions, as satisfied the jury. The law has now limited this to two witnesses brought face to face. But the parliament may still take that liberty, which is denied to inferior courts, of judging this matter, as an ordinary jury does in a case of felony. In the present case there was one witness *viva voce*, upon whose testimony several persons had been condemned, and had suffered; and these neither at their trial, nor at their death, disproved or denied any circumstance of his depositions. If he had been too much a libertine in the course of his life, that did not destroy his credit as a witness. In the first trial this might have made him a doubtful witness; but what had happened since had destroyed the possibility even of suspecting his evidence. A party had been in interest concerned to inquire into his whole life, and in the present case had full time for it; and every circumstance of his deposition had been examined; and yet nothing had been discovered, that could so much as create a doubt. All was still untouched, sound, and true. The only circumstance, in which the dying speeches of those, who suffered on his evidence, seemed to contradict him, was concerning king James's commission; yet none of them denied really what Porter had deposed, which was, that Charnock told him, that there was a commission come from king James for attacking the prince of Orange's guards. They only denied, that there was a commission for assassinating him. Sir John Friend and sir Wm. Perkins were condemned for the consultation now given in evidence against sir John Fenwick. They died not denying it. On the contrary they justified all they had done. It could not be supposed, that, if there had been a tittle in the evidence that was false, they should both have been so far wanting to themselves and to their friends, who were to be tried upon the same evidence, as not to have declared it in the solemnest manner. These things were more undeniably certain than the evidence of ten witnesses could possibly be. Witnesses might conspire to swear a falsehood; but, in this case, the circumstances took away the possibility of a doubt. And therefore the parliament, without taking any notice of Goodman's evidence, might well judge Fenwick guilty; for no man could doubt of it in his own mind. The antient Romans were very jealous of their liberty; but, how exact soever they might be in ordinary cases, yet, when any of their citizens seemed to have a design of making himself king, they either created a dictator, to suppress or destroy him, or else the people proceeded against him in a summary way. By the Porcian law, no citizen could be put to death for any crime whatsoever; yet such regard did the Romans pay to justice, even above law, that, when the Campanian legion had perfidiously broke in upon Rhegium, and pillaged it, they put them all to death for it. In

the famous case of Catiline's conspiracy, as the evidence was clear, and the danger extreme, the accomplices in it were executed, notwithstanding the Porcian law. And this was done by the order of the senate, without either hearing them make their own defence, or admitting them to claim the right, which the Valerian law gave them, of an appeal to the people, yet that whole proceeding was chiefly directed by the two greatest asserters of public liberty, that ever lived, Cato and Cicero. And Cæsar, who opposed it on pretence of its being against the Porcian law, was for that reason suspected of being in the confederacy. It appeared afterwards, how little regard he had, either to law or liberty, though, upon this occasion, he had made use of the one to protect those, who were in a plot against the other."

This last expression was much resented by those, who were against the bill, as carrying a severe reflection upon them for opposing it; and indeed the bishop, though he only offered what reasons occurred to him to justify his voting for the bill, fell under a great load of censure on this occasion. In conclusion, the bill passed by a small majority of seven voices only, there being 66 for it, and 60 against it.

A List of the Lords for and against the Bill.

Bishops for the Bill.—Canterbury, Litchfield, Sarum, Chester, Ely, Oxon, Norwich, Peterborough, Gloucester, Bristol, Lincoln, Chichester.

Lords Temporal for the Bill.—Prince George, Norfolk, Southampton, Richmond, St. Albans, Bolton, Schomberg, Newcastle, Oxford, Derby, Suffolk, Bridgewater, Bolingbroke, Manchester, Rivers, Stamford, Sunderland, Sandwich, Essex, Macclesfield, Radnor, Portland, Monmouth, Montague, Marlborough, Scarborough, Warrington, Bradford, Romney, Tankerville, Abergavenny, Delawar, Berkley, Morley, Ewre, Wharton, Sidney, Lovelace, Howard, Raby, Vaughan, Ward, Culpeper, Lucas, Rockingham, Berkley, Cornwallis, Osborn, Ossulston, Cholmondley, Ashburnham, Weston, Herbert, Haversham. In all 66.

Bishops against the Bill.—London, Durham, Winton, Rochester, Exeter, St. David, Hereford, Bath and Wells.

Lords Temporal against the Bill.—Leeds, Pembroke, Somerset, Ormond, Northumberland, Devonshire, Halifax, Normanby, Lindsay, Dorset, Kent, Huntingdon, Northampton, Bristol, Winchelsea, Kingston, Carmarthen, Thanet, Scarsdale, Bath, Craven, Burlington, Feversham, Sussex, Berkley, Nottingham, Rochester, Abington, Carlisle, Torrington, Here-

ford, Weymouth, Longueville, Willoughby of Eresby, Ferrers, Fitzwalter, Willoughby of Brook, Chandos, Hunsdon, Brooke, Leigh, Jermyn, Byron, Clifford, Granville, Arundel, Dartmouth, Guilford, Godolphin, Jefferies, Lemster, Pawlet. In all 60.

Protest thereon.—The Lords who were for the negative entered the following Protest:

"Because bills of attainder against persons in prison, and who are therefore liable to be tried by law, are of dangerous consequence to the lives of the subject, and, as we conceive, may tend to the subversion of the laws of this kingdom.—Because the evidence of grand jurymen, of what was sworn before them against sir J. F. as also the evidence of the petty jurymen, of what was sworn at the trial of other men, were admitted here; both which are against the rules of law; besides that they disagreed in their testimony.—Because the information of Goodman in writing was received, which is not by law to be admitted; and the prisoner for want of his appearing face to face, as is required by law, could not have the advantage of cross-examining him.—And it did not appear by any evidence, that sir J. F., or any other person employed by him, had any way persuaded Goodman to withdraw himself; and it would be of very dangerous consequence, that any person so accused should be condemned; for by this means a witness, who shall be found insufficient to convict a man, shall have more power to hurt him by his absence, than he could have if he were produced *in voce* against him.—And if Goodman had appeared against him, yet he was so infamous in the whole course of his life, and particularly for the most horrid blasphemy which was proved against him, that no evidence for him could or ought to have any credit, especially in the case of blood. So that in this case, there was but one witness, viz. Porter; and he, as we conceive, a very doubtful one.—Lastly, because sir J. F. is so inconsiderable a man, as to the endangering the peace of the government, that there needs no necessity of proceeding against him in this extraordinary manner. (Signed) Huntingdon, Thanet, N. Dunelm, R. Bath and Wells, Craven, Carlisle, Nottingham, H. London, Gil. Hereford, Willoughby, Kent, R. Ferrers, Granville, Fitzwalter, Halifax, Lindsey, P. Winton, Arundell, Lempster, Hereford, Carnarvon, Jonat. Exon, Jeffreys, Northumberland, Abington, Hunsdon, Chandos, Scarsdale, Normanby, Weymouth, Tho. Menev, Dartmouth, Sussex, Northampton, Bath, Tho. Roffen, Bristol, Leeds, Rochester, Leigh, Wilby, de Broke."

The king gave the royal assent to this bill January the 11th, 1697.

The WRIT for Executing sir John Fenwick, being under the whole Broad Seal, and inclosed in it.

"Gulielmus tertius Dei Gratia, Angliæ, Scotiæ, Franciæ, et Hiberniæ, Rex, Fidei Def.

* As to Bishops voting upon Bills of Attainder, see Leach's Hawk. and the books there cited: and 1 Christian's Blackstone, 401. See, too, lord Delamere's speech against the bishops voting in case of blood upon occasion of lord Danby's impeachment. See, also, Barrington's Observations on Magna Charta, and the stat. 27 Edw. 1.

&c. Vic. Com. London, et Vic. Com. Midx. Salutem: Cum Johannes Fenwick, bar. per quendam actum ad sessionem præsentis nostri Parlamenti apud Westminster. super vicesimum diem Octobris, Anno Regni nostri octavo, per prorogationem tent. edit. de alta prodicione per ipsum perpetrat. et commiss. attinctus fuit, et executio super inde adhuc restat faciend. et quia pro certis causis et considerationibus nos specialiter moventibus, totam executionem actus attincturæ prædict. super dict. Johannem Fenwick, præter amputationem Capitis sui, omitti volumus; ideo præcipimus vobis et per præsentem firmiter injungendo mandamus, quod in et super vicesimum tertium diem instantis mensis Januar. inter horas nonam et undecimam ante meridiem ejusdem diei dictum Johannem Fenwick in Goala nostra de Newgate sub Custodia vestra nunc existent a Goala prædict. usque ad Tower Hill, ducatis, et Caput ipsius Johannis Fenwick ad tunc et ibidem amputari et a Corpore suo omnino separari faciatis. Teste me ipso apud Westmonast. decimo octavo die Januar. Anno Regni nostri octavo.

The Label. CHUTE."

"Vic. Com. Lond. et Midx. de executione faciend. John Fenwick, bar. auctoritate Parl. Attinct. CHUTE."

All the Punishment being remitted but Beheading, on the 28th of January 1697, sir John Fenwick was brought to a Scaffold erected on Tower Hill, where he delivered this PAPER to the Sheriffs.

"Speaking nor writing was never my talent: I shall therefore give a very short, but faithful account, first, of my religion, and next, what I suffer most innocently for, to avoid the calumnies I may reasonably expect my enemies will cast upon me when dead; since they have most falsely and maliciously aspersed me, whilst under my misfortunes.

"As for my religion, I was brought up in the church of England, as it is established by law, and have ever professed it; though I confess I have been an unworthy member of it, in not living up to the strict and excellent rules thereof; for which I take shame to myself, and humbly ask forgiveness of God. I come now to die in that Communion, trusting, as an humble and hearty penitent, to be received by the mercy of God, through the merits of Jesus Christ my Saviour.

"My religion taught me my loyalty, which I bless God is untainted; and I have ever endeavoured in the station wherein I have been placed, to the utmost of my power, to support the crown of England in the true and lineal course of descent, without interruption.

"As for what I am now to die, I call God to witness, I went not to that meeting in Leadenhall street with any such intention as to invite king James by force to invade this nation; nor was I myself provided with either horse or arms, or engaged for any number of men, or gave particular consent for any such invasion, as is most falsly sworn against me.

"I do also declare, in the presence of God, that I knew nothing of king James's coming to Calais, nor of any invasion intended from thence, till it was publicly known: And the only notion I had, that something might be attempted, was from the Toulon fleet coming to Brest.

"I also call God to witness that I received the knowledge of what is contained in those papers that I gave to a great man, that came to me in the Tower, both from letters and messages that came from France; and he told me, when I read them to him, that the prince of Orange had been acquainted with most of those things before.

"I might have expected mercy from that prince, because I was instrumental in saving his life: For when, about April 1695, an attempt formed against him came to my knowledge, I did, partly by dissuasions, and partly by delays, prevent that design; which, I suppose, was the reason that the last villainous project was concealed from me.

"If there be any persons whom I have injured in word or deed, I heartily pray their pardon, and beg of God to pardon those who have injured me; particularly those who with great zeal have sought my life, and brought the guilt of my innocent blood upon this nation, no treason being proved upon me.

"I return my most hearty thanks to those noble and worthy persons who gave me their assistance by opposing this bill of attainder, without which, it had been impossible I could have fallen under the sentence of death. God bless them and their posterity; though I am fully satisfied they pleaded their own cause, while they defended mine.

"I pray God to bless my true and lawful sovereign king James, the queen, and the prince of Wales, and restore him and his posterity to this throne again, for the peace and prosperity of this nation; which is impossible to prosper, till the government is settled upon a right foot.

"And now, O God! I do with all humble devotion commend my soul into thy hands, the great Maker and Preserver of men, and lover of souls; beseeching thee that it may be always dear and precious in thy sight, through the merits of my Saviour Jesus Christ. Amen.*

"JOHN FENWICK."

Then he submitted to the block, and the executioner severed his head from his body.

* In the Harleian Misc. Oldys republished "Contemplations upon Life and Death," &c. as the composition of sir John Fenwick. Mr. Park, 1 Harl. Misc. 542, ed. 1808, states that Philip de Mornay lord of Plessis Marley, was the author of those Contemplations, which were printed in 1575, and translated from the French by the celebrated countess of Pembroke in 1590. Qu. If sir John Fenwick were not the maker of the translation published in the Harl. Miscellany?

395. The Case, with the Proceedings against Major JOHN BERNARDI,* Mr. COUNTER, Mr. BLACKBURN, Mr. CASSELS, Mr. CHAMBERS, and Mr. MELDRUM, on Account of the Assassination-Plot: § WILLIAM III. A. D. 1696. [Written by Major John Bernardi, in Newgate, after he had been there near thirty-three Years a Prisoner, (though in the Historical Part abridged) without any Allowance from the Government, and who could never be admitted to Bail, or take his Trial.†]

MAJOR John Bernardi was the son of Francis Bernardi, descended of an ancient noble family, counts of the holy empire, &c. This Francis was sent to England by the serene republic of Genoa, with credentials from the duke and governors of that state, in the character of agent, and afterwards of that of resident, from 1651, until after the happy restoration of king Charles 2. We find, that on Tuesday, Sept. 16, 1651, on a Report from the Speaker, "It was resolved by the parliament to receive Francis Bernardi, agent from the commonwealth of Genoa, according to the rule for receiving agents." And on the 22d of June, 1660, signior Francis Bernardi was appointed resident from the said commonwealth to England, to congratulate his majesty on his happy return to his kingdoms. But about two years afterwards the republic sent over another person to succeed the said signior Francis Bernardi; and as he was born in England, at the time when his father count Philip de Bernardi was here also in embassy, and loving the country as the place of his nativity, he lived and died in this kingdom, having spent near thirty thousand pounds in hospitality, and in indulging a particular taste in gardening, being the most famous gentleman in the kingdom of his time for fine gardens. He lived some time near Windsor, when first out of his ministry; but removed afterwards into Worcestershire, to be more remote and unknown. Here his son

John began to entertain thoughts of getting from under his father's discipline, who used him with great severity; sometimes confining him like a criminal in a little dark room for trifles, allowing him only bread and small beer; and whilst so confined, nobody durst relieve him, or let him out. Thus this John Bernardi was unhappily destined to confinement in his youth by an unkind father, and in his old age to undergo the like rigid fate by unprecedented acts of parliament, without ever being heard, or proved criminal by any court in the kingdom.

Accordingly John Bernardi escaped from his father in the year 1670, leaving him asleep in his bed; and going out of his gate, he kneeled down on the ground, protesting and praying, that he might never return whilst his father lived. He began his journey towards Coventry, and, though pursued, had the good luck to escape, and got to sir Clement Fisher's seat at Packington, near that city, whose lady was the heroic Mrs. Jane Lane, who protected and conducted king Charles 2, after the battle of Worcester, (so often mentioned in the history of those times) and who was very intimate with young Bernardi's father: But sir Clement and his lady were gone to London two days before, whither young Bernardi followed them. On hearing his case, they did not persuade him to return; but recommended him by letter to captain Littleton Clent, a relation of her ladyship's, then in garrison at Portsmouth, and equipped him with necessaries and money for his journey. On his arrival at Portsmouth the captain received him very obligingly, and entered him in his own company, and taught him all the duty and exercise of a soldier. This life young Bernardi was very fond of, and passed through various posts (in Holland) in the army; for he had seven commissions in all, five of which were conferred on him by his highness the prince of Orange, the sixth by the States-General and the prince of Orange, and the seventh by king James 2, before the revolution. He attained the rank of a captain at 27 years of age. At the siege of Maestricht he lost an eye, and was shot through one of his arms, the bones of which were dashed to splinters; after wrapping his arm in the flap

* Johnson, in his *Life of Pope*, has gratified his dislike of king William by mention of "the poor conspirator who died lately" [nearly half a century before the time when Johnson was writing] "in prison, after a confinement of more than 40 years without any crime proved against him." Bernardi has an article in the *Biographia*, and an account is given of him in the *Gentleman's Magazine* for the year 1780.

† "As many people are unacquainted with the reasons why those persons, suspected of being concerned in the assassination-plot, lay so long in Newgate, without being either bailed, tried, or discharged; this account, wrote by major Bernardi, (one of those taken up and confined) will explain the cause of it." Former Edition.

of his coat, he crowded back to the breach, and fell down to the bottom amongst the dead, (the ground being covered with them;) when a soldier under his command seeing him fall, jumped after him, took him up in his arms, and ran to the trenches with him, where surgeons are always waiting on those occasions: and thus saved his ensign from bleeding to death. The prince of Orange hearing of it, immediately promoted Bernardi, and ordered him, with the other wounded officers, to be conducted to Bois-le-duc: but Bernardi not being able to endure the jolting of the carriage, was laid on the ground, till his servant went to get men to carry him back to the hospital. When he was pretty well recovered, he went with his arm in a sling to Utrecht: but not being able to do duty for some time in his regiment, he made his addresses to a maiden lady, well born and bred, but near twice as old as himself, he being then about 20; but her fortune being considerable for one in so low a post, he married her in April 1677, and lived with her 11 years. In 1687, when king James 2 demanded the six regiments he had lent the Dutch, and they refused to return them, about sixty officers quitted that service; amongst whom was captain Bernardi, who thinking it his duty to obey the commands of his prince, came to England. In 1688, when the prince of Orange landed in England, and succeeding in his enterprize, king James 2, after many difficulties and dangers risked by him, got privately away from Rochester over into France; when major-general Kirk was sent by the prince of Orange to all the regiments then in England, with an association to be signed by all the officers, the contents of which were to bind them under their hands to stand by and defend the prince against all persons whatsoever, and all the officers that refused to sign it, were ordered to quit their commands. Captain Bernardi refused to sign such association, and quitted his employ, went to London, and solicited for the prince of Orange's pass for himself and family, being six in number, to go out of the kingdom, the only favour he desired, which was granted him; those persons that went without a pass being in danger of their lives, or being plundered by the mob. Captain Bernardi got safe to Calais, and found many English gentlemen arrived there before him, some of whom were his acquaintance, and in great distress for want of money to bear their charges to Paris, having been stripped of all they had by the tumults in England. Bernardi having got to the value of above 100*l.* in cloaths, linen, tent and field equipage, pawned them all to a broker for less than half their value, to assist some of those gentlemen; whereby he lost his goods, not having an opportunity of redeeming them in time. Captain Bernardi arriving at St. Germain's, king James 2 told him, that he was just going to Ireland, and had then about 2,300 of his subjects arrived at St. Germain's. The French king granted orders for them to march to Brest, where the late earl of Dover was ordered to

meet and receive them: In the mean time king James went to Brest, where the French king had ordered a large fleet, of about thirty-five sail, to receive him and his soldiers, and land them in Ireland; and in getting thither was the famous battle with admiral Herbert in Bantry-Bay. But king James's affairs growing bad in Ireland, he sent major Bernardi (made a major in Ireland) to Scotland, to accompany the earl of Seaforth, then going to raise men for king James: but receiving the news of king James's being defeated at the battle of the Boyne, the earl of Seaforth dismissed his forces, and sent them to their places of abode, without consulting his uncle, his officers, &c. who were greatly exasperated: whereupon major Bernardi desired to go to England, which major-general Bouchan approved of, and sent for the laird of Glencoe* to come with forty of his vassals to receive Bernardi at Invergarry, and to conduct him to the braes of Monteth, which was performed in the night-time, for fear of the garisons that lay in the way.

Bernardi proceeded on his journey from the braes of Monteth, under the conduct of a guide appointed him by colonel Graham, and arrived at Edinburgh in the month of November 1691. The rulers of that city having heard that some gentlemen were come from the highlands, ordered their gates to be shut, and a general search to be made for them. Bernardi's landlord getting notice of it, conducted him out of town, but half an hour before that order was put in execution; otherwise his journey at that time had terminated in the Tolbooth, or some other prison in Edinburgh; but escaping that and other dangers, he travelled on from thence to London, meeting with no more difficulties at that time, than those of a long winter journey. But misfortunes may be compared with evil habits, it being no easy task to get out of either, when once unhappily fallen into the road of them. And this proved to be Bernardi's case: for, having finished his affairs in London, by disposing of some effects he had left with a friend when he went out of England, and by selling his Scotch horses, he purposed to go over into Flanders; and meeting with two gentlemen of his acquaintance ready to go out of town, in order to make the same voyage, he went with them to Colchester, where they were recommended to a master of a ship, who was in a short time to carry over a lady of great quality to Ostend; but the wind happening to be fixed in the east, the lady ordered her trunks to be put on shipboard, and then went to a gentleman's house about five miles off, charging the master to send for her as soon as the wind came

* "This laird of Glencoe was a little while afterwards, with his lady and vassals, barbarously murdered. See a 4to Pamphlet, intituled, 'Murder will out.' The English parliament voted this 'a barbarous Massacre.'" Former Edit.

For the Proceedings in the Parliament of Scotland respecting the Massacre of Glencoe, see the present volume, *post*.

fair. Bernardi and his two friends met with two other gentlemen, who were strangers to them, and also unknown in the town, who were come thither to get a passage over in the same ship. They joined company, and lodged all together for some nights at Mr. Cook's, then postmaster in Colchester; but having notice of some busy people's inquisitiveness about them, Bernardi and his two friends went to a gentleman's house, about a mile out of the town, and the other two gentlemen went to the master of the ship's house. The second night after Bernardi and his two friends went into the country, intimation was given to them, that sir Isaac Rebow, a justice of the peace, had issued out his warrant to apprehend them, and bring them before him; and the wind coming fair the same night, they went directly to the master of the ship's house, in order to go on board. The master of the ship told them, that he had sent a messenger for the lady two hours before, and expected her in an hour more; and sent one of his men to conduct them on ship-board, and said he would follow them, with the other two gentlemen at his house, as soon as the lady came. A message came from the lady, that she could not possibly come before the next day in the afternoon. Bernardi and his two friends continued on ship-board to avoid the justice's warrant. The next day towards the evening, came a company of train-bands, with five hundred mob, to the quay, where the ship lay dry, at low water, about two miles from the town. This captain of the train-bands commanded his men to go on board, and to bring all the persons they found in the ship to him. These orders were obeyed; and Bernardi, and the two gentlemen with him, were seized and carried directly to Colchester gaol, where the other two gentlemen and the master of the ship had before been made prisoners. The lady had set out in order to go on board, but being told what had happened, she returned back, and never appeared; upon which six justices assembled to break open and search her trunks, exposing even her foul linen to the view of hundreds of people; but their worships could not discover who she was, neither had Bernardi or any of the other four gentlemen the least knowledge of her, but by name and title, which was the countess of Errol; having never seen her. When the six wise men had finished their search of the lady's goods, they strictly examined and searched their five prisoners separately, and charged them with having treasonable papers and pamphlets, though no such were found about them, neither had they any; but some such things were found amongst the lady's goods. These justices sent an account of their proceedings to the earl of Nottingham, then secretary of state, and thereby represented major Bernardi and the other four gentlemen to be accomplices with the said lady, and committed them to the county gaol at Chelmsford; from hence they writ to their friends, and got themselves removed by Habeas Corpus to London, and gave bail before a

judge, to appear in the court of King's-Bench the then next term. Before the term two of the five went off, either by composition or bailing their bail; but Bernardi and his two friends appeared, in hopes and expectation of being discharged by the court: but the Attorney General opposed their being discharged, having instructions from the Secretary of State so to do, alledging that they were guilty of treason. The court ordered them into custody of a messenger, where they remained confined near seven months. Bernardi having for many years been well known to my lord Romney, who was the other principal Secretary of State, writ a letter to his lordship: and, by his favour, they all three were admitted to bail again upon the first day of Michaelmas term, to appear on the last day of the same term. They appeared accordingly; but the Attorney General still went on with his charge against them, and affirmed to the court, that the treasonable papers found in the lady's trunk, together with such other evidence as would be produced in Essex, was sufficient to bring them to their trial; and therefore he moved the court to bind them over to Chelmsford assizes, and they were bound over accordingly, twelve of their friends giving 500*l.* security each for their appearance; and in order to their defence, they applied themselves to four eminent counsel in London, and gave them breviate and large fees to plead their cause, and provided coaches to carry them down, and to attend and bring them back again. The day before the assizes began, they went down with their counsel, sir Creswell Levinz, sir Bartholomew Shower, counsellor Dolben, and another whose name the author hath forgot. The six prosecuting justices were got there before them, with their subpoenaed witnesses, who were all heard by the grand jury the next day, upon an indictment preferred against them; but for want of sufficient evidence to find the bill, the grand jury rejected it, and gave in their verdict *Ignoramus*; whereupon they were discharged in court by proclamation; and the six justices galloped home to Colchester in all haste, as soon as they heard that the grand jury had thrown out the bill of indictment. This prosecution, under close confinement sometimes, and under bail at other times, continued about a year and a half, which put major Bernardi to the expence of some hundreds of pounds, and his two fellow sufferers to as much.

Major Bernardi, soon after he was discharged, went over to Holland with the earl of Nottingham's pass, and returned again within the time limited by the pass, and appeared at the secretary's office as he was enjoined, that my lord might know he had not exceeded the time prescribed him to return in; and by so doing he obtained some favours from his lordship afterwards. Not long after his return from Flanders, he judged it to suit best with his circumstances at that time to retire into the country, to be out of harm's way, and less liable to company and expence; for his five hundred

miles journey from the highlands of Scotland to London, with the undeserved imprisonment and prosecution which he suffered by the officious justices, had very much impaired his substance. And although nothing less than his life was aimed at by the Essex justices, yet his sufferings then were but flea-bites, in comparison to the unprecedented hardships laid upon him soon after. He returned from a pleasant country-house near Brentford, where he had resided about a year and a half, and where he employed much of his time, and some expence, in improving and beautifying the gardens there; but the premises being made over to doctor Ward, prebend of Salisbury, in part of his lady's portion, Bernardi was obliged to quit the house on that account, and came to London at Christmas 1695: a fatal remove from a quiet country-abode to a sea of troubles, which in great measure is to be imputed to his misfortune in meeting with one captain Rookwood by accident at a tavern! Captain Rookwood was then lately come from France, and had been an acquaintance of Bernardi's of about seven years standing, though they had not seen each other for some years then last past. Rookwood frankly told Bernardi, that he was quite tired out in foreign service, that his brother had a good estate, and interest enough to obtain leave for him to come home; and that he was come over to that end, but kept himself a little private, until his brother had gained him a licence to appear; it being then made criminal by a law, for any subject to come from France without leave from the government. Within two months or thereabouts after Bernardi's arrival in town, a horrid conspiracy to assassinate and murder his late majesty king William was discovered, and many proclamations came forth offering 1,000*l.* reward for securing each man inserted in those proclamations. Several were taken up on the first, and more were apprehended daily upon the repeated proclamations. Captain Rookwood came to Bernardi on a Saturday, soon after the horrid plot broke out, and his countenance and behaviour seemed to discover him to be under some disturbance of mind. Bernardi thereupon asked him, if any evil had happened to him? To which he answered, No; but said, that if any body should be so malicious as to give information of his being come over at that time, he should certainly be taken up. But it seems his name was in a proclamation, which came out upon that very day, to seize him as one of those who were concerned in the said assassination-plot, though Bernardi had not then heard any thing of the matter, and Rookwood concealed it from him, intending, as appeared by his behaviour afterwards, to spend that evening with Bernardi; but Bernardi told him, that he was under a promise and engagement to sup that night at a tavern on Tower-hill. Captain Rookwood thereupon earnestly replied, that if the meeting there was not upon private business, he desired he might be one of the company; with which Bernardi readily complied,

and he and Rookwood, with other company, supped there accordingly; and making it too late to go home to their lodgings, Rookwood and Bernardi stayed all night at the tavern, and went to bed together there. The next morning, being Sunday, some constables and other armed men came into the house, and entered the room where Bernardi and Rookwood were in bed, and producing their warrant to search for and seize them, they demanded submission thereto. Bernardi and Rookwood readily yielded to their authority, not making the least resistance, and got up and dressed themselves as soon as possibly they could; but the constables' orders being to carry them, and all the people belonging to the tavern before the recorder of London, who was then gone to church, they were obliged to remain in the tavern until noon, guarded by twenty men. This delay gave Bernardi time and opportunity to make some inquiry into the cause of all that hurly-burly. The senior constable told him, that a neighbour's servant-maid came to the tavern the night before, and seeing some gentlemen at supper, she asked a drawer who they were? And he making her a surly answer, she went with her brother, a journeyman shoemaker, directly to the recorder, and gave information, that some evil-minded men were at the tavern, and that the people of the house refused to discover who they were; and therefore it was reasonable to believe, that they might be such persons as the government then sought for, by divers proclamations. It was then near the latter end of February, and the before-mentioned horrid conspiracy was discovered about the middle of the same month. The constables having notice of the recorder's being at home, they carried Bernardi and Rookwood, with all the tavern family, before him, who examined them very strictly and separately, and told them that he could do no less than commit them at that disturbed time, though he found no other cause than suspicion for so doing; and therefore, as a favour, would send them to the two Compters, and not to Newgate, that they might with less difficulty and expence obtain their liberty, when the storm was blown over. He ordered the tavern family to give bail the next day. Bernardi and Rookwood remained quiet under their respective and different confinements near a month, without any communication with each other, either by letter or message, in all that time. Captain Charnock, King, and Keys, were taken up on the first proclamation, which came forth on or about the 22d day of February; and were tried and convicted of high-treason March 11, 1695-6, and were all three executed on the 18th.

Upon the 23d of March came forth another proclamation, in which Bernardi's name was inserted, and a reward of 1,000*l.* was thereby offered to apprehend him. Captain Rookwood reposing an entire confidence in the friendship of one Mr. George Harris, intrusted him with the knowledge of his and Bernardi's being prisoners in the compters, as before related,

And here it is to be observed, that although captain Rookwood was in a proclamation, which came forth but the day before he and Bernardi went together to the tavern on Tower-hill, and of which, without doubt, he had been apprised at the time of his first coming to Bernardi, who then knew nothing of the matter; yet captain Rookwood thought fit to conceal the same from the knowledge of Bernardi as long as he could, and judging it conducive to his safety, he changed his name, and prevailed on Bernardi, by earnest intreaty, to do the like; but without acquainting him with the proclamation, as a reason for his so doing. Captain Rookwood was often visited in the compters by his minion the said Mr. Harris, to whom he had communicated these particulars: And as soon as the proclamation of the 23d of March came forth, which was the last that was published to apprehend conspirators, and was published at some weeks distance from the rest, Harris went and discovered captain Rookwood and Bernardi for the reward, and they were taken out of the compters by a detachment of the guards, in the night of the 24th of the same month of March, and were carried to the Tilt-yard guard, and examined by the lords of the council the next day, and committed March 25, 1696, close prisoners to Newgate, loaded with heavy irons, and put into separate, dismal, dark and stinking apartments, not being allowed to speak to each other from the time of their being taken out of the two compters. Bernardi did never see Rookwood afterwards, who was soon after tried and condemned, and was executed at Tyburn with Cranburne and Lowick, on the 29th day of April following.

It may be here demanded, how came Bernardi not to undergo the like fate with Rookwood? To which he answers, that it was not by favour, but for want of evidence to hang Bernardi; though to have taken away his life at that time without proof, had been tender mercy, compared to the cruelty of the severe and long confinement he has since endured. None of the discoverers of the said horrid plot, who were about ten or twelve in number, ever so much as mentioned Bernardi's name, unless Harris might make some mention of him, who had no other knowledge of him, but by seeing him and his friend Rookwood sometimes together; in which case he might speak truth with respect to Bernardi, but no farther. Harris's view was the 2,000*l.* reward, which he received, and which must no doubt with him have been a consideration highly preferable to captain Rookwood's friendship, though the captain had been a true friend to Harris for many years, and according to all accounts, as kind to him as a good father could possibly be to a beloved son. Captain Rookwood was proved, by one of the chief discoverers of the conspiracy, to have been one night in their assembly and councils, and then unhappily to have given his consent to the designed bloody act against king William, which cost him his life. Had or could Bernardi at that time have been drawn into their

vile and pernicious councils, with respect to that horrid and most dishonourable design, his rank and long service must necessarily have rendered him a welcome guest amongst the conspirators, and consequently he must have shared captain Rookwood's fate, without any possible means of escaping it. Those who suffered death upon the account of the assassination-conspiracy, were eight in number, namely, captain Charnock, King and Keys, major Lowick, captain Rookwood, and Cranburne, and sir William Perkins and sir John Freind. Sir John Fenwick suffered for another species of treason, as shall hereinafter be particularly related and explained. The nine before-mentioned being executed, there still remained many close prisoners in Newgate upon that account; but evidence being wanted to convict any more of them, the Habeas Corpus act was suspended for nine months, to prevent them from gaining their liberty by law; and this was done with a view of finding out evidence against them within that time. The suspension of the act expiring, several of them entered their prayer at the then next sessions and term, to be tried and admitted to bail. The first who entered such their prayer were three gentlemen who were brothers, and related to the earl of Bath, captain Stow, captain Walbank, and Mr. Blackburn, and some others, and they were all bailed out and discharged, though they were taken by proclamation, and a thousand pounds reward was paid for each of the first five persons. The remaining number in confinement then, were only Bernardi, captain Counter, Mr. Cassels, Mr. Meldrum, and Chambers; and they being locked up close in separate dismal parts of the gaol, and most of them unknown to each other, could neither communicate or do any thing for themselves in order to their liberty, nor could know what had been done for others: But the good success of those before mentioned caused their friends abroad officiously to enter prayers for them at the second sessions after the Habeas Corpus act came in force; whereupon they were all of them taken out of their close holes, and were carried to the Old-Bailey, in order to be tried or bailed. Mr. Constantine Phipps, (who was afterwards lord chancellor of Ireland) was appointed their counsel to move for them, and asked Bernardi, if any application had been made to the solicitor of the treasury? Bernardi answered, no; alledging, that as there was no law to keep them any longer confined, their friends judged it needless to apply to any body for favour; little dreaming that an act of parliament would be obtained to secure and continue their further confinement, a practice never known or heard of before. As soon as they were produced in court in order to be tried or bailed, the solicitor of the treasury stood up and whispered the judges upon the bench: and though that sessions, being a sessions of gaol-delivery, could not lawfully be determined without either trying or bailing these state-prisoners, the judges being obliged by law to deliver the gaol; yet upon the whispering in-

tion of the solicitor of the treasury, the judges adjourned the court for a fortnight, and immediately after a bill was brought into parliament, and an act passed within that time to confine them for a twelvemonth, on a supposed probability still of finding out some evidence against them in that time.* But how came it that the same prudent precaution for the safety of the state, and to bring vile conspirators to condign punishment, was not made use of against those that prayed their trial at the sessions before, and thereby obtained their discharge, and some of whom were committed upon the oath of one witness? It will not sure be difficult to solve this question. Mr. Solicitor of the treasury neither spoke aloud nor softly against them; and why he was so good-natured may be easily understood, having no doubt, been properly talked with by them; which was a very unfortunate omission in the conduct of Bernardi and his fellow sufferers, in not properly bespeaking Mr. Solicitor's favour for them. And here a very singular and deplorable passage happened, relating to Mr. Blackburn, who being bailed out and discharged, with those who had first entered their prayers to be tried, was taken up again upon the same account, and, without any fresh charge or information against him, put into the custody of a messenger, at the time when the House of Commons were passing the bill for continuing the confinement of the five last-mentioned state-prisoners; and the bill being carried up to the House of Lords for their concurrence thereto, Mr. Blackburn was added to the said fatal number in the lords house, by way of amendment to the bill, and sent again to Newgate. Mr. Chambers, another of the last-mentioned state-prisoners, who had also entered his prayer at the term with the first to be

* By an act 8 W. 3. "to attaint such of the persons concerned in the late horrid conspiracy to assassinate his majesty's royal person who are fled from justice, unless they render themselves to justice, and for continuing several others of the said conspirators in custody;" in the last clause of which are these words: "And whereas the persons hereafter named, viz.—Counter, John Bernardi, Robert Cassels, Robert Meldrum, James Chambers, and Robert Blackburn, have been committed, and are still in custody in Newgate, for the said conspiracy and treason: Be it enacted by the authority aforesaid, that the said — Counter, John Bernardi, Robert Cassels, Robert Meldrum, James Chambers, and Robert Blackburn, and such other persons who shall hereafter render themselves, or shall be apprehended, and against whom there shall be evidence upon oath of their being concerned in the said barbarous and bloody conspiracy of assassinating the person of his sacred majesty, shall be detained and kept in custody, without bail or mainprize, until the 1st day of January 1697, unless they shall be sooner bailed by order of council, signed by six of his majesty's most honourable privy-council."

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tried or bailed, was brought up to the court of King's-bench by Habeas Corpus, in order to be bailed; but one of his bail refusing to swear himself worth 500*l.*, Chambers was remanded back to Newgate, where he remained with the rest, under the parliament's confinement, till released by death. The first act expiring, a second (9 W. 3. c. 4.) was soon passed to continue them in prison another year; unless, as in the former act, they should sooner be bailed or discharged by order of council, signed by six privy-counsellors. And at the end thereof, all prospect of finding out any evidence against them seeming to be entirely vanished, a third act (10 and 11 W. 3. c. 13.) was passed, confining them during the pleasure of his late majesty king William. And even some of the members of that parliament afterwards told Bernardi, and others of the number so miserably confined, that the very intention of that act was purely to lay them under dutiful obligations to king William for their liberty, and thereby also at the same time to pay his majesty a compliment; and that the members did not in the least doubt of his majesty's clemency to them, but that in a little time he would set them free. King William was afterwards accordingly applied to in their favour, not long before his death, by the late earl of Burlington; and his majesty was graciously pleased to promise his lordship, that he would deliver them in a short time. But the king's illness and death following soon afterwards, and before any order was given for their discharge, the good and gracious design of his majesty for the deliverance of these unhappy men (if he really intended it) was most unfortunately frustrated and prevented. The act for their confinement, by the demise of king William, being determined, (as they were advised) they entered their prayer at the next sessions to be tried or bailed, but were opposed by the attorney-general, and neither was granted. Afterwards another act of parliament (1 Ann. st. 1, c. 29,) was procured to be passed, confining them during the pleasure of queen Anne. Her majesty was graciously pleased to release captain Counter, the first named in the said acts of confinement. Major Bernardi thereupon petitioned the queen for his liberty, and prevailed upon his grace the late duke of Buckingham, then lord president of the council, to deliver his petition to her majesty; which was so done at the intercession of her grace the duchess of Buckingham his consort, and her lady mother the late countess of Dorchester, both of them being so very good as strenuously to move his grace to undertake it, urging that such acts of compassion and charity were generous and excellent in persons of quality, and well becoming a good and great man in high station. The queen was graciously pleased, upon the duke's motion, to consent to Bernardi's liberty; but his grace afterwards cautiously laying the petition before the privy council, it was by them referred to sir Edward Northey, the then attorney-general, which

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might give him an opportunity to obstruct the queen's intended clemency, for politic or other reasons. Upon this reference, it took up some time and expence to attend and solicit the dispatch of Mr. Attorney's report, which, when made, nevertheless appeared to be in Bernardi's favour. The lord president called for the report, in order to have the sentiments of all the lords in council, how and in what manner Bernardi should be delivered and discharged: but the late earl of Oxford, then lord treasurer, at the same time took the opportunity to move that Mr. Blackburn might have his liberty as well as Bernardi; and thereupon his grace the president, and his lordship the treasurer, differed in council about the respective discharges of Bernardi and Blackburn, whereby both their pretensions to their liberty, though so near succeeding (to all appearance) dropped, and never could be revived again to the queen's death. How far those two great statesmen were sincere in attempting the liberty of Bernardi and Blackburn, or either of them, or played booty, God alone knows: the windings, turnings, and labyrinths of politicians not being easily traced and found out by a well-meaning, honest man. The earl of Oxford afterwards was often applied to in their behalf, and, sometimes by persons of greater honour and quality than himself; and his lordship made more promises than he had buttons upon his coat, waistcoat, and cloak, and some of them upon his honour, that these prisoners should soon be set at liberty, if they would but have a little more patience; but all his lordship's promises were by him either forgot, or, through his most refined policy, neglected to be performed.

By the demise of the queen they had again liberty, by virtue of the Habeas Corpus act, to pray for their trial or to be bailed; and in order thereunto they entered their prayer accordingly, at the first Old Bailey sessions, and were by that court referred to Michaelmas term following. They retained three or four eminent counsel at law, and feed them to move and plead for them. Seven or eight motions were made that term, at different times, in their behalf, and several rules of court were obtained at great expence, before they could bring the then attorney-general, sir Edward Northey, to appear and defend their motions. At last the then lord chief justice Parker told serjeant Webb, (one of the counsel for the prisoners) that the court consented to their being brought to the bar by Habeas Corpus on the Monday following, being the last day of the term, in order to admit them to bail, bidding the serjeant in the mean time to direct his clients to give in the names of such substantial men as they intended to bring into court to bail them. This glimmering favour proved only as a little enlightening before death, as will appear by the sequel. The prisoners were accordingly brought up by their keepers from Newgate to the court of King's-bench, the last day of the term, when the chief jus-

tice before-named, having notice of their being there, was pleased to ask serjeant Webb, their counsel, if they had bail ready in court? And being answered in the affirmative, his lordship was pleased to reply, that wonders were to be done presently; wonders indeed, and such as were never heard of before! The prisoners were called and brought into court, and thereupon the same gentleman made an harangue against them of above an hour long: and although towards the end of his very bitter and invective speech against those helpless wretches, who were obliged to receive all his fire and huffs, he was so ingenuous as to declare, that he had never heard of any evidence charging them with the crime they were committed for; yet he was pleased also to declare, that he was very well satisfied of their guilt, by the proceeding of the first parliament against them, and would therefore remand them back to Newgate, which accordingly he did. At the meeting of the next parliament matters were so ordered, that another act (1 Geo. 1, st. 2, c. 7,) was prepared and procured to pass both houses very expeditiously, to continue them in prison during his late majesty king George's pleasure. If it was intended still to debar these unhappy men from the benefit of the law, it would have been charity to have told them so, when they entered their prayer to take their trial or be bailed at the demise of queen Anne, and not to have drilled them on with hopes of relief all that long term, when none was intended them; impoverishing them at the same time by great expence of counsel's fees, and otherwise, in attempting it, to the reducing and bringing them into a starving condition in gaol. Several petitions were afterwards delivered to his late majesty king George in the name and behalf of these wretches, imploring his sovereign compassion, and setting forth, as an instance of his great mercy, upon another occasion, his pardoning many condemned for actual treason against his majesty's person; whereas these had been long miserably confined as prisoners of state, purely upon bare suspicion only of being concerned in a conspiracy against a deceased monarch, of which the least proof could never be made out against them; yet their petitions were not minded. The court of England hath the least regard to petitions of any court in Europe, and so it hath been for many reigns past; which neglect is chiefly to be imputed to the prime ministers and other great men: his majesty having a petition put into his hand, generally gives it to one of the lords near him, where it is too often thrown aside, and never heard of more. In most other courts particular days are appointed to read petitions, inserting in the margin of each petition, to the effect following, viz. Consented to, or not consented to; and an office is settled wherein to lodge petitions, where the deliverers take them out, and by that means all petitioners soon know how far they are, or are not, to prevail upon such their submissive and most humble application.

By the demise of his late majesty king George the first, which happened at Hanover, on or about the 11th day of June, 1727, Bernardi and his two fellow-sufferers, being all the survivors of the said miserable state-monuments, had again liberty by law to pray for a trial or to be admitted to bail; whereupon Bernardi, on the 16th day of June, 1727, moved the court of King's-bench by his counsel for an Habeas Corpus to bring him up, in order to be tried, bailed, or discharged, according to law; such counsel at the same time apprising the court, that Bernardi had, so long ago as the 25th day of March, 1696, been committed to Newgate by the late duke of Shrewsbury, then secretary of state, on suspicion of being concerned in a horrid conspiracy to assassinate his late majesty king William 3, but without any proof, there not being so much as the oath of one single witness made against him, nor was it specified in his commitment that he was charged upon oath; and no proof at any time afterwards ever appearing against him, to induce the bringing him to a trial, several acts of parliament had been made to keep him in prison, and by the last of them he was confined during the pleasure of his said late majesty king George 1, by whose decease Bernardi was become intitled to his liberty, there being no law then in force to detain him in prison; and the court then made a rule for such Habeas Corpus accordingly; though the motion was strongly opposed by the attorney-general sir Philip Yorke, who, though a young man, had sprung up quickly to that great post in the law, through the early favour and countenance of the before-mentioned chief justice, and his own shining merit, built upon so nursing and advantageous a foundation. Mr. Attorney-General (but sure he was only in jest) objected in particular to the motion as not proper or regular, without producing the original commitment, which, for want of due care in keeping and preserving the records of Newgate, after upwards of 31 years, and the change of the several keepers within that time, was not then to be had; but that weighty objection was over-ruled by the court. Afterwards sir John Fortescue Aland, then one of the judges of the court of King's-bench, and now one of the judges of his majesty's court of Common-pleas, declared in court, that the same matter had been moved upon the demise of queen Anne, when the chief justice Parker before-mentioned declared his opinion, that the court had a discretionary power either to bail or discharge the prisoners, then brought up to the court of King's-bench by Habeas Corpus in the like case; yet nevertheless, at the same time, he remanded them back to Newgate. Bernardi's counsel thereupon waved the Habeas Corpus, and desired to take nothing by his motion, as conceiving the expence only certain, (which Bernardi was ill able to bear) and the success doubtful; and besides the judges commissions were not then renewed, who of themselves could not subsist longer than six months from his present ma-

jesty's accession to the crown. It was therefore thought expedient and more adviseable for Bernardi to seek relief by petitioning the king for his royal favour and clemency, than to make any farther trial to be discharged or bailed by the court of King's-bench. A bill was soon after brought into parliament, and speedily passed into an act (1 Geo. 2, st. 1, c. 4,) to continue his imprisonment, with his other two fellow-sufferers, Blackburn and Cassels, during his present majesty's pleasure. A printed Case was delivered to all the lords and commons against the bill, while the same was under the consideration of the two houses, as is hereinafter set forth. And Bernardi preferred several Petitions to the king and queen, both before and after the said last-mentioned act passed; the tenor or purport of which Case and Petitions are as followeth, viz.

The most sad and deplorable Case of ROBERT BLACKBURN, JOHN BERNARDI, and ROBERT CASSELS, humbly offered against the Bill now depending in Parliament for continuing their Imprisonment, after a Confinement worse than Death by them already undergone, of upwards of one-and-thirty Years in Newgate.

“ In March and April 1696, they were committed: the crime they were charged with in their respective commitments was high-treason, in conspiring the murder and assassination of his late majesty king William 3, but without proof, there being not so much as the oath of one single witness made against any of them, nor is it specified in their commitments, that they were charged upon oath: that no proof appearing against them whereby to bring them to a trial, several acts of parliament had been made to keep them in prison, the last of which left them to his late majesty's pleasure, and then by the demise of the king they were become intitled to their liberty: that the persons charged with this most horrid and detestable crime were originally six, namely, James Counter, Rob. Meldrum, James Chambers, Robert Blackburn, John Bernardi, and Robert Cassels: Counter was set at liberty by queen Anne, and Meldrum and Chambers died in prison; so that there were then remaining only the last three of these miserable, wretched and most unfortunate prisoners, who solemnly disclaim, and from their hearts ever did and do abhor and detest, the said villainous crime so laid to their charge as aforesaid: and although their number was then reduced to three as before-mentioned, yet nevertheless by that bill they were intended to be further confined: that they were reduced to extreme miseries by their said tedious confinement of one-and-thirty years and upwards, in a melancholy, dismal, and loathsome gaol, and by their great age, infirmity, and poverty; and though they had been confined close prisoners of state in Newgate for upwards of one-and-thirty years as aforesaid, yet they had never had one penny allowance from the government.

"Wherefore, and in regard to the unprecedented and unparalleled hardships of their case, it was humbly hoped the said bill should not pass. (Subscribed) ROBERT BLACKBURN.

"Newgate,
July 5, 1727."

JOHN BERNARDI.
ROBERT CASSELS."

Copies of commitments follow, whereby it plainly appears that none of the said three prisoners were committed upon oath.

"These are, in his majesty's name, to authorise and require you to receive into your custody the body of — Bernardi, herewith sent you for high treason, in conspiring the assassination and murder of the king; and you are to keep him safe until he shall be delivered by due course of law; and for so doing this shall be your warrant. Given at the court at Whitehall, the 25th of March, 1696.

"SHREWSBURY."

"To the Keeper of Newgate,
or his Deputy."

N. B. The commitments of Mr. Blackburn and Cassels are to the same effect with Bernardi's.

None of the said six prisoners were committed upon any oath, except Counter, who was charged upon the oath of one witness, as may appear by the following true copy of his commitment:

"Middlesex.

"Receive into your custody the body of John alias James Gunter, alias Counter, alias Rumsey, herewith sent you, charged before me, upon the oath of George Harris, gent. for high treason, in conspiring to assassinate his majesty, and to procure an invasion of this kingdom by the French, being the person mentioned in his majesty's proclamation, and there called Counter, alias Rumsey; and in order to a further examination, you are him safely to keep, until he shall be discharged by due course of law; and for so doing this shall be your warrant. Given under my hand and seal, this 29th day of May, 1696.

"S. LOVELL, Recorder."

A Copy of the Keeper's CERTIFICATE, setting forth that none of the said three prisoners were committed upon oath; which Certificate was annexed to one of Bernardi's Petitions to the king:

"Whereas James Gunter, alias Counter, alias Rumsey, James Chambers, Robert Meldrum, Robert Blackburn, Robert Cassels, and John Bernardi, were committed to Newgate in 1696, for conspiring to assassinate his late majesty king William the 3d, as appears by copies of their several commitments, signed by James Fell, the keeper of Newgate, and by his head turnkey Bodenham Rouse, which I have seen and examined: I hereby certify, that none of the before-named persons are charged upon any oath specified in the said copies of their respective commitments, except the above-said Counter, who stands charged in his com-

mitment for the said crime, upon the oath of one George Harris, gent. Given under my hand this 15th day of August, 1727.

"THOMAS ALLEN."

True Copies of Petitions to the King and Queen, and of an Affidavit of two eminent surgeons, are hereinafter set forth as followeth:

To the King's Most Excellent Majesty:

The most humble PETITION of Major JOHN BERNARDI,

"Sheweth,

"That your petitioner now is, and for upwards of one-and-thirty years last past has been a state prisoner in Newgate, committed the 25th of March, 1696, by the then earl of Shrewsbury's warrant, as secretary of state, and therein charged with high-treason, in conspiring the murder and assassination of his late majesty king William; but without any proof, or so much as any information upon the oath of one single witness, that your petitioner could ever hear of: neither hath, in all the said time of thirty-one years and upwards, any prosecution been had against your petitioner for the said horrid supposed crime, which your petitioner doth disclaim, and from his heart ever did and doth abhor and detest.

"That by two acts of indemnity, the one in the third, and the other in the seventh year of the reign of his late majesty your most gracious father king George the first, the crime alledged against your petitioner in his commitment is pardoned; but by the said acts the imprisonment of your petitioner was continued during his late majesty's pleasure.

"That your petitioner is advised, that by the demise of his said late majesty, your petitioner became intitled to his liberty, and ought not to be detained in prison by any law now in being; and has very lately applied to your majesty's judges of the court of King's-Bench to be discharged from his confinement, but without success.

"That your petitioner, by his so long imprisonment, is reduced to great straits and want, and great infirmity of body; and his life is in danger by his close confinement in Newgate, as by affidavit of two eminent surgeons, herewith produced, and sworn before one of your majesty's judges of the King's-bench, and filed in the said court, may appear. And your petitioner is now upwards of seventy years of age, great and the best part of which time has been very uncomfortably worn out by your petitioner, in a melancholy, dismal, and loathsome gaol, where it has cost your petitioner above 700*l.* for his lodging.

"That in regard to all such your petitioner's sad and deplorable circumstances, and advanced old age, your petitioner most humbly hopes he may be deemed a fit object of your majesty's charity and clemency, and more especially at this juncture of your majesty's accession to the throne.

"Wherefore your petitioner doth most hum-

bly beseech your majesty, that he may, for the present, for the benefit of his health, and to save expence, be removed from Newgate to the King's-bench prison, till such time as your majesty shall graciously see cause to order your petitioner's absolute discharge.

"And your petitioner shall ever pray, &c.

"Ex Parte JOHANNIS BERNARDI Ar'
in Banco Regis."

"John Wheeler the elder, and John Wheeler the younger, his son, both of the city of London, surgeons, jointly and severally make oath, that major John Bernardi, who now is, and for upwards of one-and-thirty years last past, as these deponents have been informed, and verily believe, hath been a state-prisoner in Newgate, hath frequently had very ill fits, occasioned by a miserable lameness and swelling in his arm, by humours flowing to an old wound. And these deponents further say, that they have attended him many times in such illness, for about twelve years last past, as his surgeons, laying his arm often open to the bone by large incisions, which have continued open and running wounds for several months after every such operation; and his torments occasioned thereby have frequently brought fevers upon him, to the endangering his life. And these deponents further say, that in these deponents' judgment, the cause of contracting such sharp and gross humours hath proceeded, and doth proceed from the length and closeness of his confinement; which, if continued, will still endanger his life, in these deponents' judgment; and the rather by reason of his advanced old age, he being now, as these deponents have been informed, and do believe, upwards of seventy years of age.

"JOHN WHEELER.

"JOHN WHEELER, jun."

"Jurat' apud Serjeants-Inn, in
Chancery-Lane, 15 Die

Junii, 1727, coram JA. REYNOLDS."

To the King's Most Excellent Majesty :

The humble PETITION of Major JOHN BERNARDI,

"Sheweth ;

"That your petitioner, by an act of parliament lately made, being entirely left to your majesty's most gracious pleasure, after having suffered near thirty-two years close imprisonment in Newgate, on suspicion of being concerned in a most horrid conspiracy against his late majesty king William.

"That your petitioner hath always prayed and petitioned to be tried, as often as he could do it by law, to be acquitted or condemned; yet he could never be heard or brought before any court, to have his guilt or innocence proved.

"That your petitioner was not charged upon any oath, of his being a conspirator in that horrid plot, which is evident by his commitment: no man ever being taken up for high treason, and so charged, but the same was al-

ways specified and expressed in his commitment (as your petitioner is advised). For instance, Mr. Counter is only charged upon the oath of one evidence; the distinction sufficiently appeareth by the copy of his commitment, and that of your petitioner, hereunto annexed.

"That your petitioner hath humbly set forth his great age, infirmity and poverty, by a former petition delivered into your majesty's most gracious hand; your petitioner being above seventy years old, suffering insupportable miseries by frequent ulcerations in his limbs, occasioned by his long and close confinement, attested upon the oath of two eminent surgeons, and annexed to his former petition to your majesty.

"Your petitioner therefore most humbly implores and supplicates your majesty, in your sovereign compassion and great goodness, to grant that your petitioner may be removed from Newgate to your majesty's Bench prison for the present, for the benefit of more air, and less expence, until your majesty may be graciously pleased to grant your petitioner entire liberty.

"And your petitioner shall ever pray, &c."

To the Queen's Most Excellent Majesty :

The humble PETITION of Major JOHN BERNARDI,

"Sheweth ;

"That your petitioner hath been a close prisoner of state in Newgate near thirty-two years, and is now destined to a longer confinement, by an act of parliament lately made to that end, leaving your petitioner to his majesty's most gracious pleasure.

"That your petitioner was not committed upon the oath of any evidence, as appeareth by the copy of his commitment annexed to his petition, delivered also to his majesty's most gracious hand this day.

"That your petitioner and the rest had their Case delivered to the members of both Houses of parliament, whilst the act for their longer imprisonment was under their consideration; a copy of which is hereunto annexed.

"That your petitioner is one of the oldest commission-officers in the kingdom, having served the states of Holland fifteen years by the king of England's consent and approbation; your petitioner bearing five of his then highness the prince of Orange's commissions in several stations of honour, the first of which bears date above fifty-four years ago; and your petitioner hath been much wounded in the said service.

"That your petitioner's grandfather and father were both counts of the empire, &c. though his said father and your petitioner were both born subjects of this kingdom.

"That your petitioner hath his beforementioned commissions, and the imperial patent, to produce in testimony of the truth thereof.

"That your petitioner hath already suffered a punishment a thousand-fold worse than a

present or violent death, and never could obtain the favour to be brought before any court of justice, to have his guilt or innocence proved; kept in prison near thirty-two years, by methods never heard of before; and is now nigh worn out with old age, decrepitude, and poverty.

"Your petitioner therefore most humbly implores and beseeches your majesty, in your sovereign compassion and pity, to move the king to grant the prayer of your most miserable petitioner, which is but one prison for another, until the King of Kings, in his divine providence, shall deliver your petitioner out of this changeable world, or that his majesty may be graciously pleased to grant him more liberty in it.

"And your petitioner shall ever pray, &c."*

To the Queen's Most Excellent Majesty:

The humble PETITION of ABIGAIL BERNARDI, Wife to the most unfortunate Major John Bernardi, who hath for upwards of one-and-thirty years last past been confined a State-Prisoner in Newgate.

"Sheweth;

"That your petitioner on the 25th of June last, did deliver to the king's most excellent majesty an humble petition on the behalf of the

* To Blackburn's Petition, to the same effect, was added the following certificate:

"Middlesex, ss. These are to certify, That upon search made amongst the records of the sessions of gaol-delivery of Newgate, held for the county of Middlesex, it appears by the said records, that on the 2nd day of April, 1696, Robert Blackburn was committed to the said gaol of Newgate, by the right honourable the duke of Shrewsbury, principal secretary of state, for high treason, in conspiring the assassination of the late king. And I do further certify, that at the sessions of gaol-delivery of Newgate, held for the said county, at Justice-hall in the Old-Bailey, in the suburbs of the city of London, on the 9th day of September, 1696, the said Robert Blackburn was delivered to bail by the court, for his personal appearance at the next sessions of gaol-delivery, to be held for the said county, to answer to all such matters, as on his said late majesty's behalf should be objected against him; and not to depart the court without licence; and in the mean time, to be of his good behaviour; that then, &c. At which said next sessions of gaol-delivery, to wit, at the sessions of gaol-delivery of Newgate, held for the said county, at Justice-hall aforesaid, on the 14th day of October, 1696, the said Robert Blackburn personally appeared in open court; and was by the said court discharged of his recognizance. And I do hereby further certify, that it appears by the said records, that on the 7th day of January, 1696-7, the said Robert Blackburn was committed to the said gaol of Newgate, by sir William Trumball, knight, one of his late majesty's

said unfortunate prisoner, thereby praying, for the reasons therein contained, that he might for the present, for the benefit of his health, and to save expence, be removed from Newgate to the King's-bench prison, till such time as his majesty should graciously see cause to order his absolute discharge, as by the said petition, reference being thereunto had, more fully may appear. That in the reign of his late majesty, in the time of the Preston rebellion, many prisoners under condemnation and sentence of death for high treason, (but reprieved) for the sake of their health obtained an indulgence of a removal from one prison to another, where the closeness of their confinement endangered their lives, as is now the case of the said unfortunate Bernardi, who, although he hath already undergone a confinement worse than death, was committed only upon suspicion of a very horrid and most detestable crime, in conspiring the murder and assassination of his late majesty king William, but without any proof, or as much as the oath of one single witness against him; neither hath any proof been found against him, or he brought to any trial, in upwards of one-and-thirty years time; and as he hath been always ready and desirous to take his trial, he hath, from time to time, regularly entered his prayer to be tried.

"Your petitioner therefore doth most hum-

most honourable privy-council, principal secretary of state, for high treason, in conspiring the murder and assassination of the said king. Dated this 10th day of August, 1708, in the 7th year of our sovereign lady Anne, by the grace of God queen of Great Britain, &c.

"S. HARCOURT, clerk of the peace, and gaol-delivery of Newgate, for the county of Middlesex."

It appears, by the foregoing Certificate, that Robert Blackburn was committed the 2nd of April, 1696. That on the 9th of September following, he was admitted to bail. That the 14th of October, 1696, he was discharged. The 7th of January committed again for the same fact; though taken up at the Buoy and Nore, by one captain Nash, for attempting to go to Flanders without a pass. By captain Nash left in custody of a messenger nine weeks. Then committed by sir William Trumball, knight, to Newgate, and never examined, or any oath against him, that ever he heard of; and then detained till an act passed to imprison Counter, Meldrum, Chambers, Bernardi and Cassels, who were all strangers to, and never seen by Blackburn, till in Newgate; and then he was inserted in the amended bill, which came down from the Lords to the Commons. He has been now almost thirty-three years in prison, and no allowance from the government, though a state-prisoner. He was not one of those, for whom the thousand pounds was offered. These several allegations have been reported true, by sir Edward Northey, and sir Robert Raymond; therefore he hopes to have his majesty's relief.

bly beseech and supplicate your majesty, in your sovereign compassion and great goodness, to intercede with the king's most excellent majesty for the removal of your petitioner's unfortunate husband, the said major John Bernardi, from Newgate to the King's-bench prison.

"And your petitioner shall ever pray, &c."

To conclude this point, it is manifest by the before-recited copies of petitions, cases and certificates, and distinct allegations of the said major John Bernardi, that he was not guilty even of as much as misprision of treason, having never had, directly or indirectly, any knowledge of the said horrid conspiracy.

Here are two passages to be curiously enquired into; the first of which is, how Bernardi came to be put into a proclamation? The answer to this is not at all difficult. Undoubtedly it was by reason of George Harris's information of his being then in the Compter with captain Rookwood; which Rookwood was accused upon oath, though Bernardi never was. And this seems to be more unquestionably evident, in regard the proclamation, wherein Bernardi is named, did not come out until the very morning before Bernardi and Rookwood were taken out of the Compter by the Guards at midnight, upon Harris's information, which was five weeks after the discovery of the Plot, and Bernardi's name was never inserted in any former proclamation.

The next and second question is, On what grounds he was first confined by act of parliament? To which Bernardi answers, that the duke of Shrewsbury having inserted in his commitment the following positive words, viz. for being concerned in the horrid conspiracy, &c. though not a syllable of any charge upon oath, his grace's word under his hand was not to be called in question by the parliament, in favour of a poor, inferior, supposed enemy to the government: and how Bernardi, or any other man, could have the confidence to set forth so positively, by petitions to the king, and a case to the parliament, that he was never charged upon oath, if he had ever known or heard of any evidence against him, and in which (if the contrary had been fact) he might easily have been contradicted, is not to be accounted for. He affirms, and with great truth, that he never lay under the odium of being guilty of any base or dishonourable act in the whole course of his life, until the commencement of his present deplorable sufferings; which may gain some credit from his several promotions in commission from time to time, both abroad and at home: and laying aside all true notions of honour, no man in his senses, having capacity or common sense enough to judge of his own interest, could sure be so infatuated as to engage in so horrid an action; because no prince upon earth, being a Christian, could or would ever countenance such a man afterwards, though what he did might turn to such prince's service. We have an

instance of it at home, of one sir Paul Whitford, who murdered Dorislaus, Oliver Cromwell's ambassador at the Hague. This base and wicked act might tend to the service of king Charles 2, when in exile; however the king, after the restoration, never suffered Whitford to appear in his presence, though he had been a favourite before; and if his majesty allowed him any thing, it was done so privately, that nobody knew it, and he lived and died in a remote part of the kingdom.

Bernardi quitted to the amount of about 500*l.* a-year, which he had coming in by employs, and by his wife's fortune, upon king James's demanding his subjects home from the Dutch service; and it may be therefore reasonable to believe, that Bernardi was in some esteem with the king as long as his majesty lived; and nothing but a fool or a madman could be so stupid as to forfeit such an advantage, by engaging in a vile, wicked, and most dishonourable action, which neither king nor subject could justify.

It may not be improper here, for manifesting and clearing up Bernardi's innocence beyond all contradiction, to give a particular relation of what passed before the lord chief justice Holt, upon the evidence given before his lordship, upon Bernardi's being suspected to be concerned in the said horrid and detestable conspiracy, the witnesses and discoverers of which were captain George Porter,* Mr. Le Rue,

* This George Porter, the principal evidence in the Assassination Plot, and against sir John Fenwick and the rest, was tried for the murder of sir James Hacket; and his Trial is here inserted.

The TRIAL of George Porter, esq. for the murder of sir James Hacket, of Scotland, knt. at the sessions of the peace, Oyer and Terminer, held at Justice-hall in the Old-Bailey, London, on Wednesday, Thursday, Friday, and Saturday, the 10th, 11th, 12th, and 13th days of December, 1684, before the honourable sir James Smith, Lord-Mayor of the City of London, sir Thomas Jenner, knt. one of his Majesty's Serjeants at Law, and Recorder of the aforesaid City; together with other Justices of London and Middlesex.

Jury.—Ralph Box, William Moyer, Walter Coventry, Jacob David, John Palmer, Ralph Izzard, John Easton, John Fauster, Roger Attley, Thomas Harrison, Francis Smith, William Drinkwater.

George Porter, of London, esq. was indicted for killing sir James Hacket, in the parish of St. Bride's, London, on the 11th of October, 1684, in the 36th year of his majesty's reign. The case and circumstances appearing on the Trial were, that the deceased and the prisoner, being at the Duke's theatre in Salisbury-Court, after the play ended, a great crowd happening upon their coming out, and sir James

captain Blair, captain Fisher, Mr. Ubank or Hewbank, Mr. Bartram, captain Boyce, and some others, whose names have escaped the author's memory: they were all ordered to assemble at the said lord chief justice's chambers in Serjeants-inn in Chancery-lane, which they did, and were there examined upon oath by his lordship, in order to the trials of major Lowick, major Bernardi, captain Knightly, and captain Rookwood, which four were designed to be tried next after the condemnation and execution of captain Charnock, Mr. King, Mr. Keys, sir William Perkins, and sir John Freind, for being concerned in the said vile and villainous plot. Captain Boyce deposed upon his examination, that he had known major Bernardi a captain in the Dutch service, where he bore a very good character, but that he had not seen him in five years then last past. Mr. Le Rue deposed, that he also knew major Bernardi, but could lay nothing to his charge; and that the last time he was in his company, to the best of his remembrance, was at least two years before the assassination-plot was discovered. Captain Porter and the rest declared,

endeavouring to make way for his children with his cane, gently moving it, happened to push Mr. Porter on the back; who asked, What the meaning of it was? But sir James, as he designed him no affront, took no notice of what he said; and still pressing for more room, accidentally hit Mr. Porter on the nose or mouth, and made it bleed; upon which the prisoner supposing himself to be affronted, and jostled or brushed by the deceased, (who had the cane still in his hand) drew his sword, and, without further consideration, run the deceased into the thigh, so that the weapon appeared both ways, cutting likewise his fingers, whilst he struggled to draw it forth; whereupon the prisoner recovered his sword, (the deceased at that time sinking down) but had no further opportunity to push at sir James, here it was seized by a gentleman present; whereat the prisoner expressed much indignation, and getting it once more at liberty, stood upon his guard, saying, he had served one already as he had deserved, or to that effect; yet the deceased, after the wound received, went home in a coach, and lived till the 26th following, and then died in the parish of St. Martin's in the Fields.—The defence the prisoner made, was, that he had received a push in the mouth, as he verily believed, from the deceased, and by that means became so rashly unfortunate, as to run him through the thigh; adding, that he knew not the person that fell through this occasion, and therefore could have no pre-meditated malice against him, &c. whereupon the jury returning their verdict, found him guilty of manslaughter only; by which means he was not found guilty upon the statute of stabbing; upon which statute he was charged with a second indictment: but the next heir brought an appeal. At the next sessions, held the 16th and 17th of January, 1684, Mr.

that they never had any knowledge of major Bernardi. Thereupon major Bernardi was struck out of the number or list of the four designed for trial, and Mr. Cranburne was appointed to be tried in his room, to make up number four. They were all four tried accordingly, and condemned. Three of them, viz. Major Lowick, captain Rookwood, and Mr. Cranburne, were executed soon after. Captain Knightly, who pleaded guilty, was by great intercession reprieved, and some time after pardoned upon the terms of banishment. Now followeth a remark upon a mistaken notion frequently broached and argued abroad, to the great prejudice and wrong of major Bernardi and his two remaining fellow-sufferers, Blackburn and Cassels, viz. That there was one evidence against them, and only one to be come at, they having artfully spirited away and decoyed out of the kingdom one other evidence, who could have proved them concerned in the fact, which was the ground and foundation of the parliament's passing the first act for their confinement. Major Bernardi takes upon him positively to deny that fact, and to

Porter prayed the court, that he might be admitted to his clergy; but was answered, that an appeal being already brought and allowed, it could not be granted. Then he desired he might have his prayer recorded; but that not being practicable in such cases, he was only admitted to bail, himself entering into a recognizance of 1,000*l.* and his sureties 500*l.* each; and ordered to move it by his counsel the succeeding term, at the King's-bench bar. Though at the next sessions held at the Old-Bailey, the 25th of February following, Mr. Porter pleaded his majesty's most gracious pardon for killing sir James Hacket, which was read and allowed, and he discharged.*

This captain Porter, as a reward for giving evidence against Charnock, King, and Keys (his servant), sir John Freind, sir William Perkins, Brigadier Rookwood, Mr. Cranburne, sir John Fenwick, &c. had a pension settled on him of 260*l.* per annum, which he enjoyed till about June 1728: for the probate of the will of this George Porter, late of the parish of St. James's, Westminster, esq. was granted in the prerogative-court of Canterbury, July 4, 1728, unto Elizabeth Porter, his widow and executrix; so entered in the Pension-office books, and in auditor Harley's and auditor Foley's office, July 1728. Captain Fisher had likewise a pension of 260*l.* per annum for being an evidence in that Plot, as had others, but less sums.

* Captain Porter, in Rookwood's Trial, (see p. 182,) was excepted against by the prisoner's counsel, as incapable of being a witness, standing convicted of felony, for killing sir James Hacket, knt, 36 Car. 2. But having got the king's pardon, was allowed a legal witness, though not burnt in the hand,

affirm that nothing can be more false and untrue: for no one evidence or discoverer of that abominable conspiracy was ever prevailed on to abscond or quit the land, or ever absented himself, while the government had any use or occasion for him. Mr. Goodman indeed, the stage-player, had been a copartner evidence with captain George Porter against sir John Fenwick, who was charged by them with being concerned in a different species of treason, with other persons of quality, by endeavouring to procure an invasion from France, two years before the assassination-plot broke out, though sir John Fenwick was not accused by Goodman and Porter till that time. True it is, that the said Goodman was soon after influenced by a bribe and fair promises (as is supposed) to quit the kingdom, thereby to prevent sir John Fenwick's being convicted of high treason by the common law; which occasioned the parliament's passing a bill of attainder against him, which took away his life. But that was not the case, in any respect, of Bernardi, Counter, Meldrum, Chambers, Blackburn, and Cassels, or any of them: neither was Goodman ever so much as mentioned or charged with the knowledge of, or of being in any manner concerned in the assassination-plot; so that he neither was, nor could be an evidence against any one upon that account.

Providence was so gracious, merciful and indulgent to major Bernardi, in the midst of his miseries and afflictions in Newgate, as to provide him a second virtuous, kind and loving wife, in the year of our Lord 1712, who hath proved to him a true helpmeet, having by her good management and industry, and great and kind care of him, contributed much to his support and comfort, and to the keeping of his heart from breaking, under the worst of his hardships, difficulties and distress. And by her he hath had, during his confinement in Newgate, ten children, who in respect of charge and expence under his strait and narrow circumstances, and under his immurement, or being buried alive, have been no small burthen to him; yet he esteems them great blessings bestowed upon him by Almighty God, at whose tribunal, after this miserable and wretched life ended, he knows he shall appear innocent of the heinous and monstrous crime laid to his charge; and for the bare mistaken suspicion of which he hath in three reigns (and for near a year and three quarters in a fourth) been so severely treated: and then he shall, if not sooner delivered by any king upon earth, God Almighty's vicegerent here below, be delivered from the English bastile (vulgarly called Newgate) by the great and merciful God himself above, the king of kings, and only ruler of princes. It may not be improper here to distinguish our said English bastile from that in France, and to shew in what circumstances they materially differ. To which end know, candid reader, that a state-prisoner in the Bastile in France pays not, nor is squeezed out of any thing for his lodging, meat, drink, or ease, nor is loaded with irons,

nor put in dungeons, or otherwise ill used in prison; but he is always handsomely provided for, and allowed a liberal subsistence by the government according to his rank and degree: But in our said English Bastile no state-prisoner has any allowance made him from the government, and in case he hath not of his own, he must live upon charity, if he can be so happy as to meet with it, or starve: and in case he hath any known substance, he must expect to be squeezed out of a great part of it, or he shall have much worse lodging than many a tolerable dog-kennel of a kind good-natured country esquire would make, be loaded with irons, and used worse than a dog. And all this is permitted or connived at, under a government, the voice of whose people is almost perpetually boasting of liberty and property, the words liberty and property being ever uppermost, and at their tongues end, and they constantly exclaiming against arbitrary power: But God alone knows the sincerity and soundness, or the hollowness and deceitfulness of men's hearts. Can it be accounted for, that so much oppression should be suffered to be practised in a free and Christian nation (as England is); and, on the contrary, that so much humanity and relief should be shewn and used to state-prisoners in distress in France, under an absolute and arbitrary government? Sure it cannot proceed from the French being more honest, more polite, more humane, less malicious and revengeful, or of a more generous and Christian temper, than the English. For my part, I am so far from asserting it, that I will not so much as think it. But this I will affirm, that what I have before observed with respect to the different usage of prisoners, in the two several bastiles of the different nations, is not more strange than true. And now I have nothing more to add hereunto, but my hope and earnest desire, that such as, out of curiosity or otherwise, shall give themselves the trouble to read this small tract, will be pleased to judge favourably of me; to which intent I was chiefly moved and induced to the pains of writing it in my old age, and to prevent an infamous and odious character of me from being wrongfully and injuriously handed down and transmitted to posterity; the very thoughts of which have been more grievous to my mind, and more piercing and wounding to my spirit, than all the rest of my hardships and sufferings, which will ever be the case of a man well born, having an honest heart, a soldier, and a man of honour. Such a man can ill bear reproach and disgrace, not having deserved it, and to whom his good name and fame must be ever dearer, and by him held in much greater esteem, than any other thing in life, nay, even than life itself, and the author being old, as before mentioned, and (as he doth hereby frankly own) unlearned, and not skilled in letters, having chiefly been trained up in war, and not much in scholarship, he humbly hopes the same may in some measure plead his excuse for such defective words as may be found in this his

short narrative, and for the plainness and uncorrectness of its stile. Untruths or misrepresentations there are none in it, to the best of his knowledge and memory; nor hath he intentionally, or at all, to the best of his judgment, herein reflected upon any person whomsoever in any wise, or upon the power, justice, or wisdom of the several parliaments, by whose renewed acts, from time to time, his confinement in prison hath been spun out to so great a length: nor upon the courts of justice and learned judges presiding therein, who have had the several opportunities before-mentioned of discharging or bailing him according to law, further or otherwise than as any reflection upon any of them, from the particular facts by him herein plainly, truly, and impartially stated, may naturally and unavoidably arise and result.

One very great misfortune it hath been to the author, and the last that he will trouble his reader withal; and which would scarce, in the case of another, be deemed a misfortune, but rather on the contrary be esteemed a very great blessing, viz. That he hath lived to so great an advanced old age, which most people would naturally desire to do, life generally speaking, being sweet, and the very thoughts of death abhorrent and shocking to nature; though death, when all other friends fail, is most certainly a kind and sure friend and deliverer in time of need, from chains and gaols, an hell upon earth: But to explain and make out, that the author's having lived so long hath been a

misfortune to him, the same is verified in this, that he hath thereby survived almost all his contemporaries, friends, and acquaintance, who have contributed to his support. And it is now too late in the day, and under confinement for him to hope or expect to make any new acquaintance or friends, whereby he may reap any advantage or assistance under his present difficult circumstances, unless this his little tract may perchance make him some friends among the good-natured, generous, and charitable part of mankind, who shall not be void of all sense, notion, and fellow-feeling of another's suffering; nor be perfect strangers to all humanity, pity, commiseration and compassion; nor profane that sacred petition in the Lord's prayer, viz. Forgive us our trespasses, as we forgive them that trespass against us; as it is to be feared many do, by having it in their mouths, when they themselves, with hardened hearts, cannot forgive even the innocent and guiltless, who have not trespassed against them. And so the author concludes with bidding his reader heartily farewell; and in attestation of the truth of what he has writ, he takes the freedom to subscribe his name.

Newgate,
March 1, 1728.

JOHN BERNARDI.

He died at his chambers in the Press-yard in Newgate, the latter end of September, 1736, in the 82d year of his age, having been a state-prisoner about 40 years in that gaol, without trial or any allowance from the government.

396. *Proceedings against Sir DUNCAN CAMPBELL, and other Heritors of the Shire of Argyle, for High-Treason:** 1 & 2 JAMES VII. (of Scotland) A. D. 1686—1687. [Now first printed from the Records of Justiciary in Edinburgh.]

CURIA JUSTICIARIE, S. D. N. Regis tenta in Pretorio Burgi de Edinburgh, quarto die mensis Januarii 1686, per nobilem et potentem comitem Georgium Comitem de Linlithgow, Justiciarium Generalem, et honorabiles viros, Jacobum Foulis de Collintoune, Justiciarie Clericum; Davidem Balfour de Forret; Rogerum Hoge de Harcarss; Johanem Lockhart de Castlehill; et Alexandrum Seattoune de Pitmedden; Comissionarios Justiciarie dicte S. D. N. Regis.

Curia legitime affirmata.

THE said day anent our sovereigne lords criminall letters raised, used, and execute at

* "Oct. 12, 1685. Sir Duncan Campbell, of Auchinbreck; Mr. Alexander Campbell, Advocate, and many others of that surname, are cited on 60 days for joining with Argyle. And being called at Criminal Court on the 14th of

the instance off sir George M'Kenzie, of Rosehaugh, his majestie's advocate, for his highnes entrest against sir Duncan Campbell, of Auchinbreck; Archibald Campbell, sone to the lord Neill Campbell; Donald Campbell, elder, of Barbreck; John Campbell, younger, off Melfort; Archibald Campbell, off Dana (prisoner); John Campbell, of Knap; maister Alexander Campbell, advocat; Dougall Campbell, off Kelberrie, younger; the deceast Alexander M'c Millan, of Drumore, Donald M'c Neill, of Crier; Collen and Duncan Campbells elder and younger, of Blairintibert; Duncan Campbell, of Carridell, elder; Alexander Campbell, of Marr; major ——— Henderson; captaine John Foulertoune; Mr. ———

December to be forfeited on probation, were continued to the 5th of January, 1686.

"Jan. 5th, 1686. At Criminal Court, sir Duncan Campbell, of Auchinbreck, and thirty-two more, Argyleshire heritors, mentioned 12th

Forrester, minyster; Mr. George Wishart, preacher; Mr. Alexander Hastie; ——— John Guthrie; ——— John Rodger, sometyme in Borrotoustounes, Guner; Walter

Browne; ——— Robert Elphinstone, off Lapness; captain ——— captain John Hendry, in Borroustounes; Patrick Campbell called Black Patrick, sone to Mr. John Camp-

October, 1685, are forfeited for joining with Argyle in his rebellion. The witnesses against them were the laird of Ellangreig, &c. though under process of treason themselves. Among others, was Campbell, of Otter, whose estate the king has gifted to commissar M'Lean, son to the bishop of Argyle. There were sundry apparent heirs among the forfeited, whose second brothers were on the king's side with Athole. It were but charity to encourage them, to make them donators to their brothers forfeiture.

"January 11th, 1686. Campbell, of Ellangreig, is forfeited for being with Argyle; but he relies on a promise of the marquis of Athole's to get him a remission." Fountainhall.

"Jan. 4, 1686. The Advocate produced an indictment upon the score of rebellion against Campbell and others. There are a vast many persons put together in this indictment, upward, I think, of four score, most part are gentlemen of the name of Campbell. I name but some of them of most note: Sir Duncan Campbell, of Auchinbreck; — Campbell, of Barbreck; Mr. Arch. Campbell, son to lord Neil Campbell, whom we had forfeited before, and how he comes in again here I know not; Campbell, younger, of Melfort; Campbell, of Knap; Mr. Alexander Campbell, Advocate; Campbell, of Kilberry, younger; Alexander Macmillan, of Drummore; David M'Neil, of Crer; Duncan Campbell, of Carridel; Alexander Campbell, of Otter; major Henryson; captain John Fullerton; Mr. Geo. Wishart, (I fancy it ought to be Barclay) preacher; Mr. Alexander Hastie, preacher; Robert Elphiston, of Lapness; captain John Henry; Patrick Campbell, commonly called Black Patrick; Patrick M'Kater, of Inchrennie; Archibald M'Levernock, of Oab; Iver M'Iver alias Campbell, of Aishness; — Campbell, of Earnathen; — Campbell, of Kildaven; — Ker, of Kersland, younger; John Campbell, of Dargachie; Rt. Campbell, his brother; Dugal Mactavish, of Dunardrie; Alex. Macarter, captain of the late Argyle.

"There is nothing of probation against those persons in the Registers; but they are remitted to the assize, who bring them in as being guilty in the rebellion with the earl of Argyle, and the Lords sentenced them to be executed and demeaned as traitors when apprehended in common form.

"Jan. 18th. Duncan Campbell, of Allengreig, younger, confesseth his accession to the late earl of Argyle's rebellion, casts himself upon the king's mercy. He, with his father Colin Campbell, of Allengreig, are sentenced to be executed July 9, at the Cross of Edinburgh, but remissions were got by that time. And December 7, Campbell, of Balnavie; Campbell, of Dana; Campbell, of Balgaltro; Maciachlan,

of Barnageid; Maciachlan, of Dunad; Campbell, of Blairin-tibbert, were sentenced to be executed and demeaned, &c. in common form. This is all I meet with as to the gentlemen concerned with Argyle this year: we shall meet with some more next year; it was their estates now they were seeking for more than their blood." 2 Wodrow, 587.

I have not observed that these proceedings are mentioned by Burnet (who, indeed, was upon the continent of Europe when they occurred) or by Mr. Laing: yet several particulars in these proceedings, highly illustrate the character as to state prosecutions, of king James the 7th's government in Scotland; and of the pannels included in the dittay of this first case, some were absent, and some were dead; of some the abodes, of some the Christian names, and of some the surnames are omitted. And the proceedings against the Campbells, of Allangreig, exhibit a most remarkable spectacle, a prosecution to conviction, on the part of the crown, of two persons charged with rebellion, who were tried within a fortnight after the crown had had the benefit of their testimony for the conviction of others who were charged to be their associates, and who it should seem were their neighbours, their friends, and their relatives.

In the first act of the second session of the first (and only) parliament of king James the 7th, 1686, (Act of Dissolution of the Lands of Cesnock and Duchal); and also in the ninth act of the same session (Act of Annescation of the Baronies of Muirhall and Melfort to the crown) it appears that James had (March 19th, 1686) granted to Melfort the lands of sir Duncan Campbell and other pannels named in this first dittay; and also of Colin Campbell, elder, of Allengreig, and Duncan Campbell, younger, thereof, "which fell in his majesty's hands by the forfeiture of the forenamed persons." The unsparing rapacity of the court devoured at once the jackall and his prey.

See, also, Act 18, of the second session of the first (and only) parliament of king William and queen Mary, A. D. 1690: 'Act rescinding the Forfeitures and Fines past since 1665.'

Patrick Campbell, who was produced as a witness on the part of the crown, upon the trial of Campbell, of Oab, and others, was, it appears, at that time himself under sentence of death. In the act rescinding the forfeiture of Fletcher of Saltoun (chap. 16, of king William and queen Mary's first parliament) one of the grounds of reversing the judgment of Mr. Fletcher is stated to be, that the witness against him was under the terror of death, and temptation of a remission as standing charged with and prisoner for the same alleged crimes, and not pardoned till he had deposed in court.

bell; ——— Donald Campbell, of Belnabbie, younger; ——— Patrick M^r Arthur, of Inchrine; Archibald M^r Ilvernoch, of Oatter; Alexander Forrester, of Knockreochbeg; Iver M^r Iver alias Campbell, of Asknish; the deceased Dugall M^r Avish, of Dunardrie; Alexander Campbell, of Cunachan; the deceased Dugall Campbell, of Auchtereearlie; ——— off Mielvernoch, Neill Campbell, of Ennachan; Colline Campbell, of Allangreig, elder; Archibald Campbell, sone to Mr. John Campbell; John Campbell, of Kildalvie; ——— Kerr, of Kersland, younger; John Nisbet; ——— Fleming; ——— John Jamesone, in Borrowstounes; Archibald Campbell, off Auchtermore; John Campbell, of Dargachie; Robert, Donald, Archibald and Hugh Campbells, his brethren; Alexander M^r Arthur, captain to the late Argyle; John Gibsone, son to Andrew Gibsone, merchand, in Glasgow; Donald M^r Ilvornock, off Ardmachbreck; * make and mentione, That where notwithstanding be the common law, laws and acts off parliament off this his majestie's kingdome, and constant practiq thereof, particularie be the third act first parliament and threttie sevent act second parliament of king James the first, and be the fourteenth act, sixt parliament and fourtie nynt act twelvt parliament king James the second, nyntie sevent act sevent parliament king James the fyth, and ane hundred and fourtie fourt act twelt parliament king James the sixt, and fyfth act first sessione first parliament king Charles the second, the ryseing of his majestie's subjects, or any number off them, the joyneing and assembling together in armes, without and contrary to his majestie's comand, warrand, and authoritie, and the abaitteing, recepting, assisteing, intercomoning, and keeping correspondence with such rebels, supplieing them with red, help or counsell, or giveing them any relieffe or comfort, or the not searching for or not apprehending of them, or not expelling them furth off the countrey, or not giving tymeous intelligence off them to that effect, are most detestable, horrid, heynous, and abominable crymes off rebellione, treason, and lese majestie, and arr punishable by forfaiture off lyfe, lands, and goods; and be the eleventh act first sessione second parliament king Charles the second, it is statute and ordained, that in tyme coming in all cases of treasonable ryseing in armes, and open and manifest rebellione, against his majestie, his advocat flor the tyme may, and ought to insist against, and prosecute such persons as he shall be ordered be his majestie or his privie counsell to persue; and iff they be cited and doe not compear, the justices, notwithstanding of ther absences, may and ought to proceed to consider and give ther interlocutor upon the lybell, and iff it be found

* The same names appear in different places to be differently spelled in the originals. It is not always easy to decypher the MS. Where blank spaces appear in this text they occur in the originals.

relivant to admitt the samen to the knowledge off ane assize, and upon the verdict of the inquest finding the samen to be provine, the doom and sentence of forfaiture ought to proceed, and be given and pronounced in the same manner as iff the persons accused hade compeired and were present: Nevertheless, it is of veritie, that the saids sir Duncan Campbell, Archibald Campbell, and hail remanent persons defenders, shacking off all fear of God, respect and regaird to his majestie's authoritie and laws, have presumed to comitte and are guiltie off the saids crymes in sua farr as ther being in the year 1683 years, ane bellish and damnable plott and conspiracie entered into by the late earles of Shaftsbury, Essex, Argyll, and other rebels, subjects of this his majestie's kingdomes of Scotland and England, for killing and murdering, at least seazing upon his majestie's sacred persone and his royall brother, our laite gracious soveraigne king Charles the second, and for raiseing open warr and rebellion in both kingdomes, and for furnishing men, money, ships, and armes to the laite earle of Argyle, for that effect, and accordingly the said laite earle of Argyle, and severall others, rebels and traitors with them, did most treasonable invade this his majestie's kingdome with men, ships, armes, and amonitione, and landed with them in the west highlands off Scotland, upon the day of May last; and no sooner hade they landed then the hail remanent persons defenders rose and joyned in open armes and rebellione with them, and did convocat and gather together his majestie's leidges to the number off

thousands, within the shyres of Argyll Tarbat highlands, and isles therabout, against his majestie and his authoritie, did issue furth treasonable proclamations and declarations, did take in and maintaine forts, strengths, and garrisons against his majestie and his forces, did robb and plunder the goods and honss of his majestie's good subjects, randevouzed and exercised themselves, did scoutt furth, kill and murder severalls off his majestie's good subjects, and did continew in open and avowed rebellion against his majestie and his authoritie, comitting all acts of hostilitie and high treason, untill at lenth they were dissipat and defeate; and the saids hail fornamed persons did most treasonable harbour, recept, intercomon, converse, and correspond with, and did abaite, assist, suplie, gave help, redd, counsell, meatt and drink, releiffe and confort to the saids laite earl off Argyle, sir John Cochran, off Ochiltrie; sir Patrick Hume, of Polwart; Denholme, off Westsheills; and others, forfait and declared traitors, in company with him in the said moneth of May and June last, within the saids western highlands and, isles did not exact dilligence in searching and apprehending of them, and expelling them furth of the countrey, nor gave not tymeous notice nor intelligence to our minysters and officers for that effect, Throw the doing and committing whereof, or ane or other of the saids deeds the

said sir Duncan Campbell and Archibald Campbell, and haill remanent persons above named, have comitted the crymes and paines of high treasone, rebellione, and lesse majestie, and ar actors airt and pairt theroff, which being found by ane assyse, they ought to be punished with lyfe, lands, and goods, to the terror and example off others to committ the lyke heirefter.

His *Majestie's Advocat* produced the criminal letters, with the executions theroff, duly execute and indorsit against the saids defenders, and the nearest of kine of such of them as ar dead, by a pursevant and trumpeter, with displayed coat, sound of trumpett, oppen proclamatione, and useing other solemnities necessar; compeired lykwayes Patrick Wilsone Carrick pursevant executor of the saids letters with William Hoome pursevant and Alexander M'Naugh'oune, indwaller in Edinburgh; Georg Colle Chapman, in Leith; James Kello, indwaller, in Edinburgh; James Leith, coachman, younger; and John Goodwillie, trumpetter, his witness, and being solemnlie sworne in precence of the justices and assyse made faith upon the truth and veritie off the samen in all poynts.

His *Majestie's Advocat* lykways produced ane act of his majestie's privie counsell for persewing the persons lybelled, wheroff the tenor follows:

EDINBURGH, September 11, 1685.

The Lords of the comitte of his majestie's privie counsell for publict affairs, doe heirby give order and warrand to his majesties advocat for processing befor the justices, sir Duncan Campbell, off Auchinbreck; ——— Campbell, off Barbreck; ——— Campbell, of Knap; and all other persons who ar informed to have been engadged with Argyle in the laite rebellione, befor the lord justice generall, justice clerk, and remanent commissioners of justiciarie, upon the head off treasone and rebellione, and previously to examine wittnesses thereanent befor the saids lords conforme to his majesties letter. Extracted by me.

Sic Subscribitur,

COLLINE M'KENZIE, Cl. St. Con.

The haill persons insisted against by his majestie's advocate, *primo loco*, flor ther forfaulture at this dyett ffollow: sir Duncan Campbell, off Auchinbreck; Donald Campbell, off Barbreck; Mr. Archibald Campbell, son to the lord Neill Campbell; John Campbell, younger, off Melfort; John Cambell, of Knap; Mr. Alexander Campbell, advocat; Dugall Campbell, off Kilberry, younger; Alexander M'Millan, off Drumoir; Donald M'Neill, off Creir; Duncan Campbell, off Carridell; Alexander Campbell, off Oatter; Major ——— Henrysone; capitaine John Foulertoune; Mr. Georg Wishart, preacher; Mr. Alexander Heastie; Robert Elphingstone, off Lapnes; capitaine John Henry; Patrick Campbell, sone to Mr. John Campbell, called Black Patrick;

Patrick M'Arthur, off Inchrenie, John M'Ilbernock, of Oab, Iver M'Iver alias Campbell, off Asknish; Dugall M'Tavish, off Dunardre; Neill Campbell, off Evnarchan; ——— Campbell, of Kildavin; ——— Kerr, off Kersland, younger; ——— Fleymeing; John Jamesone, in Borrowstounes; John Campbell, off Dargashie; Robert Campbell, his brother; Alexander M'Arthur, capitaine to the late Argyle; John Roger, guner, sometye in Borrowstounes; and Walter Brown. His majestie's advocat declares he insists against the fornamed persons for their being in rebellione with the late Argyle in maner mentioned in their dittay. And the saids haill fornamed persons, as also Mr. Thomas Forrester, minister; John Guthrie, Alexander Campbell, off Sonnachan; John Nisbitt; and Donald M'Ilvernich, of Ard-mabrick; being oft tymes called to have compeired befor the saids lords this day and place in the hour of cause, to have underlyen the law for the treason above specified, mentioned in ther dittay, as they wh^o wer lawfullie for that effect lawfull tyme of day bidden, and they nor non of them compeired. The lords justice generall and justice clerk, and remanent commissioners of justiciarie, therfor be the mouth of John M'Kenzie, macer to the court, decerned and adjudged the haill fornamed persons to be outlyes and fugitives from his majestie's lawes, and ordained them to be put to the horne, and all ther moveable goods and gear to be escheat and inbrought to his majestie's use, forther contempt and disobedience, which was pronounced for doome.

INTERLOQUITOR.

The Lords, conforme to the tenor off the for-said elevent act, first sessione, second parliament king Charles the Second, did proceed to consider and give ther Interlocutor upon the lybel against the persons insisted against, wheroff the tenor ffollowes:—The Lords Justice Generall, Justice Clerk, and Commissioners off Justiciarie, haveing considered the lybell persewed by his majestie's advocat against the persons above named, with his majestie's advocates declaration, wherby he restricts the lybell in ther being in the rebellione with the late Argyle relivant, and remitts the samen to the knowledge of ane Assyse.

ASSISA.

Sir Wm. Hop, off Grantoun;
Francis Ross, off Auchlossin;
Robert Hepburne, off Barfoord;
John Skeen, off Hallyairds;
Alexander Henrysone, off Newhavin;
Sir Wm. Muray, of Newtoun;
Sir John Ramsay, off Whythill;
Sir Jas. Ritchardsone, off Smittoun;
Walter Scot, of Lethan;
David Hepburne, of Randefoord;
Patrick Skirvine, of St. Kaitherns;
James Kerr, Barber;
John Lindsay, Mertchand;
William Browne, Baxter;
James Bickertoune, Wright.

The Assyse lawfullie sworne, no obligatione off law in the contrair.

His *Majestie's Advocate* for probatione adduced the witnesses, efter deponing, who wer all lawfullie sworne, purged off malice, prejudice, ill-will, hatred, and partiall counsell, they are to say:

Duncan Campbell, younger, off Allangreig, aged twentie-eight years, or therby, married, purged and sworne, depons, That he did see sir *Duncan Campbell*, off Auchinbreck, in company with *Archibald laite earle off Argyle*, and with the other rebels, in June last; and that he did see him in armes, and particularlie at Tarbit, and the castle of Allangreig; depons that he did see *Donald Campbell*, off Barbreck, in company with the saids rebels, in armes at Tarbat; depones he saw *Mr. Archibald Campbell*, sone to the lord *Neill Campbell*, armed with a sword, with the rebels at Tarbat, and that he did see *John Campbell*, younger, off Melfort, in company with the rebels, and lykways sawe ——— *Campbell*, of Knap, in company with the rebels, in armes at the place; depones, he saw *Mr. Alexander Campbell*, advocat, in company with the rebels, in armes at Tarbat; depones he saw *Dugall Cambell*, of Killberry; *Alexander M'Millan*, off Dunmoir; *Donald M'Neill*, off Creir; *Duncan Campbell*, off Carridell; *Alexander Campbell*, of Otter; *Captaine John Foulertoune*; *Robert Elphinstoune*, of Lapnes; *Patrick Campbell*, called Black Patrick, sone to *Mr. John Campbell*; *John M'Arture*, of Inshrenie; *Archibald M'Ilvernoch*, of Oab; *Iver M'Iver*, alias *Campbell*, off Aishneish; *Dugall M'Avish*, off Dunardrie; *Neill Campbell*, off Eunachan; ——— *Campbell*, off Killdevin; ——— *Ker*, of Kerswald, younger; *John Campbell*, off Dargashie; and *Robert Campbell*, his brother; *Alexander M'Arture*, captaine to the laite *Argyle*; all off them in company with the late *Argyle*, and the other rebels, in armes, in June last, in the West Highlands; particularlie some off them he sawe at Tarbat, and the rest off them with Allangreig, *causa patet*; for he was present and saw what he has deponed, and this is the truth as he shall answer to God; depones he knowes the haill persons above named. (Signed) *DUNCAN CAMPBELL*.

LINLITHGOW, I. P. D. Com.

Duncan Campbell, elder, off Allangreig, aged fiftie-six years, or therby, married, purged and sworne, depones that he sawe sir *Duncan Campbell*, off Auchinbreck; *Donald Cambell*, off Barbreck; *Mr. Archibald Cambell*, sone to the lord *Neill Cambell*; *John Campbell*, younger, off Melfort; *John Cambell*, of Knap; *Mr. Alexander Cambell*, advocat; *Duncan Campbell*, of Kilberry, younger; *Alexander M'Millan*, off Drummoir; *Donald M'Neill*, off Crier; *Duncan Campbell*, of Carridell; *Alexander Campbell* off Oatter; *Major Henrysone*; *captaine John Foulertoune*; *Mr. Georg Wishart*; *Mr. Alexander Haistie*; *Robert*

Elphinstoune, off Lapnes; *captaine John Henry*; *Patrick Cambell*, called Black Patrick, sone to *Mr. John Campbell*; *Patrick M'Arture*, off Inchreny; *Iver M'Iver*, alias *Campbell*, off Ashnish; *Dugall M'Avish*, off Dunardrie; *Neill Campbell*, off Eunachan; *John Campbell* of Kildalvine; ——— *Kerr*, off Kersland, younger; *John Campbell*, off Dargashie; *Robert Cambell*, his brother; and *Alexander M'Arture*, captaine to the laite *Argyle*; all off them in armes, with *Archibald late earle of Argyle*, and with the rest off the rebels, at Tarbat; and att severall other places, in the west highlands, the tyme lybelled; depones *Alexander M'Artur* was captaine off the castell of Allangreig, which *Argyle* kept out against the king, *causa securitate* [possibly scientiæ], he sawe as he heir deponed; and this is the truth as he shall answer to God.

Sic Subscribitur, COLLIN CAMPBELL.

LINLITHGOW, I. P. D. Com.

Archibald M'Gibbon, in Cowall, in Glendewell paroch, aged 46 years, or therby, maryed, purged, sworn; depons he did see sir *Duncan Campbell*, off Auchinbreck; *Donald Cambell*, of Barbreck; *Mr. Archibald Campbell*, sone to the lord *Neill Campbell*; *John Campbell*, younger, off Melfort; ——— *Campbell*, of Knap; *Mr. Alexander Campbell*, advocat; *Dugall Campbell*, off Kilberry, younger; *Alexander M'Millan*, off Drummoir; *Donald M'Neill*, off Crier; *Duncan Campbell*, of Carridell; *Alexander Campbell*, off Oater; *Major Henrysone*; ——— *Foulertoune*, who was a captaine; *Mr. Alexander Haistie*; *Patrick Cambell* called Black Patrick, sone to *Mr. John Campbell*; *Patrick M'Arture*, off Inchrenie; *Archibald M'Ilvernock*, off Oab; *Iver M'Iver*, alias *Campbell*, off Ashnish; *Dugall M'Avish*, off Dunardrie; *Neill Campbell*, off Eunachan; *John Cambell*, off Kildalvine; *John Campbell* off Dargashie; *Robert Cambell*, his brother; all of them in company with *Archibald laite earle of Argyle*, and other rebels, in armes in Glendewill, in Cowall, in June last; and this is the truth, as he shall answer to God. *ARCHIBALD M'GIBBON*.

LINLITHGOW, I. P. D. Com.*

William Stevinsone, seaman, in Borrowstounes, aged aughtein yeares, unmarried, purged and sworne; depons, that he came over in the ship called the *Anna*, with the late earle off *Argyle*, and the other rebels in his company, and that ther came alongst with them in the ship *captaine John Henry*, who was mate to the shipe; *Mr. Georg Wishart*, sone to *Mr. William Wishart*, minister, at Kinneill; *Mr. Alexander Haistie*, a preacher; *Major Henrysone*; *John Rodger*, sometime in Borroustounes; *Walter Browne*, couper, in Kincardin, on the north syde off Forth; *John Jamesone*, in Borroustounes, whom he thinks did dwell in the ferrie, and

* In præsentia Dominorum Commissionariorum.

when Argyle landit, some off them landed with him to serve him by land, and the rest kepted the ships; and this is the truth, as he shall answer to God causâ.

Sic Subscribitur, WILLIAM STEVINSTONE.
LINLITHGOW, I. P. D. Com.

Archbald Campbell, off Dana, aged 29 years, or therby, maryed, purged and sworn, depones he did see sir Duncan Campbell, off Auchinbreck; Donald Campbell, off Barbreck; Mr. Archibald Campbell, sone to the lord Neill Campbell; John Campbell, younger, off Melfort; John Campbell, off Knap; Mr. Alexander Campbell, advocat; Dugall Campbell, of Kilberry, yr.; Alexander M'Millan, off Drumoir; Donald M'Neill, off Crier: Duncan Campbell, off Carridell; Alexander Campbell, off Oatter; Major Henrysone; captaine John Foulertoune; Robert Elphingstoune, off Lapnes; Patrick Cambell called Black Patrick, sone to Mr. John Campbell; M'Artur, off Inchrenie; Alexander M'Ilvernock, off Oab; Iver M'Iver alias Campbell, off Arshnish; Dugall M'Avish, off Dunardrie; Neill Cambell, off Eunachan; John Campbell, off Killdalvine; John Campbell, off Dargashie; Robert Campbell, his brother; and Alexander M'Arture, captaine off Allangreig, under Argyle; and all off them in armes with the laite Argyle, and the other rebels, att Tarbatt and all the way they went in June last; and this is the truth as he shall answer to God.

Sic Subscribitur, ARCHBALD CAMBELL.
LINLITHGOW, I. P. D. Com.

Angus M'Iver, in , in Glasrie parish, aged fourtie years, or therby, married, purged and sworne, depones, he did see Major Henrysone in company with the rebels, in June last, in Argyle shyre, in Cowall, in armes, on horse back; and this is the truth, as he shall answer to God; Depones he cannot wreitt.

Sic Subscribitur,
LINLITHGOW, I. P. D. Com.

Dugall M'Gibbon, in Killmichael, in Cowan, aged 25 yeares, unmarried, purged and sworne, depones he did see captaine John Henrysone, in armes with Argyle, and the other rebels, att Garloch-head, and all allongs with the rebels in June last, and lykeways that he did see major John Henrysone in armes with the said rebels all allongs; and also he did see captaine — Foulertoune, and — Campbell, off Killdalvine, all allongst in armes with the saids rebels in June last; and this is the truth as he shall answer to God.

Sic Subscribitur, DUGALL M'GIBON,
LINLITHGOW, I. P. D. Com.

Efter leading and adduceing off the q'lk probatione, the lords ordaines the assyse to inclose, and returne ther verdict to morrow at two o'clock in the efternoone.

The Lords haveing considered the severall acts of councill produced in favours of Collin Campbell, off Blairintibert; Duncan Campbell, his son; Archibald Campbell, off Dana; Ar-

chibald Campbell, of Auchtimoir; Archibald Campbell brother to Dargashie, designed in the act of councill in Auchinbreck; Donald Campbell, also brother to Dargashie, designed in the act off councill in Stroudavin; with ane act off the Leivtenent court of Argyll and Tarbat, relateing to ane act off councill in favours off Hugh Campbell, ane other brother off Dargashies, designed in the foresaid act in Airdtarish, upon the clearing off q'lk designatione ther wes wittness sworne; they for the causs and considerations mentioned in the said acts, with consent off his majesties advocat excuses ther absence, and continew the dyet against Hugh Campbell till the twelt instant, and against the hail other persons till the first day of February nixt to come. And also, with consent off his majesties advocat, continews the dyett against Donald Campbell, of Balnabie, who is an islaman, and was not citted aither personallie or at his dwelling house, and against whom ther is no sufficient probatione, till the said first day of February nixt to come, and excuses his absence.

The Lords continewes thed yet as to the faultures off Mr. Thomas Forrester, minister; John Guthrie; Alexander Campbell, off Sonachan; John Nisbett and Donald M'Ilvernock, off Ardmabreck; and the deceast Dugall Campbell, off Auchterharle, till Munday nixt, and lykways Alexander Forrester, off Knockreochbeg; till the said dyet.

The said day anent the criminal proces off treasone persewed at the instance off sir Gorg M'Kenzie, off Rosehaugh, his majestie's advocat, against the deceast Dugall Campbell; designed off Auchterharlie, and his nearest of kine, for his interest, for his being accessorie to or engaged in the late rebellione with Archibald sometyme earle of Argyle, in manner mentioned in the dittay, compeirand his majestie's [advocate] for his interest as persewer on the one pairt, and on the other pairt compeired Iver M'Iver alias Campbell, brother and nearest off kine off the said defunct, with Mr. Collin M'Kenzie, advocat, his procurator, and gave in a petitione to the saids lords, representing and declareing that his eldest brother, John Campbell, was the uncontraverted heritor and proprietor off the lands off Auchterharlie, extending to a merk land holden off the late Argyle, and haveing laity dyed immediately before the rebellione, without aires off his owne body, his second brother, who is now lykeways dead, is indyted to this dyet, and tho' petitioner is as nearest of kine citted for his interest, and since the said Dugall his second brother was nether infest, seasit, nor in possessione of the said estaite, and that the rebellione followed immediatly efter his eldest brothers decease, and that he himself, who by lawe is uncontravertedlie to succeed to his eldest brother who dyed last, vest and seased, is a loyal and honest subject, and was actualle in his majestie's service, as by a certificate, under the hand off Patrick Stewart, off Bal-lachan, comander off the marquis off Atholls

first regiment, and daited the fyth day off December last was instructed, therfor he craved that since tho his said brother were guiltie, yet that his forfaulture could produce nothing to his majestie, he haveing nothing in his persone but might tend to the prejudice off the petitioner ane honest and loyall subject. That ther lo'ps would ordaine ther name to be delete out off the sumonds and sist all farder procedur against him.

The lords justice generall and justice clerk, and commissioners off justiciarie, haveing considered the said petitione and disyre therof, delay to give answer therto, but remitt the civill interest to the judge ordinar as accords.

January 5, 1687.

The persons who past upon the Assyse off the Argyle heritors, returned ther Verdict in presence off the saids lords, wheroff the tenor followes :

The Assyse haveing elected and chosen sir John Ramsay above designed chancellour, they all in on voice find sir Duncan Campbell, off Auchinbreck ; Donald Campbell, off Barbreck ; Mr. Archibald Campbell, sone to the lord Neill Campbell ; John Campbell, younger, off Melfort ; John Campbell, of Knap ; Mr. Alexander Campbell, advocat ; Dugall Campbell, of Killberry ; Mr. Alexander M'Millan, off Dumoir ; Donald M'Neill, off Crier ; Duncan Campbell, off Carridell ; Alexander Campbell, off Oatter ; major — Henrysone ; capitaine John Fowlertoune ; Mr. George Wishart, preacher ; Mr. Alexander Heastie ; Robert Elphistoune, off Lapnes ; capitaine John Henry ; Patrick Campbell, sone to Mr. John Campbell, called Black Patrick ; Patrick M'Arture, of Inchrenie ; Archibald M'Ilvernock, off Oab ; Iver M'Iver alias Campbell, of Ashnish ; Dugall M'Avish, off Dunardre ; Neill Campbell, off Evnachan ; — Campbell, off Kildalvine ; — Kerr, off Kersland, y'r ; John Campbell, off Dargashie ; Robert Campbell, his brother ; Alexander M'Arture, capitaine to the laite Argyle, Guiltie off the crymes off treasone and rebellione lybelled against them, in respect they find the samen sufficiently prove, and lykwayes find — Fleymeing, John Jameson, in Borrowstounes ; John Rodger, gunner, sometyme in Borrowstounes ; and Walter Browne, clear and innocent, and not guiltie ; in respect ther is not compitent probatione led against them. In verificatione wherof this our verdict is sub' be the fornamed sir John Ramsay, chancellor, att Edinburgh, the fourth day off Janwary, 1686 years.

Sic Subscribitur, JOHN RAMSAY, Ch.

The Lords justice generall, justice clerk, and commissioners off justiciarie, having considered the verdict off assyse returned against the said sir Duncan Campbell, off Auchinbreck ; Donald Campbell, off Barbreck ; Mr. Archibald Campbell, sone to the lord Neill Campbell ; John Campbell, younger, off Melfort ; John Campbell, off Knapp ; Mr. Alexander Camp-

bell, advocat ; Dugall Campbell, off Kilberry, younger ; the deceast Alexander M'Millan, off Drumoir ; Donald M'Neill, off Crier ; Duncan Campbell, off Carridell ; Alexander Campbell, off Oater ; major — Henrysone ; capitaine John Fowlertowae ; maister Georg Wishart, preacher ; maister Alexander Haistie ; Robert Elphingstoune, of Lapnes ; capitaine John Henry ; Patrick Campbell, sone to maister John Campbell, called Black Patrick ; Patrick M'Arture, off Inchrenie ; Archibald M'Ilvernick, of Oab ; Iver M'Iver, alias Campbell, off Ashnish ; the deceast Dugall M'Avish, off Dunardrie ; Neill Campbell, off Evnachan ; — Campbell, off Kildalvin ; — Kerr, of Kersland, younger ; John Campbell, off Dargashie ; Robert Campbell, his brother ; and Alexander M'cArture, capitaine to the laite Argyle.

They therfor be the mouth off John Lesslie dempster off court discerned and adjudged the hail fornamed persones (except Alexander M'Millan and Dugall M'Avish, who ar dead) to be execut to the death, demained as traitors, and to underlye the paines off treasone and utter punishment apoynted be the lawes of this realme when ever they shall be aprehended, at such tymes, places, and in such maner, as the lords justice generall, justice clerk, and commissioners of justiciarie, shall apoynt, and ordaines their names, fame, memorie, and honours (and the name, fame, memorie and honours of the said deceast Alexander M'Millan and Dugall M'cAvish who ar dead) to be extinct, their blood to be tainted, and ther armes to be riven furth and delate out off the books off armes, so that ther posteritie may never have place, nor be able heirefter to bruik or joyse any hounors, offices, titles, dignities, lands, or possessions, within this realme in tyme comeing, and to forfault omitted and tint all and sundrie ther lands, heretages, tacks, steadings, roomes, possessiones, titles, offices, goods, and gear, whatsoever pertaineing to them, to our soveraigne lord, to remaine perpetuallie with his majestie in propertie. Which was pronounced ffor doom. Wherupon his majestie's advocat askit and took instruments.

CURIA JUSTICIARE, S. D. N. tenta in Pretorio Burgi de Edr. undecimo die mensis January 1687, per nobilem et potentem Comitem Georgium Comitem de Linlithgow, et honorabiles viros Jacobum Foulis de Collingtonne Justiciarie ; Clericum Joannem Lockhart de Castlehill ; Davidem Balfour de Forrett ; Rogerum Hog de Harcarss ; Alexandrum Seatoune de Pittmedon ; Patricium Lyone de Carss ; Commissionarios Justiciarie, dict. S. D. N. Regis.

Curia legitime affirmata.

Intran.

Coline Campbell, off Allangreig, elder.

Indicted and accused ffor the crymes of high treasone and rebellione ment. in his dittay, as

the samen is recordit upon the ffourth of January instant.

Persewer—Sir Georg M'Kenzie, of Roshaugh, his majestie's advocat.

His majestie's advocat declaires he insists against the pannall ffor joyneing with the late earle of Argyle in maner mentioned in his confessione.

The lords finds the dittay relivant as the same is foundit on his confessione, and remitts the same to the knowledge off an assyse.

ASSISA.

Sir William Hope, of Grantoune.

Francis Ross, of Auchlossin.

Robert Hepurne, of Bairford.

John Skeen, of Halyairds.

Alex. Henderson, of Newhaven.

Sir Wm. Murray, of Newtowne.

Sir John Ramsay, of Whythill.

Walter Scot, of Letham.

David Hepburn, of Randerstoun.

Andrew Ker, glover.

Patrick Skirvine, of St. Katherins.

James Ker, barber.

John Lindsay, merchand.

William Browne, baxter.

James Buckertoune, wright.

The Assyse lawfullie sworne; no objectione in the contrair.

His Majestie's Advocat for probatione adduced the pannell's owne Confessione and the witnesses efter named, wheroff the tenour folowes:

EDINBURGH, January 11, 1686.

In presence of the justices and assyse, Collin Cambell, elder, off Allangreig, being examined, confesses, That he was present with the late earle of Argyle and the other rebells in May and June last, in Argyle, Bute, and Tarbat, and severall other places, and that he hade a carrabine, and declares he is heartilie sorrie, and begs God and his majestie pardoune therefor, and that he never hade designe off rebellion against the king's majestie, but was abused and misled by his chieff the lat Argyle.

Sic Subscribitur, COLLIN CAMPBELL.—

James Ffoulis, J. Lockhart, David

Balfour, Roger Hoge, Alexander Seat-

oune, Pattrick Lyone.

LINLITHGOW.

Archbald M'Gibbone, in the paroch of Glendewell, aged 46 or therby, married, purged, and sworne, depones he saw Collin Campbell, off Allangreig, elder, in company with the late Argyle, and the other rebells within the isle of Bute, in June last, walking up and downe and conversing with them; depones he did not see him have armes; and this is the truth as he shall answer to God.

Sic Subscribitur, ARCHBALD M'GIBBON.

Hector M'Gibbon, in Cowall, aged 26, or therby, unmarried, purged and sworne, devol. XIII.

pones he saw Colline Campbell, off Allangreig, elder, in company with the late Argyle and the other rebells, within the isle of Bute, in June last, walking up and downe conversing with them, but remembers not iff he hade any armes; and this is the truth as he shall answer to God.

Sic Subscribitur,

HECTOR M'GIBBON.

LINLITHGOW, I. P. D. Com.

The Lords ordaines the assyse to inclose and to returne ther verdict the morrow at twelve a-clock.

The Lords having considred ane act of coun-cill presented for Alexander Forrester, off Knockreochbeg, they with his owne and his majestie's advocats consent continew the dyet against him ffor his alleadged accessione to the late Argyll's rebellione till the last Munday off March nixt, and ordaines him to find cautione ffor his appearance at that dyett, and therfor grants him letters off exculpatione ffor proveing his defenss against the said day.

The Lords continew the criminall actione and cause depending at his majestie's advocats instance against Mr. Thomas Forrester, minister; John Guthrie; Alexander Campbell, of Sonachan; John Nisbitt; — Dugall M'Ilvernock, off Ardmacbreck; the deceast Dugall Campbell, off Auchterharlie; ffor ther alleadged accessione to the late Argyll's rebellione, till the last Munday off March nixt.

January 12th, 1686.

The Persons who past upon the Assyse of Colline Campbell, of Allangreg, elder, returned ther Verdict in presence of the lords, wherof the tenor followes:

The Assyse having unanimously elected sir John Ramsay, off Whythill, ther chancelar, finds Collin Campbell, elder, of Allangreg, by his own judicall confessione, guilty off being present with the late Argyle and the other rebells, in May and June last, in Argyle, Bute, Tarbat, and severall other places, and that he hade a carrabine, and off conversing with the forsaid rebells in Bute, in regaird they find the same sufficiently provin, they purged wittnesses: in verifikatione wherof, this our verdict written be Walter Scot, of Letham, is subscribit be the above-named chancellour at Edinburgh, the eleventh day off January, 1686 yeares.

Sic Subscribitur, JOHN RAMSAY, Chan.

The Lords continew the pronouncing off doom and sentance against the said Collin Campbell, off Allangreig, elder, till Munday nixt.

Intran'

Hugh Campbell, brother to John Campbell, of Dargashie, indyted and accused ffor ryseing and joyneing in arms and oppen rebellion with Archbald sometyme earle off Argyle, and other rebells and traitors, in the moneth off May and June last, in maner mentioned in his dittay.

Persewer.—His Majestie's Advocat.

Procurator in Defence.—Mr. John Stewart.

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The said defender and his procurator declared, that he was so far from being accessory or joyneing with said laite rebellione, that upon the contrair he was most eminentlie serviceable to his majestie's interest, in so farr as he was imployed be John M'Arture, chamberlaine to the marquis of Montrose, in Cowal, as ane intelligencer ffor his majestie's service against his rebels, the q'ls intelligencers, are by an act of counsell, daited the twentie nyth off July last, declared free of all pursuit, civill or criminall, for their conversing with the late rebels, the same being done upon public faith and securitie, and under secrecy as the said act bears.

And for farder instructing that the said Hugh Campbell was one of the said intelligencers produced ane act off the leivtenant and sheriff court off Argyle and Tarbat, daited, the nynteenth of October last, wherein the said Hugh Campbell (who is therein designed of Airdtarish) is condescendit upon as one of the eight persons employed by the said John M'Arture, for giving and carryening intelligence against the saids rebels, as the said act at length bears; and for cleareing that the said Hugh Campbell, who in the act of the said leivtenant court of Argyle and Tarbat above specified, is designed in Ardtarish, is the same person who in the criminal letters and dittay above mentioned is designed brother to Dargashie, he produced the said John M'Arthure and Mr. Duncan M'Arthure, minister at Killmodan, who being solemnly sworne in face of judgement made faith thereupon; And also the said John M'Arthure did lykways solemnlie depone and swear that the said Hugh Campbell was one of the eight persons, whom he employed as intelligencers for his majestie's service. The lords justice general, justice clerk, and commissioners off justiciarie, having considered the said Hugh Campbell in Ardtarish, brother to John Campbell, off Dargashie, his defences above-mentioned, verificationes and instructiones thereof, and witnesses depositiones taken theranent, they therfor with consent off his majestie's advocat deserted and be thir presents diserts the dyet simpliciter.

January 13, 1686.

Duncan Campbell, younger, off Allangreig, indyted and accused ffor the crymes of treason and rebellione, and joyneing in armes with the late Argyle, in maner mentioned in his dittay efter recordit.

His *Majestie's Advocat* restricts the lybell to his being in rebellion, with Argyle, and having a sword, and being airt and pairt off the rebellione.

The Lords finds the dittay relivant as restricted, and remitts the samen to the knowledge of ane assyse.

ASSISA.

Sir Philip Anstruther, of that ilk.
— Drumond, of Riccartoun.

John Keirne, off Gogar.
James Gordon, off Seatloun.
Sir John Sinclair, of Longformacus.
Da. Fotheringham, of Purie.
— Stirlin, of Carden.
Robert Mylne, of Balsaig.
William Fisher, glover.
Thomas Hunter, feltmaker.
William Mitchell, baxter.
Pattrick Chalmers, feltmaker.
James Browne, candlemaker.
James Norrie, merchand.
Charles Robertsons, brewer.

The Assyse lawfully sworn, no objection in the contrair.

His *Majestie's Advocat* for probatione adduced the pannall's owne judiciall Confession and witness efter deponing.

Duncan Campbell, younger, off Allangreig, ye ar indyted and accused, That wher, notwithstanding be the common law, laws and acts off parliament off this kingdome, and constant practiq theroff, particularlie be the third act first parliament, threttie seventh act second parliament king James the first, fourteint act sixt parliament, and fourtie-nyne act twelt parliament king James the second; nyntie sevent act seventh parliament king James the fyfth, — hundred and ffourtie ffour act twelt parliament king James the sixt; and fyth act off the first session first parliament king Charles the second, the rysing off his majestie's subjects, or any number off them, the joyneing and assembling together in armes without and contrair to his majestie's comand, warrand and authority, and the abaitteing, assisteing, accepting, intercomoning, and keeping correspondence with such rebels, suplyeing them with help, red or counsell, or giving them any relieff or confort, ar horrid, hynous and abominable crymes, off rebellione, treason, and lese majestie, and punishable with lyfe, land, and goods: Neverthelesse, it is of veritie, that the said Duncan Campbell, younger, off Allangreig, shackeing off all fear off God, respect and regaird to his majestie authoritie and lawes, have presumed to committ and is guiltie off the saids crymes. In sua farr as Archibald earle off Argyle haveing in prosecutione of a damnable plott and conspiracie entered into betwixt him the late earles off Shaftsberry, Essex and severall others, traitors and rebels, within this kingdome and England, invadit this kingdome, with men, ships, money and armes, in the moneth off May last, no sooner hade he landit, but the said Duncan Campbell joined in oppen armes and rebellione with them, and ye and they did issue furth treasonable declarations and proclamations, did convocat and gather together his majestie's leidges to the number off , within the shyres off Argyle, Tarbat, highlands, and isles thereabout, in oppen rebellion, against his majestie and his authoritie, did take in and maintaine efforts, strengths and garrisons, against him and

his forces; did rob and plunder the goods and housse off his majestie's good subjects, randedouzed and exercised yourselves, did scout furth, kill, and murder severall off his majestie's good subjects and sonldiours, and did continew in open and avowed rebellion against his majestie and his authoritie, comitteing all acts off hostilitie and high treasone, untill at length ye were disipat and defeat, and ye did most treasonable harbour, recept, intercomon, converse, and correspond, with the said laite earle of Argyle, a forfait and declared traitor, in the said moneths off May and June last, in the said westerne highlands and isles off

The whilk crymes off high treason, rebellion, recepting, conversing and intercomoning with traitors, and rebels, the said Duncan Campbell as actor, airt and pairt, which being found by an assyse ye ought to be punished with forfaiture off lyfe, land and goods, to the terror off others to comitt the lyke heirefter. So ffolowes his owne judiciaill Confessione.

EDINBURGH, Jan. 18, 1686.

Duncan Campbell, younger, off Allangreig, in presence off the justices and assyse, humble confesses and acknowledges the lybell, and that he rose and joyned in armes with the late Argyle and the other rebels in the West highlands, in May and June last, and comes in his majestie's mercie and will, and declaires he is heartillie sorry therfor, and begs his majesties pardon and ther lordships; and the counccills recommendatione ffor that effect, declares he was in company with Argyle and the other rebels at Tarbat and Allangreig the tyme lybelled.

Sic Subscribitur, DUNCAN CAMPBELL.—
James Foulis, J. Lockhart, David Balfour, Roger Hoge, Alexander Seattoune, Patrick Lyone.

Angus M'Iver, in Glaserie, in Argyle, aged fourtie yeares, married, purged and sworne, depons he saw Duncan Campbell, younger, off Allangreig, the pannall, in company with Argyle and the other rebels, att Tarbat and Allangreig, the tyme lybelled; and this is the truth as he shall answer to God; depones he cannot wreit.

Sic Subscribitur, JAMES FOULIS, I. P. D.

Gilbert M'Kertur, in Collachie, aged ffourtie-six, sollutus, purged and sworne, depones he sawe Duncan Campbell, younger, off Allangreig, at Tarbat, in company with the rebels the tyme lybelled; and this is the truth as he shall answer to God; depones he cannot wreitt.

Sic Subscribitur, JAMES FOULIS, I. P. D.

The Assyse having elected and chosen sir Philip Anstruther ther chancellor, they all in one voice ffinds Duncan Campbell, younger, off Allangreig, guilty of ryseing and joyning in armes with the late Argyle and the other rebels, at Tarbat and Allangreig, in May and

June last, conforme to his owne confessione and wittnesses depositions.

Sic Subscribitur,

ANSTRUTHER.

Efter opening and reading of the q'lk verdict off Assyse the lords justice clerk, and commissioners off justiciary, therfor be the mouth off John Leslie dempster off court, decerned and adjudged the said Duncan Campbell, younger, off Allangreig, and lykwayes Collin Campbell, elder, off Allangreig, his father, who was found guiltie by ane assyse on the twelt instant off the treasonable crymes above specified, to be taken to the Mercat Croce of Edinburgh, upon Friday, the ninth off July nixt, to come betwixt two and four a clock in the efternoon, and ther to have ther heads severed from ther bodies, and ther name, fame, memory and honours, to be extinct, ther blood to be tainted, and ther arms to be riven furth and delate out of the books off armes, so that ther posteritie may never have place, nor be able heirefter to bruike or joyse any lands, heretages, titles, or offices within this realme in tyme comeing, and to have forffault omitted and tint all and sundrie ther lands, heretages, goods, and gear, whatsoever pertaining to them to our soveraine lord, to remaine perpetuallie with his highnes in propertie, which was pronounced ffor doome.

February 1, 1686.

The diet deserted against Alexander Forrester, in respect it was made appear to the privy council that he had not voluntarily joined the rebels, but had been made prisoner by them, and forced into their service.

The diet continued against the remaining pannalls from time to time till the 6th of December 1686, when the following proceedings appear upon record:

The said day anent our sovereign lords criminal letters off treasone, raised and execute at the instance off sir Robert Colt and Mr. George Bannerman his majesties solicitors, by warrand of his majestie's privie counccill, against Donald Campbell, of Oab; Archibald Campbell, of Danna; Collin Campbell, off Blairintibert; Duncan Campbell, off Culgatro; Donald Campbell, off Belnabie; Duncan Campbell, of Drumfunie; the deceast Donald Campbell, his sone; Angus Campbell, of Daltout; John Campbell, of Ulva; Angus M'Lauchlan, off Barogad; and Allaud M'Lauchlan, off Dannad; makand mentione, That wher, notwithstanding be the common lawe, lawes and acts of parliament off this kingdome, and constant practiq theroff, particularlie be the third act off the first parliament and the threttie seventh act of the second parliament off king James the first, and be the fourteenth act of the sixt parliament, and fourtie nynth act off the twelt parliament of king James the second, and nyntie seventh act off the seventh parliament off king James the fyth, and hundredth ffourtie ffourth act off the twelt parliament off king James the sixt, and first act off the first sessione off the first parliament off king Charles the second, the ryseing off his

majestie's subjects, or any number off them, the joyneing and assembling together in armes without or contrary to his majestie's command, warrand or authoritie, and the abaitteing, assisteing, recepting, intercomoneing, or keeping correspondence with such rebels, suplyeing of them with help, red or counsell, or giveing them meatt or drink, or any releiffe or confort, or the not searching for or aprehending off them, or not expelling off them furth off the country, or not giveing tymeous intelligence off them for that effect, ar most detestable, horrid, hynous, and abominable crymes of rebellione, treason, and lese majestie, and ar punishable by forfaiture off lyfe, land and goods; and be the eleventh act first sessione off the second parliament of king Charles the second, it is statute and ordained, that in tyme comeing, in all cases of treasonable ryseing in armes and oppen and manifest rebellione against the king's majestie, his advocat ffor the tyme may and ought to insist against and present such persons as he shall be ordered be his majestie or his privie counsell to persew, and if they be cited and doe not compeir, his majesties justices, notwithstanding off ther absence, may and ought to proceed to consider and give their interloquitor upon the lybell, and iff it be found relivant to admitt the same to the knowledge off the assyse, and upon the verdict off the inquest ffinding the same to be provine, the doome and sentance off forfaitur ought to proceed, and be given and pronounced in the same maner as iff the persons accused hade compeared and were present. Nevertheless, it is off veritie, that the saids Donald, Archibald, Collin, and Duncan Campbells and the other persons above compleaned upone, shacking off all fear of God, respect and regaird to his majestie's authority and lawes, have presumed to committ, and ar guilty off the saids crymes, in sua farr as ther being in the year 1683, ane hellish and damnable plott and conspiracie, entered into be the late earles off Shaftsburie, Essex, Argyle and others, rebels and traitors, subjects off this kingdome and off England, ffor killing, and murdering, at least seized upon his sacred majestie's person and his royall brother, ther late gracious souveraine king Charles the second, and for raiseing oppen warr and rebellion in both kingdoms, and for furnishing men, money, ships and armes, to the late earle of Argyle for that effect; and accordinglie, the said laite earle off Argyle and severall others, rebels and traitors, with him, did most treasonable invade this his majestie's ancient kingdome, with men, ships, armes, and amonitione, and landed with them in the west highlands off Scotland, upon the day off May, 1685 years; and no sooner hade they landit, then the saids Donald, Archibald, Colline, and Duncan Campbells, and the haill remanent persons above compleaned upon, rose and joyned in open armes and rebellione, and did convocat and gather together his majestie's leidges to the number off flour or ffyve thousand men, within the shyres off Argyle, Tarbat, highlands, and isles

therabout, in oppen rebellion against his majestie and his authority, and did issue furth treasonable declarations and proclamations, and did take in and maintaine forts, strengths, and garrisons, against his majestie and his forces, did robb and plunder the goods and houss off his majestie's good subjects, randevouzed and exercised themselves, did scoutt furth, kill and murder severall of his majestie's good subjects and souldiours, and did continew, in open and avowed rebellione against his majestie and his authority, comitteing all acts off hostillitie and high treason, untill they were disipate and defeat; and the saids haill fornamed persons, did treasonable harbour, recept, intercomon, converse and correspond with, did abaite, assist, suplie, give help, redd, counsell, meatt, drink, releiffe, and confort, to the said laite earle off Argyle, sir John Cochran, sometyme off Ochilttrie; sir Patrick Hume, off Pollwort; William Denholme, off Westsheills; and others, forfaitured and declared traitors, in company with him in the saids moneths off May and June, 1685 yeares, within the saids Western highlands and isles, did not exact dilligence in searching and aprehending off them, and expelling off them furth off the countrey, nor gave not tymeous notice nor intelligence to our ministers or officers ffor that effect, throue the doeing and committing wheroff or one or other of the saids deeds, the saids Donald, Archibald, Collin, and Duncan Campbells, and the other persons above compleaned upon, have committed the crymes and incurred the paines of high treason, rebellion, and lese majestie, and ar actor airt and pairt theroff, which being found be ane assyse, they ought to be punished with lyfe, lands, and goods, to the terror and example off others to comit the lyke heirefter; Compeired the saids sir Robert Colt and Mr. Georg Baunerman, his majestie's solicitors, as persewers, and produced the forsaid criminal letters dewlie execute and indorsit against the haill persons defenders, and against the nearest off kine to the said deceast Donald Campbell, younger, off Drumfine, by a pursevant and trumpetter, with his majestie's coat off armes displayed, sound off trumpett, open proclamation, and useing other solemnities necessar. Compeired lykwayes Patrick Wilsone, Carriek pursevant, executor off the saids letters, Neill M'Neill, writer, in Edinburgh; John Douglas and James Kelle, residenters there; James M'Larran and James Fergusone, servitors to Patrick Stewart, off Balachan, witness therto, and being solemnlie sworne in presence off the justices and assysers sittand in judgment made faith upon the truth and veritie off the samen in all points. His majestie's [solicitors] produced ane act of privie counsell, ordering them to persew a proces off forfaitur against the persons above named, wheroff the tenor follows:

EDINBURGH, *September 16, 1686.*

The Lords of his majestie's privie counsell being informed that the persons under written,

viz. Donald Campbell, of Oab; Archibald Campbell, off Dana; Collin Campbell, of Blairintibert; Duncan Campbell, off Cullgratoch; Donald Campbell, of Bellnabie; Duncan Campbell, off Drumfine; and Donald Campbell, his sone; Angus Campbell, of Daltout; John Campbell, off Ulva; Angus M'Lauchlan, off Barnagad; and Alland M'Lauchlan, off Dunade, were actually in, or accessorie to, or airt or pairt off the late Argyll's rebellione, doe therfor heirby give order and warrand to his majestie's sollicitors, with all dilligence to persewe a proces off forefalture against the saids persons before the lords commissioners of his majestie's justiciary for the crimes foresaid, and that at the publick charge, and take recognitione if the witnesses be therein. Extracted by me,

WILLIAM PATTERSON, Clk. Sci. Cli.

Compeared the said Duncan Campbell, of Gallatro, and Donald Campbell, of Balnabe; Angus M'Lauchlan, of Balnagado; Allan M'Lauchlane, off Dunade, defenders, and entered themselves in pannel and humblie and ingenouslie confest their guiltines of the crymes above specified in manner after mentioned; and the said Archibald Campbell, of Danna; Colline Campbell, off Blairintibert; Duncan Campbell, off Drumfunie; Angus Campbell, of Daltout; John Campbell, of Ulva; being oft tymes called to have compeared before the saids Lords, this day and place, in the hour of cause to have underlyen the law for the crymes above specified, and the saids defenders and the nearest of kine of the deceased Donald Campbell, off Drumfunie, to have given in their defences against the lybell, and objections against the witnesses and assysors, if they any had, lawful tyme of day bidden, and none of them compearand, the saids Lords therefore, be the mouth of John M'Kenzie, macer of court, decerned and adjudged the said Archibald, Collin, Angus, and John Campbells, to be denounced our sovereigne Lord's rebels, and put to the horn, and all their moveables, goods, and gear, to be escheat and inbrought to his majestie's use, for their being outlaws and fugitives from the laws for the crimes above specified; thereafter the saids Lords did proceed to consider and give their Interlocutor upon the lybell, whereof the tenor follows:

The lords justice general, justice clerk, and commissioners off justiciary, having considered the lybell persewed be his majesties sollicitors against Donald Campbell, of Balnabie; Archibald Campbell, of Danna; Duncan Campbell, of Culgatro; the deceased Donald Campbell, of Drumfine; Angus M'Lauchlane off Barnagad; Allan M'Lachlane, off Dunade; Collin Cambell off Blairintibert; (against whom his majesties sollicitors did insist in the first place) they find the said lybell relevant, and remitts the same to the knowledge of an assize.

ASSISA.

Patt. Smith, of Methven.

Robert Hepburne, of Bearfood.
John Muir, of Park.
Major James Murray, in Potter row.
Alexander Henryson, off Newhaven.
And. Cassie, of
James Ellies, of Southsyde.
John Scott, of Vogra.
Lauchlan M'Pherson.
Alexander Hunter, of Murrays.
Henry Joysie, merchant.
James Murdoch, taizlour.
Alexander Scot, stabler.
James Dykes, shoemaker.
Robert Young, wright.

Sir Robert Colt, his majestie's solicitor, craved the dyet against Oab may be continued 'till the first Thursday off March next, and he put under caution for his appearance then; and craved as to Duncan Campbell, elder, of Drumfunie; Angus Campbell, of Daltout; and John Campbell, of Ulva; who are declared fugitives, that the process of forfaulture against them may be continued to the same day, which the Lords accordingly did.

THE PROBATION.

Duncan Campbell, of Culgatro; Donald Campbell, off Belnabie; Angus M'Lauchlane, of Barnagad; and Allan M'Lachlane, of Dunade; being interrogate what they had to say against the lybell raised against them, for being in rebellion with the laite Argyle, they judicially in presence of justices and assysers humblie and ingenouslie acknowledges and confesses they rose and joyned with the late Argyle and the other rebels, in the highlands, in May and June, 1685, conferand to the lybell, and humblie beggs and throwes themselves upon his majestie's mercy.

Sic Subscribitur,

DUNCAN CAMPBELL, DONALD CAMPBELL,
ANGUS M'LACHLANE, ALLAN M'LACHLANE.
LINLITHGOW, I. P. D.

Donald M'Neill, of Dallgasseck, aged threie-three years, married, purged, and sworn; depones that the tyme libelled he sawe Angus M'Lauchlane, of Barnagad; and Allan M'Lauchlane, of Dunad; in company with the rebels in Argyle shire, when they were in armes and rebellion against the king's majestie and his forces; depones that he did see Collin Campbell, of Blairintibert deliver up the castle of Carnsooth, which castle he had kept as a garrison for the rebels against the king's forces the tyme lybelled; and that this is the truth as he shall answer to God; *causa scientie*, he was in the king's service against them, and received the castle from Belnabie.

Sic Subscribitur, DONALD M'NEILL.

Alexander Campbell, off in Kirkmichall of Glastrie, aged 32 years, married, purged and sworn, depones he did see Duncan Campbell, of Culgatro; Angus M'Lauchlan, of Barnagad; and Allan M'Lauchlan, of Dunado; three of the pannels present, and Archibald

Campbell, off Danna, the deceased Donald Campbell, younger, off Drumfunie; in company with the rebels in Argyleshire the tyme lybelled; and this is the truth as he shall answer to God; depones he cannot writt.

Sic Subscribitur, LINLITHGOW, I. P. D.

Angus Campbell, of Tunnus, aged fourtie years, married, purged, and sworne; depones he did see Donald Campbell, of Culgatro; Angus M'Lachlane, of Barnagad; Allan M'Lauchlane, of Dunnade, three of the pannels present, and Archibald Campbell, of Danna; and the deceast Donald Campbell, younger off Drumfunie; in company with the rebels in Argyleshire the tyme lybelled; and this is the truth as he shall answer to God; depones he cannot writt.

LINLITHGOW, I. P. D.

Mr. John Campbell, son to Barbreck, aged twenty-two years, unmarried, purged, and sworne; depones that Collin Campbell of Blairintibert was captain of the castle of Carnasereth the tyme of the late Argyle's rebellion, and kept out the castle for the rebels against the king's forces, and after their defeate he delivered up the same; depones he sawe Archibald Campbell, of Danna, in company with the rebels, and Donald Campbell, of Belnabie; Duncan Campbell, of Culgatro; Angus M'Lauchlane, of Barnagad; Allan M'Lauchlane, off Dunnado; all of them in company with the rebels in Argyleshire, in armes, the tyme lybelled; and this is the truth as he shall answer to God.

Sic Subscribitur, JOHN CAMPBELL.

The Lords ordained the Assize to inclose and returne their verdict to morrow at twelve o'clock.

The Lords having ordained the pannels to be carryed prisoners to the Tolbooth of Edinburgh, Mr. John Stewart advocate as procurator for them, produced an act of privy council, whereof the tenor follows:

EDINBURGH, December 6, 1686.

The Lords of his majestie's privie council being informed that there are several persons this day indicted before the lords commissioners off his majestie's justiciary for the crymes off treason, as having been in the late rebellion with the late earle of Argyle, and considering that Duncan Campbell, sometime of Culgatro; Angus M'Lauchlan, some tyme of Barnagad; Allan M'Lauchlane, some tyme of Dunade; and Donald Campbell, sometime feuar of Balnabie; have saiffe conducts for sometime not yet expyred, doe therefore recomend to the lords commissioners of justiciary that in case the saids persons, or any of them, be found guilty of the saids crymes by the verdict of Assize, that in respect of the saids saiffe conducts yet depending, they be not committed to prison; but permitted to go from the bar to injoy the benefit of the said saiffe conducts, for the tyme remaining; in respect the lords of councill is to recomend them to his sacred

majestie for his royal remission to them for their lives only. Extracted be me.

Sic Subscribitur,

WILL. PATTERSON, Cl. Sc. Con.

Then follows a continuation against the other Campbells, &c. to 3rd March next. Absent witnesses fined.

Verdict of Assize.

The said day the persones who passed upon the assyse off Archibald Campbell, of Danna, and others, returned their verdict in presence of the saids lords, whereof the tenor follows: the assyse having elected and chosen Patrick Smith, of Bracco, their chancellor, they all in one voice finds the lybell sufficiently proven against Archibald Campbell, of Danna; Collin Campbell, of Blairintibert; Duncan Campbell, of Culgatro; Donald Campbell, of Belnabie; the deceased Donald Campbell, sone to Duncan Campbell, of Drumfunie; Angus M'Lauchlane, off Barnagad; and Allan M'Lauchlane, off Dunnado; and that for their being in rebellion with the late earl of Argyle, and the other rebels, with him in the highlands, in May and June, 1685 years, and being in armes with them, the which verdict is subscribed be the foresaid chancellor in name of the inquest, and written by Henry Jossie clerk elected.

Sic Subscribitur, PATRICK SMITH, Br. Chan.

The Lords having considered the verdict of assize returned against the persons above named, they, in respect thereof, decern and adjudge the said Donald Campbell, off Balnabie; Archibald Campbell, of Dana; Duncan Campbell, of Culgatro; Angus M'Lauchlane, of Barnagad; Allan M'Lauchlane, of Dunnado; and Colin Campbell, of Blairintibert; to be execut to the death, demained as traitors, and to undergo the paines of treason and utter punishment appoynted by the laws off this realm, at such tymes and places and in such manner, as our sovereign lord the king's most sacred majestie shall appoynt; and ordaines their names, fames, memory, and honours, off the deceast Donald Campbell, off Drum, to be extinct, ther blood to be tainted, and thur armes to be riven furth and delete out of the books off armes, so that their posteritie may never have place nor be able to bruik or joyse any honours, offices, titles, or dignities hereafter within this realm, and in tyme comeing and to have forfeaulted, ommitted, and tint all and sundrie thur lands, heritages, taxes, steadings, rooms, possessions, titles, effects, goods, and gear, whatsoever pertaining to them, to our sovereign lord, and to remain perpetuallie with his majestie in propertie. Which was pronounced for doom. Whereupon his majesties solicitors asked and took instruments.

March 3, 1687.

The said day, anent the criminal actione and proces of treason, formerlie insisted and now persegued at the instance of his majestie's advocat, against Donald Campbell, off Oab;

Duncan, elder, of Drumfunie; Angus Campbell, of Daltot; and John Campbell of Ulva; for ther ryseing and joyneing in armes and in rebellione with the laite Argyle and other rebels, in maner mentioned in ther dittay, which, with the former procedur thereanent, is recordit the sixt of December last, which criminall action being this day called, compeired sir John Dalrymple, younger, off Stair, his majestie's advocat, with sir Robert Colt and Mr. Georg Bannerman, advocats, his majesties solicitors, as persewers on the one pairt, and on the other pairt compeired the said Donald Campbell, of Oab; who denyed the dittay, and crymes, lybelled, and Angus Campbell, of Daltout; and John Campbell, of Ulva; who confess in maner efter specifit.

His Majesty's Advocat declares he restricts the lybell to the pannalls joyning with the rebels, or corresponding or conversing with, or harbouring, recepting, or assisting them, or being airt or pairt off the rebellione lybelled.

Mr. John Stewart, advocat, as procurator for the pannalls, alleadges, that that pairt off the lybell that the pannall Oab was perhaps once seen in company with the rebels, that *per se* is not relivant; because in this particular case, it should be made appear that the pannall was ever in company with the rebels, which is denyed; It is offered to be provine by the persewers wittness, that the pannall hade a daughter dead, to be burried to-morrow efter the pannall sawe the rebels; and it was goeing to the littell village to gett some necessarys for her burriall; ffarther alleadges, that wearreing off armes *per se* is not relivant, and particularlie haveing off a sword, alwayes denyeing that the pannall hade any or wore any sword, at any tyme that ever they rancountered with the rebels, because in that countrey, and at the tyme of that horrid rebellione, ther was no man that hade a sword, but he hade it about him to give a significatione off the loyalte and dependance upon his majestie iff the occasione should offer, and to defend themselves against the violence off the rebels, which cannot in no sence inferr such ane abominable guilt as that off the cryme off treason lybelled.

Sir Robert Colt, ane of his majestie's solicitors, oppons the lybel which is most relivantlie lybelled upon the invasione by the late Argyle, and that the pannalls are airt and pairt off the said rebellione as being eyr actualle in armes with the late Argyle or those that rose in that rebellione, or as assistors theroff, or as corresponders with, and in company with these rebels, whither in armes or without armes; so that the lybel being relivant in the severall members theroff, and the defence resolveing in a naked denyal off the lybell; and Campbell, of Oab, for whom this defence is proponed, haveing raised no exculpatione, and having alledged nothing that can eleid the relivance, the defence ought to be repelled and the lybell admitted to the knowledge off ane inquest,

in order to its being provine or not, and taks instruments upon the pannalls procurators acknowledging the pannalls being present with the rebels voluntarlie at that same place mentioned in the defence.

Mr. John Stewart oppons the defence, which is no acknowledgement, but upon the contraire, ane expresse denyall off all the articles off the lybell, and that which is alleadged against the relivance is nowayes answered, nor could a lybell of that nature be sustained supposeing it were proven that which is insinuat, and the defence, because the pannall perhaps one single tyme, the tyme off the whole rebellione, was seen in a littell clachan or village wher the rebels was, about such a necessary duty, and never being seen with them befor or efter, or in company with any of them, albeit he hade a sword about him at that tyme it cannot inferre the treasonable converse lybelled.

INTERLOQUITOR.

The lords justice general, justice clork and commissiouners off justiciarie, haveing considered the lybell persewed at the instance off his majestie's advocat and solicitors against Donald Campbell, off Oab; Duncan Campbell, elder of Drumfunie; Angus Campbell, of Daltout; John Campbell, of Ulva; with the debate above written, they find the lybell as it is restricted, viz. that the pannalls, joyned with the rebels, or corresponded or conversed with, or harboured or recept, or assisted them, or was airt or pairt off the rebellione lybelled, relevant separatim to infer the crime and paine of treason, and remitts the samen to the knowledge of the assyse.

ASSISA.

Patrick Smith, of Methven.
David Hepburne, of Randerstoune.
John Muir, of Park.
Major James Murray.
Alexander Hume, off Murrayes.
John Wint, cordiner.
John Sandilands, brewer.
Alexander Douglas, felt maker.
Archbald Douglas, armorer.
Samwell M'Lelan, merchand.
Alexander Scot, stabler.
Georg Watson, taizlor.
James Murdoch, taizlor.
Robert Young, wright.
Lauchlan M'Pherson, taizlor.

Angus Campbell, of Daltout, and John Campbell, of Ulva, doe judicialle in the presence of the justices and assysers acknowledge and confess that they were in rebellione with the late Argyle the tyme lybelled; declare they cannot wreitt nor speake Inglis, and therfor his confessione is signed by my lord justice generall, and John M'Kenzie, macer, who was judicialle sworne interpreter.

Sic Subscribitur,

LINLITHGOW

JOHN M'KENZIE, interpreter.

Martin Sinclair alias *M'Nakaird*, in Killfushane, aged threttie aught years, or therby, married, purged, and sworne; depons that the tyme lybelled of Argyll's rebellione, he did see Donald Campbell, off Oab, in company with the rebels at Killmichaell, off Glasrie, at the tyme when Mr. Charles Campbell was ther, with about the number of two hundreth rebels with him, and that he did see him walking up and downe with them as others did; and that within a day or two efter that he did see him at Killmichaell, off Inverglassie, wher Mr. Charles Campbell, with the rebels, went to immediatlie out of Killmichaell off Glasrie, and that he did see him converse with Mr. Charles Campbell and with others off the rebels, as the rest of them did; and that he hade a sword about him; depons that he did see Duncan Campbell, elder, off Drumfunie, ryding from Killmichaell off Inverlessie, with a sword about him, in company with Mr. Charles Campbell, and the rebels at that time, when the rebels came back from Killmichaell off Inverlessie to Kilmichaell off Glasrie; depones he did see Angus Campbell, of Daltout, in company with the rebels the tyme lybelled at Killmichaell off Glasrie, at ther first ryseing, and that he heard that John Campbell off Ulva was ther, but did not know him, and this is the truth as he shall answer to God.

Sic Subscibitur, MARTIN SINCLAIR.

John M'Lauchlan, in Michnan, aged threttie yeares, or therby, married, purged, and sworne; depons that the tyme off the late Argylls rebellione lybelled, he sawe the pannall Donald Campbell, of Oab, in Killmichael of Inverlassie, where Mr. Charles Campbell and a pairtie of the rebels were for the tyme, and sawe Oab speake to some off the rebels, and does not knowe what was the subject of ther discourse, and that he sawe him walk two or three with the rebels, but does not know how long he stayed with them, and sawe him standing within the breadth off his house to the place wher Mr. Charles Campbell was; depons that he knows that Oabs naturall sone was in the rebellion, but knows not if his father receipt or conversed with him after he was in the rebellione, depones that he the deponent went to Oab his maister, towards the beginning of the rebellion, and asked him what he and the other tenants should do; and Oab answered, that he did not know, but thought they should do as the rest of the country did; and depones that the greatest pairty off the country thereabout, went in to Mr. Charles, after Mr. Charles had threatened to burne their houses, and hade burnt one house, and the deponent himself, and Oabs natural sone and M'Regner, his domestic servant, and four or five of Oab's tenants, as he remembers, went to Mr. Charles; depones that he sawe Angus Campbell, of Daltout, and Angus Campbell, of Ulva, with the rebels at the Tarbat and Bute, and they hade armes; and that he sawe Campbell, off Drumfunie, at Kirkmichaell, off Inverlassie; in

company with the rebels wher Mr. Charles was ther, and that he hade a sword; and this is the truth as he shall answer to God, depones he cannot wreitt.

Sic Subscibitur, LINLITHGOW, I. P. D. Com.
JOHN M'KENZIE, Interpreter.

Patrick Campbell, called *Black Patrick*, some tyme ffactor to Auchinbreck, aged threttie yeares, married purged and sworne; depons that the tyme lybelled, he did see Donald Campbell, of Oab, in company with the rebels in Kirkmichaell of Glasrie, when Mr. Charles Campbell was ther; and depons that thereafter he sawe him at Kirkmichaell off Inverlassie, on horse back, rydeing doune from a littell hight above the towne, wher Mr. Charles Campbell and two hundreth of the rebels were, and depons that he did see Duncan Campbell, elder, off Drumfunie, at Kirkmichaell of Glasrie with Mr. Charles Campbell, the tyme forsaid and fyve hundreth of the rebels together, depones he sawe Angus Campbell, of Daltout, and John Campbell of Ulva all allongst with the rebels in armes, and particularlie at Bute, Rosa, Tarbat and Cowall; and this is the truth as he shall answer to God.

Sic Subscibitur, PATRICK CAMPBELL.

John Pollock, in Killmichaell, off Glasrie, aged sixtie yeares, married, purged and sworne, depons that he did see Duncan Campbell, elder, off Drumfunie, in company with the rebels at Killmichaell of Glasrie, and sawe him ryding into the town with severalls of them, the tyme of Argyll's rebellione; depones he sawe Angus Campbell, of Daltout, in company with the rebels walking with a sword the same tyme and places, and in armes; and this is the truth as he shall answer to God.

Sic Subscibitur, JOHN POLLOCK.

Robert M'Indoer, sone to Leugas M'Indoer, in Killchowne, aged seventeen yeares, unmarried, purged, and sworne; depons that the tyme lybelled, he sawe Donald Campbell, of Oab, at Killmichaell of Glasrie, walking up and down the towne, when Mr. Charles Campbell and the rebels were there; depons he sawe Angus Campbell, of Daltout, and John Campbell of Ulva, walking up and downe with the rebels and conversing with them, when Mr. Charles Campbell was at Killmichaell off Glasrie; and this is the truth as he shall answer to God.

ROBERT M'INDOER.

The Lords ordaines the assyse to inclose and returne ther verdict to-morrow at ten o'clock.

March 4th, 1687.

The said day the persons who past upon the assyse off Donald Campbell, of Oab; Duncan Campbell, elder, off Drumfunie; Angus Campbell, off Daltout; John Campbell, of Ulva; returned ther verdict in presence of the saids lords, wheroff the tenor ffolowes:

The Assyse haveing elected and chosen Patrick Smith, of Methven, chancellor, they

all in one voice find Donald Campbell, of Oab; Duncan Campbell, elder of Drumfunie; Angus Campbell, off Daltout; and John Campbell, off Ulva, were persewed ffor the cryme off treasone, that the same is sufficiently provine, according to the interloquitor off the lords off justiciarie, and thir presents ar written be John Sandilands clerk, and signed be the forsaid chancellor, at Edinburgh, the third day off March, 1687.

Sic Subscribitur, PATRICK SMITH BRACCO,
Chancellor.

Efter oppeing and reading of the whilk verdict off Assyse, The lords justice generall, justice clerk, and commissioners of justiciary, therefore be the mouth off John Leslie, dempster of court, decerned and adjudged the said Donald Campbell, of Oab; Duncan Campbell, elder, of Drumfunie; Angus Campbell, off Daltout; and John Campbell, of Ulva; to be

execute to the death, demained as traitors, and to underlye the paines off treasone and utter punishment apoynted be the lawes off this realme, at such tymes and places and in such maner as our souveraine lord the king's most excellent majestie shall appoynt, and ordaines ther name, fame, memorie, and honors, to be extinct; ther blood to be tainted, and ther armes to be riven furth and delatte out off the book of armes, so that ther posteritie may never have place, nor be able heirefter to bruike or joyse any honours, offices, titles, or dignities, within this realme, in tyme coming, and to have forfaulted, ommitted, and tint, all and sundrie ther lands, heritages, tacks, steadings, rowmes, possessions, titles, offices, goods, and gear, whatsoever pertaineing to them to our souveraine lords use to remaine perpetuallie with his highnes in propertie. Which was pronounced for doom. Whereupon his majestie's advocate asked and took instruments.

397. *Proceedings in the Parliament of Scotland against the Viscount of DUNDEE* and others, for High Treason: 2 WILLIAM & MARY, A. D. 1690. [Now first printed from the Parliamentary Records at Edinburgh.]*

EDINBURGH, July 14, 1690.

ANENT the lybelled summons and indytement for high treasone raised and persewed before the king and queen's majasties and the estates of parliament writfin in Latine, and exped under the hand of the deput of the directors of chancellary, keeper of the quarter seall conforme to ane warrand and act of parliament after mentioned; att the instance of sir John Dalrymple, younger, of Stair, their majesties advocat for their highnes interest in the matter underwrytten against John, viscount of Dundee; James, earle of Dum-

fermling; ——— viscount of Frendraught; ——— lord Dunkeld; major William Grahame, of Balwhaple; Collonell Alexander Cannan; John Clelland, of Fasken; Mr. Colin M'Kenzie, uncle to the earle of Seaforth; sir John Drummond, of Machany; William Crawford, younger, of Ardmillan; James Crawford, his brother; ——— Robertson, of Strowan; David Grahame, brother to the deceist John viscount of Dundee, for himselfe, and as representing the said viscount ——— Halyburtoun, of Pitcurr; and ——— Halyburton, as air to the said deceist ——— Halyburton, of Pitcurr; his father, James

Which Dryden did not disdain to translate as follows:

"Oh, last and best of Scots! who did maintain
Thy country's freedom from a foreign reign;
New people fill the land, now thou art gone,
New Gods the temples, and new kings the throne.
Scotland and thou did each in other live,
Nor wouldst thou her, nor could she thee survive.
Farewell, who dying didst support the state,
And couldst not fall but with thy country's fate."

See in Laing, vol. 4, p. 222, 2d ed. the detection of a misrepresentation of Dalrymple's relating to the battle of Killycranky.

Dalrymple has printed the following Correspondence, furnished to him, he says, by sir David Dalrymple (Lord Hailes):

Lord Strathnaver to Lord Dundee.

"My lord; The concern that many equally interested in us both, has for your lordship, ab-

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* The celebrated Graham, of Claverhouse, who forms a very conspicuous figure in the Scottish History in the seventeenth century. Upon the meeting of the Convention of Estates, "he went" Dalrymple instructs us, "wherever the spirit of Montrose should direct him," a modern fiction, says Laing, exceeded only by another, that his heroism was caught from the recitation of Ossian's Poems. He was killed in the battle of Killycranky, (June 17th, 1689), where he had beaten the troops of king William under Mackay. Pitcairn has honoured him with the following epitaph:

Ultime Scotorum, potuit quo sospite solo
Libertas Patriæ salva fuisse tuæ:
Te moriente, novas accepit Scotiæ cives,
Accepitque novos, te moriente, Deos.
Illa tibi superesse negat, tu non potes illi:
Ergo Caledoniæ nomen inane vale.
Tuque vale, gentis priscae fortissime ductor,
Ultime Scotorum, atque ultime Grame, vale.

VOL. XIII.

Edmonstoun, of Newtoun, of Drum; sir Ewan Cameron, of Lochzeell; ——— Cameron, his eldest sone; Donald M'Donald, younger, of Sclaite; the laird of M'Naughton; ——— Grant, of Ballandalloch; ——— Stewart, of Appin; ——— M'Kean, alias M'Donald, elder, of Glencoe; Alexander M'Donald, younger, of Glengary; Donald M'Neill, of Gallabellie; and sir John M'Lean, of Dowart, and divers others their associats and accomplices. The authentick copie whereof, in English, produced in manner after specified maketh mention, That where the crymes of rebellione and treasone, ryseing and continowing in armes against their majesties and their highness authority and government, and the assaulting of their majesties forces, the garisoneing of houses and strengths, the harbouring, corresponding, and associating with open rebels and traitours; the falling upon, wounding or robbing their majesties forces in their retreat, are high crymes, punishable with forfeiture of lyfe, lands, and goods; and by the third act first parliament king James the first, it is statute and ordained, That no man nottourly rebell against the king's persone, under the pain of forfaiting of lyfe, lands and goods; and by the thretty-seventh act of his second parliament, it is statute, that nae man wilfully resett, entertaine, or doe favours to open and manifest

tracting from that respect which your own merit made me have, cannot but occasion re-grate in me, to see that the courses you take, tend inevitably to the ruin of you and yours, if persisted in. I cannot therefore but wish, that you would follow the duke of Gordon's example, and I am persuaded it will be found the best course; neither shall your friends who at this time dare not well meddle, be wanting to show their affection to you, and interest in the standing of your family, and I hope you will do me the justice to believe that none wishes it better, or will more effectually lay himself out in it, than, my lord, &c. STRATHNAVER."

"Inverness,

"3d of July, 1689."

Lord Dundee to Lord Strathnaver.

"My lord; Your lordship's, dated the 3d, I received the 13th, and would have returned an answer before now, had I not been called suddenly to Enverloch, to give orders anent the forces, arms, and amunition sent from Ireland. My lord, I am extreemly sensible of the obligation I have to you, for offering your endeavours for me, and giving me advice in the desperate estate you thought our affairs were in. I am persuaded it flows from your sincere goodness and concern for me and mine, and in return, I assure your lordship, I have had no less concern for you, and was thinking of making the like address to you; but delayed it till things should appear more clear to you. I am sorry your lordship should be so far abused as to think, that there is any shadow of appearance of stability in this new structure of go-

rebells; and by the 14th and 15th acts parliament 6th of king James the second, and parliament twelfth king James the sixth caput on hundred and forty-six, the ryseing in fear of weare, or supplying the rebels in help, red, or councill, or the stuffing of houses for the furthering of the king's rebels, are crymes for which the persones are punishable as traitours, against whom not only forfaitures are allowed to proceed in absence by the eleventh act of the first session second parliament of king Charles 2nd, but also by the 69th act parliament 6th king James the fyfth, the summons of treasone may be persewed against the air for the treason committed by his predecessor: Nevertheless it is of verity, that the deceist John viscount of Dundee, and James earle of Dumfermling; ——— viscount of Frendraught; ——— lord Dunkeld; major William Grahame, off Baquhale; collonell Alexander Cannan; John Clelland, of Fasken; Mr. Colin M'Kenzie, uncle to the earle of Seaforth; sir John Drummond, of Machany; William Crawford, younger, of Ardmillan; James Crawford, his brother; ——— Robertsons, of Strowan; Mr. David Grahame, brother to the viscount of Dundee; the deceist ——— Halyburton, of Pitcurr, and ——— Halyburton, his sone; James Edmonstoun, of Newtoun, of Drum; sir Ewan Cameron, of Lochzeill; ———

vernment these men have framed to themselves: they made you, I doubt not, believe, that Darie (Londonderry) was relieved three weeks ago. By printed accounts, and I can assure you, it never was relieved, and now is taken. They told you, the English fleet and Dutch were masters of the sea. I know for certain the French is, and in the Chanel; in testimony whereof they have defeated our Scots fleet. For as they came alongst they fell on the two frigats, killed the captains, and seised the ships, and brought the men prisoners to Mull. They tell you Shomberg is going to Ireland to carry the war thither. I assure you the king has landed a considerable body of forces there, and will land himself amongst our friends in the west (whom I am sorry for) very soon. So, my lord, having given you a clear and true prospect of affairs, which I am afraid amongst your folks you are not used with, I leave you to judge if I or you, your family or myn, be most in danger. However, I acknowledge frankly, I am no less obliged to your lordship, seeing you made me an offer of your assistance in a tyme when you thought I needed it. Wherein I can serve your lordship or family at any tyme you think convenient, you may freely employ me. For, as far as my duty will allow me in the circumstances we stand, I will study your well as becomes, my lord, your most humble servant,
DUNDEE."

"Struan,

"15th July, 1689."

See, in this Collection, other particulars concerning Dundee, vol. 11, p. 945, et seq.

Cameron, his eldest sone; Donald M'Donald, younger, of Sclait; the laird of M'Naughtoun; ——— Grant, of Ballindalloch; ——— Stewart, of Appin; ——— M'Lean, alias M'Donald, elder, of Glencoe; Alexander M'Donald, younger, of Glengerrie; Donald M'Neill, of Galenhellie; and sir John M'Kean, of Dowart, with diverse others their associats and accomplices, haveing shaken off all fear of God and regaird to their ma'ties and their lands, and love to their native countrey, they did ryse and continow in open armes against their majesties authority and government, the first, second, thrid, or ane or other of the dayes of the moneth of Aprill, 1689 years, or ane or other of the dayes of the moneth of May thereafter, the said year; and upon the ——— day of May or ane or other of the dayes of the said moneth and year of God forsaid, the said deceist John, viscount of Dundee, and the other persons a'mentioned, did come to the toune of Perth in fear of wear, and therein in ane hostile manner did seize and carry away the deceist laird of Blair, and other officers of their majesties forces, and detained the laird of Blair prisoner in the castle of Dowart, in a cruell and sad conditione, till he dyed; and upon the ——— day of June, one thousand six hundred and eighty nyne years, or ane or other of the dayes of the said moneth, the persones abovenamed and others, being all armed, marching to joyne the rebels, did attack a certain number of their majesties forces under the command of captain Alexander Young, in Kyn tyre; as also the said John, viscount of Dundee, James, earle of Dumfermling, and the other persones abovenamed, haveing raised and assembled severall thousands of rebels, and highland rebels, [sic in orig.] they had the boldness to march throw the countrey, oppressing and destroying their majesties good and loyall subjects, and to oppose their forces; and upon the 26th day of Jully, 1689, or ane or other of the dayes of the said moneth, the said unq'll John, viscount of Dundie, as generall or leader of the persons forsaid, and other rebels, did in a plain battle attack their majesties armie, betwixt the blair of Athole and the pass of Gilliechrankie, and did kill and wound severall of their majesties forces and good subjects; and thereafter, upon the ——— dayes of August, 1689, or ane or other of the dayes of the said moneth, or ane or other of the moneths of the said year, the said James earle of Dumfermling, and the other persons forsaid, and their accomplices, did attack their majesties forces at Dunkeld, where they did kill lieutenant collonell William Clelland, major ——— Hendersone, and severall others of their majesties officers and faithfull souldiers; and haveing mett and assembled at Innerlochic upon the first, second, or third dayes of the month of ——— and year of God forsaid, or ane or other of the dayes of the months of ——— they entered into treasonable conspiracies, bonds, and associations, for furnishing of certain numbers and proportions of armed men for the maintenance and

support of the rebellion, and sent out parties to murder and destroy their majesties good subjects, and to robb and herrie them of their goods, and the particular acts of rebellion, treason, ryseing, and continueing in armes against their majesties authority and government, the assaulting of their forces, the garrisoneing of houses, and strengths, the harbouring, corresponding with open rebels and traitours, and the falling upon, wounding or robbing their ma'ties forces, and the other crymes abovementioned, upon the dayes rex'ive of the severall months of the said year, one thousand six hundred and eighty nyne, or upon ane or other of the dayes of one or other of the moneths of the said year 1689, off the which horrid and treasonable crymes above specified, or ane or other of them, the hail forenamed persones, and ilk ane of them are actors airt and pairt, which being found by their majesties and the estates of parliament, they ought to be punished as horrid traitors and rebels, with forfeiture of lyfe, lands, honour, and goods, to the terror of others to committ the lyke in tyme comeing; and therefore the saids hail defenders abovenamed, to have compeared before their majesties and the three estates of parliament within the parliament house of Edinburgh, at ane certane daye bygone, to have heard and seen sentence and decreet, given and pronounced against them in the same matter, as at more length is contained in the said principall summons, which containes therein a warrand for executing thereof, with the usuall solemnities necessar upon twenty fyve days warning, at the mercat cross of the head burgh of the shyre, where the fornamed persones live; and in case there be not *tutus accessus* thereto at the head burgh of the next adjacent shyre where they live, conforme to ane act of the first sessione of your majesties first parliament, daited the first day of August, 1689 years, as the said summons raised and dewly execute against the hail fornamed persones more fully proports, The said sir John Dalrymple, their majesties advocat, compeared personally, who desyred that the said proces of treasone raised before the parliament at his instance against the representatives of the viscount of Dundee, and ——— Halyburton, of Pitcurr; and against the said James earle of Dumfermling, and the persons abovenamed, and others in this kingdom, who rose in actuall rebellion against their majesties, and still continow in armes, might be called, and accordingly all the persons against whom the lybell or indytement of high treasone is raised were thryce publicly called by meacers at the barr and at the great door of the house, and none of them compearing, the said sir John Dalrymple, their ma'ties advocat, produced in presence of the estates of parliament, the letters and indytement of high treasone wrytten in Latine upon parchment, under the hand and subscriptione of the deput director of the chancelary, keeper of the quarter seall, together with ane other duplicat thereof, under the hand and subscriptione of the

said deputy, director of the Chancery, keeper of the said quarter seall, item, Ane authentick copie of the said letters of treasone translated into English, together with the forsaid act of parliament, dated the first day of August, 1689 years, wherby the king and queen's majesties and the estates of parliament doe grant warrand to his majesties advocat to raise ane indytement of high treasone befor the parliament, against the viscount of Dundee, the earle of Dumfermling, and other persones, who are in open rebellion against their majesties; and lykways against all such persones as intercepted any of his ma'ties forces under the command of major generall M'Kay in their retreat, and killed, wounded, or robbed them of their cloaths, horses, and armes; and thereby they declare that a citation against the saids persones, at the mercat cross of the head burgh of the shyre where they duell, or in case ther be not *tutus accessus* therto at the mercat cross of the head burgh of the next adjacent shyre shall be sufficient; and after production and reading of the said indytement, in Latine, wherof there was two principalls produced and ane authentick copie thereof in English, and the act of parliament abovementioned, which were read in audience of their majesties high commissioner and the estates of parliament, their ma'ties said advocat did produce ane executine of the said summons, dated the 7th, 8th, 10th, 12th, 13th, 14th, and 24th days of March, 1690 years, under the hand of George Ogilvy, Albany herauld; bearing that the said George Ogilvy, Albany herauld, att command of the saids letters of treasone raised at the instance of their majesties said advocat against the saids defenders, and by vertew thereof, with one of their ma'ties trumpeters, and witness thereunto subscriyving, past upon the said 7th day of March, to the mercat cross of Coupar, in Fyfe, head burgh of the s'refdome thereof; and upon the said eight day, to the mercat cross of Forfar, head burgh of the s'refdome thereof; and upon the said 10th day, to the mercat cross off Aberdeen; and upon the said 12th day, to the mercat cross of Bamff; and upon the said 13th day, to the mercat cross of Elgine of Forress: and upon the said 14th day to the mercat crosses of Nairne and Invernes rex'ive; and upon the said 24th day, to the mercat cross of Perth, head burghs of the s'refdomes thereof, and thereat ilk ane of the saids croces rex'ive and successive in their ma'ties names and authority with their coatts of armes displayed, sound of trumpet, and other solemnities requisite and necessar open proclamation and publick reading of the said summons of treasone, he lawfully charged the haill persones above and aftermentioned, viz. John viscount of Dundee; James earle of Dumfermling; viscount of Fren-draught; lord Dunkeld; major William Graham, of Baquhapple; collonell Alexander Cannan; John Cleiland, of Fasken; Mr. Colin M'Kenzie, uncle to the earle of Seaforth; sir John Drummond, of Machany; William Crawford, younger, of Ardmillan; James

Crawfurd, his brother; ——— Robert-sone of Strowan; David Graham, brother to the deceist John, viscount of Dundee, for himself, and as representing the said viscount; ——— Halyburton, of Pitcurr; and ——— Halyburton, as air to the said deceist ——— Halyburton, of Pitcurr, his father; James Edmonstoun, of Newtoun, of Downe; sir Ewen Cameron, of Lochzeel; ——— Cameron, his eldest sone; Donald M'Donald, younger, of Sclate; the laird of M'Naughtoun; ——— Grant, of Ballindalloch; ——— Stewart, of Appin; ——— M'Lean, alias M'Donald, elder, of Glencoe; Alexander M'Donald, younger, of Glengarie; Donald M'Neill, of Gallihellie; and sir John M'Kean, of Dowart, and diverse others, their associats, and accomplices; and all others the successors of such of them as are dead, and your tutors and curators, if they any have for their intrest; to have compeired befor the high court of parliament, within the parliament house of Edinburgh, upon the days particularly mentioned in the said summons, and that he made certification, and affixt and left authentick doubles, with a list of the witness, at and upon ilk ane of the saide mercat crosses, befor and in presence of the witness mentioned, in and subscriyving witness to the said executione; together with another executione under the hand of William Glover, Rothesay herauld, bearing that upon the said eight, tenth, tuelt, fourtein, and fyfteen days rex'ive of the month of March, 1690 years, the said William Glover to have at command of the said summons of treasone, at the instance of the said sir John Dalrymple, their majesties advocat, for ther highnes intrest, against the haill defenders abovenamed, and their accomplices, past with ane trumpeter, upon the said 8th day of March, and year of God forsaid, to the mercat cross of Lanerk, head burgh of the s'refdome thereof, and upon the tenth day of March, and year of God above wryten, to the mercat cross of Air, head burgh of the s'refdome thereof; and also upon the said 12th day of March, and year of God, forsaid, to the mercat cross of Inverarie, head burgh of the s'refdome of Argyle; and upon the fourteen day of March, and year of God above wrytin, to the mercat cross of Renfrew, head burgh of the s'refdome thereof, and upon the fyfteen day of March, and year of God forsaid, to the mercat cross of Sterling, head burgh of the s'refdome thereof; and there at ilk ane of the saids crosses, respective and successive; in their majesties name and authority, the said William Glover, Rothesay herauld, lawfully summoned, warned, and charged, ilk ane of the fornamed persones abovenamed, and others contained in the summons of treasone, and ilk ane of them, and the successors of such of them as are dead, be sound of trumpet, three severall tymes, with displayed coatt, be open proclamatione, and publick reading of the said summons of treasone, and using other solemnities, necessar to compear befor their majesties high court of parliament,

to be holden within the parliament house of Edinburgh, at ane certain day bygone, in the hour of cause without continuation of dayes, to the effect for the causs't and made certification as is exprest in the said summons of treason, and affixt and left ane just and authentick copie upon ilk ane of the saids mercat crosses, respective and successive, upon the dayes respective above specified, together with a list of the witness names befor, and in presence of the witness mentioned, and designed in the execution and subscriyving witness therto, as the saids executions more fully bears. Therafter the saids George Ogilvie, Albany herauld, and the said William Glover, Rothesay herauld, who did execute the saids letters of treason, and the witness ins'rt and subscriyving witness to their saids executions respective forsaid, compeared personally in presence of their majesties high commissioner and the estates of parliament; and after publict reading of the said lybell of treason in Scots, and the executions of the samen; the saids heraulds and witness, being solemnly sworne, and interrogat, deponed that the saids executions formerly subscribed by the saids heraulds and witness, were trew executions in all poynts, in manner therein contained, and that the samen was true, as they should answer to God, as their oaths and depositiones, wryten upon the back of the saids respective executions and subscriyved by them, and by the president of parliament, more fully bears. Therafter their majesties advocat did obviat three objections which might be made; Primo, that where the executions does not bear that the parties were ceited at their duelling houses, but only at the mercat cross of the head burgh of the shyres, he represented that the warrand given by the parliament for raising the proces, does expressly allow that manner of citation; Secundo, Albeit the persons cited be absent, yet the leading of probation against them, altho absent, is expressly warranted by the act of the session of parliament, king Charles the second, in anno 1669; Tertio, the deduceing of probation against persons guilty of treason after their death, is conform to the sixty nynt act, sext parliament of king James the fyfth, which acts were read in audience of their majesties high commissioner and the estates of parliament, and then their majesties advocat declared, that he restricted the lybell to the defenders their being actually in armes against their majesties, after the fourth day of May, 1689 years, (which was twenty one days after the proclamation of their majesties king William and queen Mary, to be king and queen of this realme) or such of the saids defenders who joyned with any of the rebels who were in armes after the said day; and the said James earle of Dumfermling; ——— viscount of Frendraught; ——— lord Dunkeld; major William Grahame, of Baquhapple; collonell Alexander Cannan; John Cleiland, of Fasken; Mr. Colin M'Kenzie, uncle

to the earle of Seaforth; sir John Drummond, of Machannie; William Craufurd, younger, of Ardmillan; James Craufurd, his brother; ——— Robertstone, of Strowan; James Edmonston, of Newton, of Doune; sir Ewan Cameron, of Lochzeel; ——— Cameron, his eldest sone; Donald M'Donald, younger, of Sclait; The laird of M'Naughtoun; ——— Grant, of Ballindalloch; ——— Stewart, of Appin; ——— M'Kean alias M'Donald elder of Glencoe; Alexander M'Donald, younger, of Glengarie; Donald M'Neill, of Gallabellie; and sir John M'Lean, of Dewart, and also the said David Grahame, for himself, and as successor to the late viscount of Dundee; and ——— Halyburtone, of Pitcurr, son to the said, ——— Halyburton, of Pitcurr, his father; being lawfully summoned by heraulds, with displayed coats, and sound of trumpet, and other solemnities requisite, to have answered to the forsaid indytement; and being oft and diverse tymes called by macers in the parliament house, and at the great door which was cast open as use is and not compearand, the which lybell and indytement of treason persewed by their majesties advocat against the deceast viscount of Dundee, and his representatives, the earle of Dumfermling, and others contained in the lybell, with the executions thereof, with the principall indytement, and the authentic double of the samyne, in English, with the forsaid act of parliament, empowering and granting warrand to the said sir John Dalrymple, their majesties advocat, to intent, raise, and prosecute, the forsaid lybell of treason against the saids defenders in the way and manner abovementioned, being at length heard, seen and considered by their majesties and the estates off parliament; and they therewith well and ripely advysed, They by their vote and interlocutor, fand the lybell relevant in thir termes, that these persons were actually in armes against their majesties after the fourth day of May, 1689 years, or joyned with any of the rebels, who were in armes after the said day relevant to infer the pain of treason; After pronounceing of which interlocutor their majesties advocat persewer did adduce diverse famous witnesses, lawfully ceited for proveing the poynts of the lybell admitted to his probatione, who haveing compeared in presence of their majesties high commissioner and the estates of parliament, and being solemnly sworne, purged of partiall councill, examined, and interrogat, upon the poynts of the lybell and indytement of treason, admitted to the persewars probatione, deponed in manner mentioned in their oaths and depositiones, as the samen subscriyved by them and the president of parliament extant in the proces fully bears; and sicklyke, their majesties advocat produced the wreats aftermentioned, viz. Ane bond of association entred into by the laird of Lochzeell, Donald M'Donald younger, of Sclait, and other highlanders, wherby they bind and obleidge themselves, for his majesties (the late king James) service and

their own safety, to meet at the day of September, 1689 years, and to bring alongst with them the number of fencible men; that is to say, each one of them their proportionall part and number, particularly y^rin enumerat, but it is therby declared, that in case any of the rebels shall assault or attack any of the persones mentioned in the said bond of association, betwixt the date thereof and the forsaid day of randevouze, they doe solemnly promise to assist one another to the outmost of their power; dated the 24th day of August, 1689 years; Item, another bond of associatione betwixt the viscount of Frendraught, John Grant, of Ballindalloch, and others, dated att the 15th day of January 1690 years, whereby, as they pretend in testimonie of their loyalty to their sacred and dread soveraign; and for the security of their freinds and good neighbours, they vow and protest befor the Almighty God, and on their salvation at the great day, to goe on secretly and with all the power and strength they have to stick and byde by one another, and when any of them shall be stressed or any ways molested by any pairty or enemy whatsoever, they shall repair to their aid with all their strength and power, and that upon the first call without any further murr or delay; and that they shall never be byassed or broken off the said associatione, without the consent of his majestie's generall and the major pairt of themselves, So help them God; as also produced ane letter wryten by the said sir Ewan Cameron, of Lochzell; Mr. Colin M'Kenzie, uncle to the earle of Seaforth; John Grant, of Ballindalloch; the laird of M'Naughton; sir John M'Lane, of Dovart; and others of the highland clans, direct to major Generall M'Kay from Birse, the 17th day of August 1689, in answer to his q^y they acknowledge the receipt of the major generall's letter fra Strathbogie, and they said that he gave account to brigadeer Cannon from St. Iⁿstone, to which he gave a civill return, for by telling that they support themselves by fictions and stories (a thing known all the world over) is no railleing; and that the Christian means (as the major generall said in his last) they make use of to advance their good cause by, is evident to all the world, and the argument they use to move them to address to their government, is consequentiall to the whole; for, instead of telling them what Christians, men of honour, good subjects, and good neighbours, ought to doe, he tells them in both letters that his majestie (the late king) hes hott warrs in Ireland and cannot in haste come to them, which tho it were also trew, as they know it is not, is onely ane argument from safety and enterest; and that he might know the sentiments of men of honour, they declare to him and all the world, they scorne his usurper and the indemnities of his government, and to save his further trouble by his frequent invitations, they assure him that they are satisfied, their king take his own tyme and

way to manadge his dominions and punish his rebels; and albeit he should send no assistance to them at all, they will all dye with their swords in their hands befor they fail in their loyalty; and swore alleadgence to their soveraign; and desyres he may then judge what effect duke Hamilton's letter hes upon them; but that they had gotten ane honourable father for that storie from Ireland, and altho they can better tell him how matters goe in Ireland, and that they pity those on whom such stories hes influence, yet since they have no orders to offer conditions to any rebels, they allow his grace and the major-generall to believe on, and take their measures by their success till his majestie (the late king) his further orders; and they thank the major generall for the good meaning of his invitation, though they are confident he had no hopes of succes, and that they will shortly endeavour to give him a requyteal; and that those of them who live in islands have already seen and defyed the prince of Orange his friggatts; and that they had returned duke Hamilton's letter, becaus they had more use for it then they: And after production and reading of the saids two bonds of associatione, and missive letter abovementioned, in audience of their majesties high commissioner, and the estates of parliament, the said sir John Dalrymple, their majesties advocat, declared, that besydes the depositiones of the witness adduced against sir Ewan Cameron, of Lochzell; Donald M'Donald, younger, of Sclaith; the laird of M'Naughton; and Grant, of Ballindalloch; he made use of the saids two bonds of association entred into and signed by the laird of Lochzell, and other highlanders, at the castle of Blair, in August, 1689, and the other bond in January 1690, subcryved by the viscount of Frendraught and others; by which bonds they obleidge themselves to stick to one another in his majesties service, which by the place and persons appears to be the late king James; and farder he declared, that he made use of the saids bonds of associatione and missive letter for adminiculating of the probation against the saids persons subscrivers thereof, and desyred that the probation adduced against the defenders might be read over and votted singly as to every one of the defenders, and which was accordingly done; And the king and queen's majesties, and the estates of parliament having considered the forsaid lybell and indytement for high treason, persegued at the instance of their majesties advocat, against the fornamed persones, defenders, with the depositiones of the witnesses who were adduced and present, and deponed in the said matter of treason, as to the poynts admitted to the lord advocat his probation in manner forsaid, viz. against the deceist John, viscount of Dundee; Mr. David Grahame, brother to the said viscount, for himself, and as air and successor to the said late viscount; the lord Dunkeld; major William Grahame, of Balquhapple; collonell Cannon; John Clelland, of Fasken; James earle of Dumfermling; ——— viscount off

Frendraught; Mr. Collin M'Kenzie, uncle to the earle of Seaforth; sir John Drummond, of Machanie; William Craufurd, younger, of Ardmillan; James Craufurd, his brother; the laird of Strowan; ———— Robertson; James Edmonstoun, of Newtoun of Doune; sir Ewin Cameron, of Lochzeell; ———— Cameron, his eldest sone; ———— Hallyburton, of Pitcurr; and ———— Hallyburtone, of Pitcurr, his sone; ———— Stewart, of Appin; ———— M'Lean, alias M'Donald, elder, of Glencoe; Alexander M'Donald, younger, of Glengarie; David M'Neill, of Gallochelly; sir John M'Lean of Dowart; Donald M'Donald, younger, of Sclaitt; ———— Grant, of Ballindalloch; and the laird of M'Naughtoun; that the fornamed persons were actually in armes against their majesties after the 4th day of May, 1689, or joyned with any of the rebels who were in armes after the said day; and having also considered the bonds of association and missive letter abovementioned, produced by the lord advocat, which he declared he made use of, for adminiculating of the probation against the said Donald M'Donald, younger, of Sclaitt; and ———— Grant, of Ballindalloch; they fand and hereby finds the forsaid cryme of treasone as it is found relevant, viz. that the fornamed persones were actually in armes against their majesties, after the 4th day of May, 1689 years, or joyned with the rebels who were in armes after the said day, sufficiently verified and proven against the said John, viscount of Dundee; Mr. David Grahame, his brother; major William Grahame, of Baquh-
aple; collonell Alexander Cannon; John Cleill-
and of Fasken; James earle of Dumfermling; ———— viscount of Frendraught; Mr. Colin M'Kenzie, uncle to the earle of Seaforth; sir John Drummond, of Machanie; William Craufurd, younger, of Ardmillan; James Craufurd, his brother; the laird of Strowan; Robertstone; James Edmonstoun, of Newtoun of Doune; sir Evin Cameron, of Lochzeell; ———— Cameron, his eldest son; ———— Halyburton, of Pitcurr; ———— Stewart, of Appin; M'Lean alias M'Donald, elder, off Glencoe; Alexander M'Donald, younger, of Glengarie; ———— M'Neill, of Gallachelly; sir John M'Lean of Dowart; Donald M'Donald, younger, of Slait; ———— Grant, of Ballindalloch; and the laird of M'Naughtoun; haveing past severall votes upon advyseing of the probation as to each one of y'm, upon pronounceing of which interlocutor, William earle of Craufurd, for himselfe and in behalfe of dam Henrietta Seton countes of Wigtoun, now countes of Craufurd, his spous, gave in the protestation under wryten, representing, That wheras the said James, earle of Dumfermling, upon ane assignatione granted to him by the said countes of Craufurd of two thousand merks of her joynture, did grant to the said countes a back bond, dated the 2nd day of May, 1683 years, declareing the samen to have been granted in trust and for the behoove of the said countes and her children, as the

said backbond bears; as also that the said William earle of Craufurd having ane assignation from the deceist earle of Craufurd, his father, of all debts and soumes of money, hath right to the soumes dew to him by the said James earle of Dumfermling, his father, on any account whatsoever; and therfor the said William earle of Craufurd, for himself, and in name of the said countes of Craufurd, his spous, protested that the doom and sentence of forfaulture to be given and pronounced against the said James earle of Dumfermling shall not be prejudiciall to their saids debts and claims; but that the estate to be forfaulted shall be burdened and lyable therefore; sicklyke as the said sentence of forfaulture had not been pronounced, and therupon asked and took instruments, which protestation their majesties and the estates of parliament have admitted and admitts; and sicklyke captain Charles Straiton protested, that the doom and sentence of forfaulture to be given and pronounced against the viscount of Dundee, shall not prejudice him of the soume of 5,000 merks a'rents thereof, contained in a bond granted by the late viscount to provest Kennet, and in a translation be him in favours of the said captain Charles Straiton, and which bond was granted several years befor the late happie revolution, which protestation their majesties and the said estates of parliament also have admitted and admitts; And therefore our sovereign lord and lady, and the estates of parliament, by the mouth of John Ritchie, dempster of parliament, decerne and adjudge the name, fame, memory, and honour, of the said viscount of Dundee, and ———— Halyburton, of Pitcurr, to be extinct, their blood to be tainted, and their names to be riven furth and be delett out of the book of armes, sua that their posteritie may never have place nor be able hereafter to brook or joyse any honours, offices, titles, or dignities, in tyme comeing; and the said persons to have forfaulted, amitted, and tint, all and sundry their lands, heretadges, tacks, steedings, rounes, possessions, goods, and gear, moveable and immoveable, whatsoever pertaining to them, to belong to their majesties, and to remain perpetually with them and their successors in property; And lykeways their majesties and the estates of parliament, by the mouth of the said John Ritchie, dempster of parliament, decern and adjudge the said James earle of Dumfermling; ———— viscount of Frendraught; ———— lord Dunkeld; major William Grahame; collonell Alexander Cannon; John Cleilland, of Fasken; Mr. Colin M'Kenzie, uncle to the earle of Seaforth; sir John Drummond, of Machanie; William Craufurd, younger, of Ardmillan; James Craufurd, his brother; the laird of Strowan; Robertson; David Grahame, brother to the viscount of Dundee; James Edmonston, of Newtoun, of Doun; sir Ewin Cameron, of Lochzeel; ———— Cameron, his eldest son; Donald M'Donald, younger, of Slait; the laird of M'Naughtoun; ———— Grant, of Ballindal-

loch; ——— Stewart, of Appin; ——— M'Lean alias M'Donald, elder, of Glencoe; Alexander M'Donald, younger, of Glengary; Donald M'Neill, of Gallahelly; and sir John M'Lean, to be execute to the death, denounced as traitours, and underly the pains of treasone whenever they shall be apprehended, and that at such tymes and places and in such manner as their majesties or the estates of parliament, or the commissioners of justiciary, shall appoynt; and ordains the saids persons, their name, fame, memory, and honours, to be extinct, their blood to be tainted, and their armes to be riven furth and delett out of the books of

armes, so that their posterity may never have place nor be able hereafter to brook or joyse any honours, offices, titles or dignities in tyme comeing; and the saids persons imediately abovenamed to have forfeited, amitted and tint, all and sundry their lands, heretadges, tacks, steedings, rouns, possessions, goods, and gear, moveable and immoveable, whatsom-ever pertaineing to them, to belong to their majesties, and to remain perpetually with them and their successors in property. Which was pronounced for doom; and whereupon their majesties advocat asked and took instruments.

398. The Trial of ALEXANDER HALYBURTON and WM. FRASER, for High Treason: 4 WILLIAM & MARY, A. D. 1692. [Now first printed from the Records of Justiciary in Edinburgh.]

CURIA JUSTICIARIE, S. D. N. Regis et Reginae tenta in Pretorio Burgi de Edinburgh, septimo die mensis Martij 1692, per nobilem et potentem comitem Robertum Comitem de Lothian Justiciarium Generalem, et honorabiles viros, Dominum Colinum Campbell, de Aberuchill, magistrum Davidem Home, de Croserig, Johannem Lauder de Fountainhall, magistrum Archibaldum Hope de Rankeillor, et magistrum Jacobum Falconer de Pheasdo, Commissionarios Justiciarie dicti S. D. N. Regis et Reginae.

Curia legitimæ affirmata.

Intran'

Alexander Halyburton,
William Fraser, prisoners in the Tolbooth of Edinburgh.

INDYTED and accused, at the instance of sir William Lockhart, there majesties sollicitor; sir Patrick Home, and Mr. Hugh Dalrymple, advocates, assessors to the said sir William, for the majesties interest; That whereas by the comon law, the laws of this and all other well governed nationes, the crymes of treasone and rebellione, and the aiding, assisting, abateing, suppleeing, intercomoneing, and keeping correspondence with, or doeing favours to manifest rebels and traitours, are punisheable with forfeiture of lyfe, lands, and goods; and be the third act of the first parliament of king James the first, It is statute and ordained, that no man openly or notourly rebell against the king's persone, under the pain of forfeiture of lyfe, lands, and goods; and be the thretty seventh act second parliament king James the first, it is statute and ordained, that no man wilfully recept, mantain, or doe favour, to open and manifest rebellors against the king's majesties and the comon law, under the pain of forfeiture; and be the twenty fourth act sixt parliament and fourty nynt act twelt parlia-

ment king James the second, it is statute and ordained, that if any man comitt treasone against the king's persone or his majestie, or ryses in fear of weir against him, or receipts any that hes comitted treasone, or supplies them in help, redd, or counsell, or stuffs the housse of them that are convict of treasone, and holds them, against the king, or that stuffs the housse of there owne in furthering of the king's rebels, or that assailzies the king's castles, shall be punished as traitours; and if any persone or persons be slandered or suspect of treasone, they shall be taken and remaine in firmance while the tyme they have tholed ane asyse, whether they be guylte or foull; and be the nynty seventh act parliament seventh king James the fyth, all persons were comanded to apprehend rebels and are discharged to recept, supplie, or doe favours to them; and be the hundreth ffourty and ffourth act parliament twelfth king James sixt, all his majesties subjects are discharged to supplie or intercomune with traitors or rebels, or give them any relieff or comfort, or any help, redd, or counsell, but to doe there outmost diligence to apprehend or expell them out of the countrey in maner specified in the said act; and be the fyfth act session first parliament first king Charles the second, it is declared, that it shall be high treasone for the subjects of this realme, or any number of them, less or more, upon any pretext whatsoever, to ryse or continow in armes, to make peace or warr, or any treaties or leagues without his majesties speciall approbatione; and be the second act session second parliament first king Charles the second, it is declared high treasone to levie warr or take up armes against the king, or any comissionat by him, or to intyse any stranger or others to invade any of his dominiones, or to wreit, print, or speak any thing that may express or declare such ther treasonable intentiones; and be the comon law, lawes and acts of parliament of this kingdom, airt and part, is punishable as the

principall cryme: Nevertheless it is of verity, that the saids Alexander Halyburton and William Fraser, haveing shaken of all fear of God, respect, and regaird to there majesties authority and lawes, hes presumed to comitt, and is guilty of the crymes above mentioned, in sua farr as the said Alexander Halyburton, haveing entered into a most wicked and damnable combination with Michael Midletoun, Patrick Roy, and David Dunbar, sometyme prisoner in the Bass, and several other persons, to surprise the fort and garisone of the Bass, where they were prisoners; the said Alexander Halyburton, with his accomplices, did, upon the — day of June* last, 1691 years, or ane or other of the days of the said moneth, surpryse and make themselves maisters of the said fort and garrisone of the Bass, and notice being given thereof to the lords of ther majesties privie counsell, they, by there act the seventeenth of June last, did recommend to sir Thomas Livingstoun, comander in cheiff of there majesties forces in this kingdome, to take such effectual course ffor reducing of the said island from the hands of the foresaids, who were in the possessione thereof, as he should think fitt, and ordained any of there majesties heraulds to pass to the said island of the Bass, with there coatts displayed, in there majesties name, to requyre and comand the said Alexander Halyburtoun, and the other persones above named, his accomplices, to delyver up the said island and fort; and also to render themselves prisoners under the pains of treason, certifyinge them if they refused they should be treated as traittours, with all rigour and severity, and that without mercie, which warrand was accordingly duely execute against the said Alexander Halyburtoun, and the other persons above named, his accomplices, as appears by the act of privie counsell and the heraulds execution, and the said Alexander Halyburtoun, and the saids other persones, haveing most contemptuously refused to give obedience to the said charge, the lords of privie counsell did emitt a proclamation, of the dait the first day of Jully thereafter, declareing the said Alexander Halyburtoun, Michael Midletoun, and the saids other persons, his accomplices, and all who hade joyned themselves with them, in surprysing, mantaing, or defending the said garisone of the Bass, guilty of open and manifest treason and rebellion, and ought to be persewed as traitors to the king, and discharged and comanded all there majesties subjects, that no persone presume to aid, abate, assist, harbor, or any wayes supplie the saids traittours, or any of them, under the pain of high-treason; and that they doe not keep correspondence or intercommuneing with them without warrand of the privie counsell for that effect, under the pain forsaid, certifyinge such

* This word which occurs frequently in the MS. is uniformly so written, that it may be June or Jany. The context seems to require the former.

as shall doe in the contrairie, that they shall be holden and repute, treated and proceeded against as airt and pairt of and accessory to the forsaid cryme of treason and rebellion against the king and his authority with the outmost severity of the law; And yet, notwithstanding the said Alexander Halyburtoun, with the saids persones and others, his accomplices, did most presumptuously flortifie, and by open violence defend and mantain, the said garisone of the Bass, against the king and his authority; As also, the said William Fraser haveing entered into a most wicked and traitterous contrivance with the said Michael Midletoun, who was a declared traittour by the forsaid proclamation, and — Crawford, of Ardmillan, younger, a forfaulted persone and others, his accomplices, for supplyeing the Bass with provisiones efter it was surprysed by the said Alexander Halyburtoun and the other persons above named, he the said William Fraser with others, his accomplices, haveing hyred a boat under pretence of carryeing some provisiones and hushold furniture from Leith to the Elie, upon the lady Ardross accompt, and there being a certain quantity of meall, bisket, pease, butter and brandie, and other provisions put aboard the said boatt, and when the boatt was sett to sea, and steering over to the Elie, the said William Fraser and his accomplices did force the boatmen to alter there course and goe straight to the Bass; and when some of the boatmen seemed to be refractorie and unwilling, the said William Fraser did beat some of them upon the face, and did thraw about there nose; And when the boat arryved at the Bass, the said William Fraser was very active in helping up the provisions to the rebels in the Bass, and so soon as he came there he was made gunner, and did fyre severall canons at fisher boatts and others as they came by, of designe to have sunk them, or otherwayes to have yielded to these rebels; and he and his other accomplices did keep the boatmen prisoners in the Bass for severall days, and hade almost sterved them for hunger; And ordered them to put on a red coat, take up armes, and stand centry to there assistance; off the which treasonable crymes above specified, or ane or other of them, the saids Alexander Halyburtoun and William Fraser are actors, airt and pairt, which being found be ane assyse, they ought to be punished with forfaultur of lyfe, land, and goods, to the terror and example of others to comitt the lyke hereafter.

Persewar—Mr. Hugh Dalrymple, advocat as assessor to there majesties sollicitor.

Continued till next day at 2 o'clock.

March 8th, 1692.

Intran'

Alexander Halyburtoun,
William Fraser, prisoners.

Indyted and accused for the cryme of treason in fortyfyeing, mantaining, supplicieing,
3 H

and takeing in, and keeping out, there majesties fort and garisone of the Bass, against there majesties and there authority, in maner mentioned in there lybell 'ut in die precedente.'

Persewer—Mr. *Hugh Dalrymple*, advocat, assessor to there majestie's sollicitor.

Mr. *Hugh Dalrymple* produced ane warrant of privie counsell for persewing the pannalls, whereof the tenor followes: "Edinburgh, the "twenty-ane day of January, 1692 yeares. "The lords of there majesties privie counsell "doe hereby perremptorly appoint and requyre "there majesties sollicitor or his assystants, "without delay, to intent and prosecute an Indytment of treasons befor the lords commissioners of justiciarie against Alexander Halyburton, and William Fraser, prisoners in the Tolbooth of Edinburgh, which they were appoynted to doe by a former Interloquitor and hes neglected. Extracted by me, "Sic Subscrib. D. MONCREIFE, Cl. S. Con."

Sir *Robert Coll* and Mr. *Charles Gray*, advocatts, being allowed to propone defences for the pannells, they declaired that they would propone no defences for the pannalls.

Mr. *Hugh Dalrymple*, as persewar, desyred therefor that the lybell might be advysed and remitted to the knowledge of the inquest.

The Lords justice generall, and commissioners of justiciarie, having considered the indytment persewed by there majesties sollicitor and his assystants, against Alexander Halyburton and William Fraser, prisoners, they find the said indytment relivant to inferr the crymes and paines of treasons lybelled, and remitts the same to the knowledge of ane Assyse.

Sic Subscribitur, *LOTHIAN, I. P. D.*

ASSISA.

Home, of Nynewalls.

William Cuninghame, off Buchguhan.

Capt. Patrick Chalmers, beltmaker.

Arskin, of Balgowin.

James Brown, merchant, in Edinburgh.

James Livingstoun, merchant, yr.

John Blackstoun, periwig-maker, younger.

Alexander Robertson, glover.

Andrew Brown, watchmaker.

John Bruce, feltmaker.

Robert Sandielands, merchand.

Andrew Milner, masson.

Alexander Haiges, wright.

Alexander Robertson, armorer.

John Naismith, wright.

The Assyse lawfully sworne; no objection of the law in the contrair.

The Persewer for probation adduced the witnesses efter deponeing.

John Liddell, souldier, at Castletoun, aged twenty-two yeares, unmarried, purged of malice, prejudice, hatred, ill-will, and partiall counsell, and solemnly sworne, depones that upon the fyfteint of June the deponent being employed to carry coalls from a vessell up to

the Bass, according to their uswall maner, with some others of the souldiers, the deponent heard a shot of a gune goe off, and a crye followed, and immediately thereafter the deponent saw Alexander Halyburton, the pannall, with ensigne Roy and ensigne Dunbar, who wer ther prisoners in the Bass, come to the wall head, with three guns in there hands presented to the deponent and others, who were in the boat, lyeing imediatly under the entrie of the Bass, and did threaten the deponent and the rest who were in the boatt to shoott at them, and kill them if they offered to come into the Bass, and would not instantly goe away with the boat; and depones, that when the deponent came last out of the Bass to the said boat the day forsaide, he left John Hamilton the centinell standing upon his centinell post wholl and sound; and that he was, efter the said shott, putt down to the boatt with the cran, and was shott through the shoulder; and depones that they ordered them to stay with the boatt a litle tyme, till another litle boatt belonging to the Bass came into the cran, with two barrells of aile and two dozen of whyt loaves, or thereby, was taken up from the boat, and ordered them to stay till that was taken, least there removeing should scarr the litle boat from comeing in with the provisions. *Causa scientie*, he was for a considerable tyme before a souldier in the Bass, and saw and knew Alexander Halyburton, the pannall, and heard him distinctly speak the threatening words over the pannalls; depons he cannot wreit.

Sic Subscribitur, *LOTHIAN, I. P. D.*

Ritchard Midletoun, souldier, at Castletoun, aged twenty-eight yeares, *solutus*, purged of malice, prejudice, hatred, ill-will, and partiall [councill] and solemnly sworne, depones *conformis precedenti in omnibus*; and farder adds, that Hamilton, the centinell, was all bleeding of his wounds when he came to the boatt, and that the first persone that appeared to the deponent and the rest who were in the boat, imediatly after surprising the Bass, was Alexander Halyburton, the pannall, with a gun in his hand at the stair head, and threatened the deponent and the rest who were in the boat, if they offered to come up to the Bass he would kill them; and the deponent haveing asked the pannall what he meaned, the said Alexander Halyburton answered, that what he did was for his liberation out of the Bass, and when the pannall threatened the deponent, he said, if the deponent and the rest would goe away with the boat and not offer to come up, they would sustain no prejudice, otherwayes he would kill; and thereafter the deponent saw the pannall and the other two persones upon the wall head in the Bass. *Causa scientie*, he was a souldier two yeares in the Bass, and knew the said Alexander Halyburton, and saw and heard as he hes deponed; and this is the trueth as he shall answer to God, and depones he cannot wreitt.

Sic Subscribitur,
LOTHIAN, I. P. D. C.

George Porteous, Marchemount herauld, solemnly sworne, purged of malice, prejudice, and partiall counsell, and aged fourty-six yeares, or thereby, marryed, and interrogat upon the trueth and veritie of ane execution, under his hand, daited the twenty-first of June last, in obedience to ane act and ordnance of counsell, dated the sixteint of the said month of June, ordering the deponent to charge Alexander Halyburtoun, the pannell, and others, to surrender up the Bass, and to render themselves prisoners, under the paine of treasone, as the said act and ordnance more fully beares; depones that in obedience and conforme to the said act and ordnance, the deponent did truely and reallie execute the same, conforme to the tenor of the said execution in all points befor the witness therein contained; which act, ordinance, and execution, were judicially read and shoven to the deponent; and farder depones, that efter he hade execute the said act and order of the counsell in the way and maner contained in the said executione, a man who owned his name to be Halyburtoun, spoke to the deponent over the wall, and told the deponent that they could not render the Bass, ffor they thought they would be in no better state then they were in before *causa patet*; and this is the trueth, as he shall answer to God.

Sic Subscribitur,

G. PORTEOUS.

Henrie Fraser, Ross herauld, aged fourty-years, marryed, purged of malice, prejudice, partiall counsell, and solemnly sworne, depones *conformis precedenti in omnibus*, with this variation, that he does not remember that the person who spoke over the wall head owned his name to be Halyburtoun; but he heard the boatmen say that it was Alexander Halyburtoun and ensigne Midletoun with him; but he could not distinctly know him, the wall head being so high from the place where the deponent was, which act and ordinance of counsel, with the execution thereof, were shoven to the deponent. *Causa scientie patet*, farder depones, that when the papers were towed up the rock, to the best of his memory, he heard of the men who spoke over the wall say, they would not render the Bass; and this is the trueth as he shall answer to God.

Sic Subscribitur,

HENRY FRASER.

Patrick Stevinson, servant to Henrie Fletcher, of Saltoun; aged twenty years, marryed, purged of malice, prejudice, hatred, ill-will, and partiall counsell, and solemnly sworne; depones *conformis precedenti in omnibus*, except that he does not remember what was spoken over the wall, tho he heard a voyce, it being at a distance; this he depones to be a trueth as he shall answer to God; the warrant and order of counsell being publictly read and shoven to him.

Sic Subscribitur,

PAT. STEVINSON.

John Sloass, serjeant in the earle of Leven's regiment, aged twenty-six years, unmarried, purged and sworne, depones that efter the sur-

pryseall of the Bass in June last, he was one of those that was imployed to lye at Castletoun to wait the motion of those that were within that island, and that about the end of harvest he was sent in with a drummer and two mariners, with a printed act of indemnity, to make ane offer thereof to him who commanded the garrison for himself and the rest, if they would surrender the Basse to his majesty, and accordingly he was permitted to enter the rock and called for the commanding officer, and one Mr. Midletoun came to him and owned himself to be the person who commanded there in cheiff, to whom he delyvered his comission, and gave him the act in his hands, who after reading thereof huffed and appeared verie dissatisfyed; but cannot be positive whether Mr. Hallyburtoun, the pannell, was present there, when he first requyred the governour, or if he came sometye after; but depons he heard them speaking together anent the said indemnity, and heard them express their detestation against the present government, and heard them say they would receive comand from none but king James, who was the rightfull king, and that he knew Mr. Hallyburton, and that he hade a sword about him and a gune, and that they detained the deponent prisoner, from Thursday at two o'clock, till Friday in the evening, upon the pretence that the king's souldiers hade taken away there boat; and haveing taken a view of William Fraser, prisoner at the bar, he thinks he sawe him in the Bass at that tyme, when he went in with the offer of the indemnity, *causa patet*; and this is the truth as he shall answer to God.

Sic Subscribitur,

JOHN SLOSS.

James Wishart, a drummer in the earle of Leven's regiment, aged thretty-three years, marryed, purged of malice, prejudice, hatred, ill-will, and partiall counsell; depons that he went along with serjeant Sloass from Castletoun to the Bass, in the end of harvest of last, with ane offer of the indemnity to those who had surprised the rock, and that the serjeant went first up, and left him and the two mariners in the boat, and that afterwards he and the sea men were called for, and a litle English boy was put by them in the boat, and when he came up he sawe Mr. Hallyburton, and two or three more communing with the serjeant, but did not know what past betwixt them, but they thrust the two seamen in to the holl, and did detain the serjeant and the deponent all night, and forced them to drink king Jameses health, and ane other boat haveing come off from the land to see what was become of them, Mr. Midletoun gave orders for styleing a canon to shoot at it, but Mr. Hallyburtoun was against it, and the deponent thinks the distance was so great as the canon would have done no skaith; and farder depons, that they forced him to pull the feathers off the sollen goose, and that when he was goeing away with his drum, Mr. Midletoun caused take it and his sticks from him, but cannot charge their incivilities upon

Mr. Hallyburton the pannal; and depones he sawe Mr. Hallyburton, the pannall, have a gunn in his hand; and this is the trueth as he shall answer to God; depons he cannot wreitt.

Sic Subscribitur, LOTHIAN, I. P. D. C.

David Christall, boatman and skipper of the Janet, of Burntisland, aged thretty-eight yeares, marryed, purged of malice, prejudice, ill-will, and partiall counsell, and solemnly sworne, depones that in the moneth of August last, the boat called the Janet, of Burntisland, whereof the deponent was one of the sailors, being lyeing then at Leith, was fraughted to the Ffyffe-syde to carrie some provisions to the north side, and that amongst other passengers, William Fraser, the pannal now at the barr, and one Middletoun, were two, and when they were out, these two persons and others fell upon the deponent and the other boatmen, and commanded them to change their course, and steir straight to the Bass, and the deponent and the other seamen showing their unwillingness, they did beat them, and threatened to kill them if they refused; and that Mr. Midletoun did hold a loaded pistoll and a bygonett to the deponents breast, who was then sitting at the helme, and that when they came to the Bass, the passengers took out all the provisions, consisting of meall, bisket, butter, brandy, &c. up to the Bass, and took the deponent and the other boatmen alongst with them, and kepted them there about the space of six days; and that he sawe William Fraser as active and busie as any other; and that he heard severalls shotts they tyme he was there, which he conceaves were levelled at fisher boatts goeing by; that he and the rest were forced to stand centries in the night tyme; and this is the trueth as he shall answer to God; depones he cannot wreitt.

Sic Subscribitur, LOTHIAN, I. P. D. C.

Edward Serples, seaman in Burntisland, aged thretty-four yeares, marryed, purged, and sworne; depones that he was one of the boatmen in the above mentioned boat that took in the provisions which were pretended to be goeing over to the Elie, and that William Fraser, the prisoner now at the barr, was with them; and when they were about the north syde of Insh Keith, the passengers commanded them to steer towards the Bass, and particularly William Fraser did beat the deponent on the mouth, when he did not so readily complye with his demands; and when they came to the Bass, the said William Fraser was also bussie as any of the rest in helping up the provisions up the rock, which consisted of meall, peise, bisket, brandie, and other things; and that he and the rest of the seamen were forcibly detained in the Bass; and that he saw the said William Fraser shoot some cannons at fisher boats, and that he heard his neighbour who stood with him on centry say, that they purposed by it to droun the boatts, and when Swan, the old gunner, came near hand, Mr. Fraser would not let him medle but bade him

begone; and that Mr. Fraser offered the deponent a reed coat, and he swore he would never take up armes against king William, whereon Mr. Halyburtoun desyred William Fraser to let him allone to save his oath; and depones, that they were very ill used, haveing only a peck of meall in the week among four of them; and this is the trueth as he shall answer to God; depones he cannot wreitt.

Sic Subscribitur, LOTHIAN, I. P. D. C.

Alexander Rankeiller, seaman in Burntisland, aged forty yeirs, or thereby, marryed, purged, and sworne; depones that he was one of the seamen in the boat forsaide, and that when they were about Insh Keith he saw William Fraser, the pannell, with the rest, compell the seamen to steir towards the Bass; and in regaird of some of there aversion he sawe him beat Edward Serples on the mouth, and take John Thomson by the nose, and that William Fraser wes verie bussie in the disloadeing the boatt; and that the deponent being taken prisoner with the rest he saw him shoot on of the guns on the Bass at a boat goeing by, and that he would have forced the deponent to put on a reed coat, which he altogether refused, but he was necessitat to stand centry in the night with the rest of his neighbours, whenever he was commanded; and depones that Mr. Halyburtoun carryed very civilly to him; and this is the trueth as he shall answer to God.

Sic Subscribitur, LOTHIAN, I. P. D. C.

The Persewer, for farder probation against William Fraser, adduced his owne Petition, and humble Acknowledgement, written on the back thereof, whereoff the tenor followes:

Unto the right honourable the lords justice generall, justice clerk, and commissioners of justiciary; the humble Petitione of William Fraser, prisoner at the barr, sheweth, That where the petitioner upon his comeing furth of the Bass, in last, in order to his taking the benefite of his royall majesties gracious act of indemnity, was the very next day he came to Edinburgh, to that effect, apprehended prisoner, and did and represent this his designe to the lords of privie counsell, by a former petition throwing himself on his royall majestie's mercie, and resolved to propone no defence against his indytment; and now standing accused befor your lop's for the crymes contained in my lybell, in prosecution of my former application, the supplicant as of before humbly represents to your lop's, that as I have sincerely acknowledged all I know in relation to these matters for which I am accused, so I intend to propone nothing by myself, or any lawyers, in my owne defence, but simply remitts myself to his royall majesty, for his gracious pardon and indemnity; and therefore humbly craves your lop's will delay my tryall till his majestie's royall pleasure be knowen, as to my particular case, or otherwayes dispose of your petitioner in thir circumstances, as your lop's out of your innate clemencie and goodnes shall

think fit. And the petitioner, his poor wyfe and children, shall ever pray, &c.

Sic Subscribitur, WILL. FRASER.

Followes the said William Fraser's judiciall Acknowledgement, written on the back of the said Petition :

EDINBURGH, March 7, 1692.

William Fraser, the pannall and petitioner within designed, being called to the barr, doeth judicially acknowledge, in presence of the lords and the assysers, the within written petition; and farther adds and acknowledges, that he is guilty, of concurring with the other persones in the lybell, in carryeing in provisions to the Bass; and surpryseing the boatmen, and making them prisoners, and carryeing them in prisoners to the Bass; and that he assysted with the rest of the garrison, to detain them prisoners, in the way and maner lybelled, as also did concurr with the rest of those who did hold out the Bass, while he was there, and is sensible of, and heartily sorie for his guilt and accession to those crymes, and does humbly throw himself at there majestie's feet, humbly begging and imploreing there mercie and clemencie may be extended to him.

Sic Subscribitur, WILL. FRASER.
LOTHIAN, I. P. D. C.

The Lords ordained the assyse to inclose, and returne there verdicte to-morrow at ten o'clock.

March 9, 1692.

The said day the persons who past upon the Assyse of Alexander Halyburtoun, and William Fraser, prisoners, returned there Verdict, in presence of the saids lords, whereof the tenor followes :

The Assyse all in one voice, by the mouth of John Home, of Nynewalls, there chancellour, doe find it sufficiently proven, That Alexander Halyburton, the pannall, while prisoner in the Bass, hade accessione to, and joined with others in surpryseing the garrisone of the Bass, and lykewayes finds it proven, that the said Alexander Halyburtoun wes seen with a gune in the said island thereafter; and finds William

Fraser, the pannall, guiltie of the crymes lybelled, conforme to his subscribed confession, and the probation adduced. In witness whereof thir presents are subscribed be the chancellour att Edinburgh, the 8th day of March, sixteen hundred and ffour score twelve years. Written be James Livingston, clerk to the said assyse.

Sic Subscribitur, Jo. HOME, CAN.
JA. LIVINGSTON, Clk.

Doom continued till the 16th March instant; thereafter to 24th.

The Lords commissioners of justiciary haveing considered the verdict of assyse returned against Alexander Halyburtoun and William Fraser, prisoners, upon the nynth of this instant, whereby the assyse doe find it sufficiently proven, that the said Alexander Halyburtoun, while prisoner in the Bass, hade accession to and joyned with others in surpryseing the garison of the Bass; and doe lykewayes find it proven that Alexander Halyburtoun was seen with a gune in the said island thereafter; and whereby the said assyse doe find William Fraser, the pannell, guilty of the crymes lybelled against him conforme to his subscribed confession and probatione; they therefor, be the mouth of John Ritchie, dempster of court, decerne and adjudge the saids Alexander Halyburtoun and William Fraser, to be taken to the marcat cross of Edinburgh, upon Wednesday the 25th of May nixt to come, betwixt two and four a'clock in the afternoon, and there to be hanged on a gibbet till they be dead; and ordaines there names, fame, memorie and honours, to be extinct, and there armes to be riven furth and dilate out of the books of armes, sua that there posterity may never have place nor be able herefter to brook or joyse any honours, offices, titles, or dignities within this realme, in tyme comeing, and to have forfaulted, amitted, and tint, all and sundrie their lands, heretages, tacks, steadings, rouses, possessions, goods and gear, whatsoever pertaining to them to our soveraigne lord and lady, to remaine perpetually with there majesties in property, which is pronunced for doom.

Sic Subscribitur, C. CAMPBELL.—
David Home, Jo. Lauder, J. Falconar.

399. Proceedings against Captain JAMES MIDDLETOUN and others, for High Treason: 5 WILLIAM & MARY: A. D. 1694. [Now first published from the Records of Justiciary at Edinburgh.]

CURIA JUSTICIARIE, S. D. N. Regis et Reginae tenta in Pretorio Burgi de Edinburgh, decimo nono die mensis Februarij, millesimo sexcentesimo nonagesimo quarto per honorabiles viros, Dominij* Colinij Campbell de Aberuchill, Magistrum Davidem Home de Crocerig, Dominij Joannem Lauder de Fountainhall, magistrum Archibaldum Hope de Rankeillor, et magistrum Jacobum Falconer de Pheisdo, commissarios justiciarum dict. S. D. N. Regis et Reginae.

Curia legitime affirmata.

Intran'

Captain James Middletoun,†

William Wetham,

William Nicholson, late souldiers in the Bass,

John Trotter, late merchant in Edinburgh,

Alexander McLeish, seaman in Dumbar,

All prisoners in the Tolbooth of Edinburgh.

INDYTED and accused at the instance of sir James Stewart, their majesties advocat, that

* The Orthography of the record is preserved.

† In the small and rare Collection of Jacobitical Tracts, (Memoirs of lord viscount Dundee, &c.) published in London, 1714, is given the following article relating to the case of these persons:

“ *The Siege of the Bass.*

“ The Bass is a strong rock in the Fryth of Forth, standing between Fife and East Lothian, within five miles of Dunbar, in which there was a garrison of fifty men, commanded by a captain and his respective officers, whereof Charles Maitland was governour, 1688, and defended it strenuously for his master, king James, till 1690. Then having small hopes of king James's restoration, wanting provisions, ammunition, and other necessities, was forced to give it up to the government, who made Mr. Fletcher of Salton governour, he having four of king James's officers prisoners, they boldly surprised the garrison and sent all the soldiers ashore, which being reported in the country, where there were many loyal families, they were supplied with men, provisions, and ammunition. Intelligence thereof being carried to France to king James, there was a ship sent with all sorts of provisions and stores, and two boats, one that carry'd two pattareroes, twelve musquets, and rowed with twelve oars, and another smaller boat.

“ But afterwards their provisions falling

wheras by the common lawe and the lawes of this and all other well governed nations, the crimes of treason and rebellion, and open enmity and hostility against their majesties, and the aiding, assisting, abateing, supplying, intercomuning, and keeping correspondence with rebels or traitors, or oppen enemies, are punishable with the forfaiture of lyfe, lands, and goods, and particularlie by the act James first parl. 1st, cap. 3d, it is statute, that noe man openlie or notourlie rebell against the king's persone under the pain of forfaiture of life, lands, and goods; and by the act 37 parl. 2nd Ja. 1st, it is statute, that noe man resett, maintaine, or doe favour to open and manifest rebels against the king's majestie under the foresaid paine; and by the act Ja. 2, parl. 6, cap. 24, and parl. 12, cap. 49, it is statute, that if any commite treason against the king's persone or his majestie, or ryses in fear of weir against him, or recetts or supplies any that hes committed treason, in help, redd, or counsell, or stuffes the houses of those that are convict of treason, and holds them against the king, they

short, the garrison sent the twelve oar'd boat by night, to bring off some sheep and other necessities, which they frequently received from their friends, and the government being informed thereof sent some companies to guard the coast, who surprized several of the garrison, when they came ashore, and thereby their communication with the land being stopped, they went out by night in their boats, and took several ships, one laden with salt, whence having taken what was convenient, she was ransomed from Edinburgh; a Dutch dogger which they plundered and put off again; and a ship laden with wheat which they thought to have carryed to the Bass; but the wind proving contrary drove them to the coast of Montrose, where she run ashore, and the men getting safe to land dispersed in the country; and falling again short of provisions they went in their boats to the isle of May, where they took several sheep, and what coals their boat could carry. But the government being enraged at their repeated boldness, king William ordered the whole revenue of the kingdom to be expended on their reduction, and on that account sent two frigates, one of sixty and another of fifty guns, who lay battering two days without doing any damage to the garrison, though the ships had several of their men killed, and their rigging and sails cut and shattered, and their ships so much damnified, that they cost the treasury of Scotland about 500*l.* to repair them.

“ Afterwards there were two ships appointed

shall be punished as traitors; and by the act Cha. 2, parl. 1, sess. 1, cap. 5, it is declared, that it shall be high treason for the subjects of this realme, les or more, to ryse or continew in armes upon pretext whatsoever without his majesties speciall approbation; as also by the

constantly to attend that service, whereby the garrison was rendered incapable of procuring any provisions by the use of the boats; however, there came after some time, a small privateer from Dunkirk, laden with rusk and other necessaries: but the garrison became so weak of men, that they had not hands enough to hoist up the rusk, but were obliged to borrow ten sailors to assist them, and when they had got only seven bags into the garrison, the largest of the two ships bore down upon the privateer, who was forced to cut her cables to prevent her being run down, so that the garrison was then in worse condition for holding out than before, having ten sailors added to their number, and only seven bags of rusk, which could serve but a short time; wherefore the governor was obliged to put each man of the garrison to the allowance of two ounces of raw rusk dough in 24 hours. About that time, Mr. Trotter was taken, and condemned for aiding and assisting the place, and captain Alexander Hallyburton, captain William Frazer, Mr. William Witham, and Mr. William Nicolson, who belonged to the garrison, were taken on shore, and condemned to be hanged; and the day of Mr. Trotter's execution being come, the gibbet was erected at Castle-town, and he being brought to the place a gun was fired from the Bass, amongst the crowd, which terrified them, and obliged them to remove the gibbet to a farther distance, where he was hanged. The rest who lay in prison at Edinburgh under condemnation, were reprieved from time to time, till set at liberty by the capitulation.

"At last the garrison being reduced to five or six days provision according to the above-mentioned allowance, put out a flag of truce, whereupon the government sending to know what they wanted, the garrison replied, that they would surrender upon terms, and drew up their own articles, upon which the honourable privy council sent two of their number to the Bass, to acquaint them what conditions they would grant.

"The governour, who had saved some bottles of the best French wine and brandy, and some fine bisket, made them drink plentifully, telling them there was no scarcity of provisions, and unless he had his own terms he would not surrender, delivering at the same time his articles to their lordships, and after they were gone, he ordered all the caputs, coats, and hats in the garrison to be put on the muzzles of musquets, to make them believe the place was full of men; upon which their lordships returned to the council, and reported how they were treated, and that the garrison was in every respect well provided, which induced the ho-

2nd act sess. 2, of the same parliament, it is declared, that it shall be high treason to levie warr or to take up armes against the king, or to intyse strangers or others to invade any of his dominions; lykeas it is declared and statute, by the 2d act of this present parlia't, daited the 17 June, 1689, that it is high treason in any subject of this kingdome, by writeing, speaking, or any other mainer of way, to disowen, quarrell, or impugne their majesties royall power and authority, or right and title to the crowne; and also by the common lawe and lawes, and acts of parliament of this kingdome, the holding out or assisting and aiding others to hold out in armes or otherwayes any of the king's forts and strengths against the king, or the usurping of the same, without lawe or warrand, or airt and pairt of any of the crimes forsaid, are punishable as treason: Nevertheless it is of verity, that the saids captain James Midletoune, William Nicolson, and William Wotham, haveing shaken off all fear of God and regaird to their majesties authority and lawes, did, about the moneths of November or December, ane or other of the dayes of the saids moneths, in the yeire 1691, or in the moneths of Januarie or Februarie, or one or other of the moneths of the yeire 1692, or one or other of the dayes thereof, or in the moneths of Janwarie, Febwarie, March, Aprill, or May, 1693, or ane or other of the days thereof, by or without commission from the late king James, come under the command of collonell William Grahame, or some other person from Dunkirk, or some other pairt beyond sea, with the other persones in your company for recruiting the garison of the Bass, that at that tyme held out, and still holds out rebelliouslie against

nourable council to comply with the governor's articles, which were,

I. "That the garrison should come ashore with their swords about them, and there should be a ship appointed by the government with fresh provisions to transport such of them as were willing to go to Dunkirk or Havre-de-Grace, and that in a month after the surrender, those who pleased to stay at home, might live without disturbance.

II. "That all they had taken, or what belonged to them after they surprised the place, they should be allowed to dispose of to the best advantage, together with their boats, and all things pertaining to any of them.

III. "That such of them as should incline to go abroad might stay in Edinburgh, until the ship was ready, without molestation, and have so much a day, according to their several stations.

IV. "That all who had belonged to the garrison, or had aided or assisted it, should have the benefit of the capitulation; and those who were dispersed over the kingdom, should have a time to come in; and those who were condemned, in prison, or otherways distressed, should be set at liberty the same day the garrison should come ashore, without any fees, or other charges whatsoever."

their majesties, and there they and each of them, getting and taking armes, under the command Michael Midletoun, or other commandant upon the place, did stay and continew in the garison to keep out that ffort against their majesties, att least they abod and continowed therein with the saids rebells and gave them their presence; and notwithstanding they the saids James Midletoun and William Nicolson, were with others latelie charged to surrender the said ffort under the paine of treason, yet they disobeyed the said charge and stand therfor denounced rebells; and further ther was a proclamation with letters of intercomuning out against them, notwithstanding of all which they continowed their said rebellious practices in keeping out the said ffort, and in aiding and assisting the garrison therof soe to doe, untill that latlie in the moneth of May last, or therabout, they were apprehended; lykeas the said William Wetham haveing come in on or other of the dayes of the moneths of the yeires forsaid, and joyned or taken pairt with the saids rebells and rebellious garrison, by presence or otherwayes, for some dayes or moneths, did thereafter goe out and went abroad to England, Flanders, and France, and to St. Germanes, in all or one or other of these places, corresponding, acting, or conspyreing traitorouslie against ther majesties, and with their enemies, untill that comeing back lately, with what intelligence and help he could bring to his accomplices in the Bass, he and the other two persones above named did meett together, and in their returne to the Bass were stoped about the darkning of the evening near to Whyt Kirk, where after some resistance made by them, they were taken by some of the king's true leidges and brought in prisoners to Edinburgh; Lykeas the said John Trotter and Alexander M'Leish haveing also shaken off all fear of God and regaird to their majesties, and the lawes and government, and turning most unnaturall and wicked enemies to their majesties and their native countrie, have from the beginning of the suppryseing and revolting of the said rock and fort of the Bass, which wes in the moneth of June, 1691 yeires, and since that tyme in one or other of the dayes of the moneths of the yeire 1691, 1692, 1693, 1694, and untill of late they were taken aiding, assisting, helping, supplyeing, recepting, harbouring, corresponding, or intercomuning, with the forsaid enemies, and rebells in the Bass, or one or other of them, and hade furnished them with meatt and drink, house, harbour, victwall, or something els usefull or comfortable to them, or hade sent, caried, or caused carye to them meatt and drink, or something else helpfull or comfortable to them; or hade intelligence with them by word, write, message, or some other way, or hade sent or caused send letters or messages to, or received letters or messages from them; and particularlie he the said John Trotter in the moneths of November 1691, or Januarie, Februarie, or March 1692, or in ane or other of the dayes thereof, or on one or other

of the days above lybelled, hade letters or other messages by word or write sent to him out of the Bass, from the said collonell Grahame, with a demand of supplie of some necessaries, such as ane iron chain and staple for their boate, and iron and leather with other particulars necessarie or usefull for the saids rebells, which letters being left at the house of one George Hoge in Weintoun or some other house there or therabout, to be delyvered to him; he gott the same, and according to the direction thereof mett with the bearer and told him so much, and promised that what was demanded should be sent into the Bass; and the said bearer haveing a letter of charge from the said Grahame to be delyvered to the said John Trotter out of his own hand, that he might forward it to France by the way of Rotterdam, and which Graham said was for the late king James, he the said John Trotter gott and tooke the said letter from the bearer when he mett with him att the place called Kitlenaked or therabout, and said he should be carefull of it, and not pleased that it was not left att Wintoun with the other letters that he might have gott it sooner; lykeas he the said John Trotter hade att severall tymes drunk the late king James his health; as also by the meanes and procurement of Trotter, there was provision of butter, bisket, cheese, and the lyke, sent from Cocken-nie and other places, in one or other of the dayes, moneths and yeires above lybelled, and further in one or other of the dayes of March, 1692, or in one or other of the moneths of the said yeire or other yeires lybelled, he the said John Trotter bought and purchased a boat, and sent her with provisions of shoes, stockens, butter, and suggar loaves, and the lyke into the Bass, and his accompt sent therewith containing more particulars then were sent; he was thereafter challenged by ane express from the Bass, who mett with him at the place called Kitlenaked or therabout, and he answered that he sent these things as he gott them, and he payed for them conforme to the accompt sent; and he the said John Trotter in ane or other of the dayes of the moneths of the yeires forsaid, sent for one William Robertstone, skipper, in Port Seatoun, to come to him to Wintoun, and ther he mett with him in companie with ——— M'Govan and ——— M'Clean, who were declared rebells come from the Bass; and he proposed to the said Robertson to lend his boat, and to serve in her with some men that he and the rebells were to putt on board to surprise captain Burd's ship, which was appointed to watch the Bass, and offerred him ffourtie pound sterling for that service, but Robertstone refuseing, he the said John Trotter treated with him to carye in some provisions, as meall from Leith, and some drinking bear from Aberdour to the Bass in his boat; and he promised to him for this last busines to repaire to him the loss of a boat that the rebells of the Bass had taken from him, and gave him a crowne in earnest; and the saids ——— M'Govan and ———

M^cClean, at the same time told that he had gott threttie pund starlin to make provision for the Bass, and that he had not made them but kept the money, and thereafter meiting again with Robertsons he gave him two dollars more to encourage him in his undertaking; and meiting with him in Leith, he gave him money to buy a number of hames for the Bass, which Robertsons did, and he the said Trotter gave him money to pay them; lykeas the said John Trotter persisting in his said wicked and traitorous practices in the moneths of December and Januarie last, or in one or other of the dayes therof, or in one or other of the dayes of ye moneths and yeires above lybelled, came to Dumbar and having changed his name (the better to cover his traitorous trafecqueings) from Trotter to Dods, he with the said Alexander M^cCleish, both or either of them treated with certain seamen, viz. William Smellie, Alexander Wood, George Ker, and Robert Spevin, and one or other of them to carye them into the Bass, and gave them good deed for that end, and also threatned them if they would not, and they refuseing he left with Alexander M^cCleish a letter to be sent into the Bass, which was sent in by the same seamen, and Alexander M^cCleish received a letter in answer from the Bass directed for him, which was sealed upon him when he was taken, and he ordoured the wife of James Hamilton, in Dumbar, in whose house he was taken, to burne the said letter, with two letters more that he gave her; lykeas there were found upon him, when he was taken, or at least he left with his said landlady, severall receipts and accompts and other notes and papers, aither written by himself or others, all relateing to the said treasonable correspondence with and supplying of the saids rebels in the Bass, which were held as repeated *brevitatis causa*, and should be shoven to him or his lawiers before his tryeall, and then should be produced in judgment against him; as also he the said Alexander M^cCleish did upon one or other of the dayes of the moneths and yeires forsaid, meitt with the said skipper, William Robertson, ——— M^cGovan and ——— M^cClean, att Aberdour, about the furnishing the rebels in the Bass; and lately in November, December, or Januarie last, and upon one or other of the dayes therof, he the said Alexander M^cLeish hyred the forsaid four seamen, and treated with all or one or other of them, to carye in two men in their boat to the Bass, under pretext that they were to carie them only to a ship lyeing out at sea about nyne or ten a clock att night, but so he had contrived it that those two men being armed should constraine and force the seamen to carye them to the Bass, which they lyke-ways did, calling when they came near, a Hacket! a Hacket! which was the name of one of the said rebels, and probably of one of the said two; and the seamen haveing gott a guinie for their paines, he the said Alexander M^cCleish changed the said guinea, and distribute the money amongst them att their re-

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turne, and bid them keep the matter quyet, for it would hang them as well as himselfe; and thereafter, on one or other of the days forsaid, he again treated with the said seamen to carye in ale to the Bass, and *de facto* brought a barrell of ale to the boat syde that they might take it in, but they refused it; and further, upon one or other of the dayes forsaid he hyred them, giving them ale and money to goe into the Bass with a letter, which they caried in and delyvered at the Bass, and gott and brought ane letter in answeare back againe and delyvered it to him; and he was also present when the said Trotter, under the name of Dods, and he and Trotter, or either of them, treated with the said seamen to carye in the said Trotter to the Bass, as lykewayes to serve Trotter to and from the Bass for a yeire if could have agreed with him; and in these villanous and traitorous practices, he and the said John Trotter were surprysed and taken, and by the haille forsaid practices, and by his accession therto, the haille forsaid persones all or each of them are guilty of the crimes of treason and oppen hostility or conspiracie against their majesties, at least were open enimies to their majesties and the kingdome, or airt and pairt of the samen, which being found be ane assyse, the ought to be punished by fforefaulture of their lyfe, lands, and goods, to the example and terrour of others not to doe the lyke in tyme coming.

Sic Subscribitur,

Js. STEWART.

Persewars.—Sir James Stewart, yr majesties advocat; sir James Ogilvie, of that ilk, yr majesties solicitor.

Procurators in defence.—Sir Patrick Hume; Mr. David Forbes; Mr. John Frank.

My lord advocat produced acts and warrands of counsell for processing and persewing of the fornamed pannalls, for high treason, befor the justices, whereof the tenors followes:

EDENBURG, May 30, 1693.

Their majesties high commissioner, and the lords of privie counsell do heirby give ordour and warrand to sir James Stewart, their majesties advocat, to raise and prosecute ane indictment of high treason befor the lords commissioners of justiciarie, against captain James Midletoun, William Wotham, ane Englishman, some tyme padge to the earle of Dumbarton, and William Nicolsone, late serjeant in collonell Pottors regement, in Flanders, under the king of Spaine, three of the rebels in the Bass, seased since their coming from thence, and now prisoners in the Tolbooth of Edinburgh. (*Sic Subscribitur,*) Tweddall, Melvill, Drumlangrig, Argyll, Erroll, Linlithgow, Strathmore, Annandale, Selkirk. Extracte by me,

Sic Subscribitur, PA. MONCRIEFF, C. St. Con.

EDENBURGH, Feb. 1, 1694.

The lords of their majesties privie counsell doe hereby approve of the commitment of

John Trotter, — M^cCleish, and Gavin Johnstone, and recomends to sir James Stewart, their majesties advocat, to raise and follow furth a criminall indictment before the lords justice generall, justice clerk, and commissioners of justiciarie, against the fornamed persones, and — Hamilton, for high treason and corresponding with their majesties enemies and rebels in the Bass. (*Sic Subscribitur,*) Tweddale, Chan. Southerland, Leven, Forfar, Kintore, Raith, Ross, Balhaven, T. Livingston. Extracted by me,

PA. MONCRIEFF, C. S. CON.

My lord advocat declares, he insists against Midletoun, Wetham, and William Nicolson, for having joyned themselves to the rebels in the Bass, and borne arms with them in holding out that fort, and as being airt and pairt of their rebellion, conforme to the indytment exhibit against them.

Sir *Patrick Hume* for captain James Midletoun, William Nicolson, and William Wetham, the pannalls, allwayes denyeing the indytment, and haill members and qualifications therof, alleadges ffirst, that that pairt of the indytment bearing that the be the common lawe and lawes and acts of parliament of this kingdome, the holding out or assisting others to hold out in armes or otherwayes any of the king's fforts against the king, or the usurping of the same without his lawe or warrant, is no otherwayes relevant, then as the samen is founded upon the speciall lawes and acts of parliament mentioned in the indytment, which doeth not meit this case.

2. The particular tyme when it is alleadged the saids crimes were committed, is not condescended upon as ought to be in all criminall indytments.

3. Whereas it is alledged, that the pannalls came under the command of collonell *Grahame*, or some other person from beyond sea, with others, for recruiting the garison of the Bass, it is not relevant to infer the crimes lybelled, because it being acknowledged by the indytment that the defenders were souldiers, and came over under the command of a superior officer they behoved to obey, so that the coming over not being voluntar or ane act of choise of the defender's owne, but it being acknowledged that they were commanded to it by superior officers, whose command they could not disobey, otherwayes they would have bein shott to death upon the place; if it were true that the defenders came over in manner lybelled it could not infer a crime against them, farr less the crime of treason, according to that excellent rule in lawe, Leg. 167, 'de Regulis juris qui Jusu Judicis vell superiors,' which is all one 'aliquid facit non videtur dolo malo faceræ, qua parere necesse habet,' especiallie seing it is acknowledged that the defenders did not goe in here to recruite the Bass in this kingdome, but were sent from beyond sea when they were in the enemies power, and could not resist their commands.

4. If the defenders had bein sent over under the command of a superior officer, as their comeing over could be no crime for the reason foresaid, so their getting and takeing armes when they were in the Bass could be noe crime, because they were still in the same hazear, and under the same impressions of fear of being hanged and shott to death, in caice they disobeyed, and whatever might have bein pretended if they had bein once at freedome and att their own libertie, and thereafter come and subjected themselves to the command, but seing it is acknowledged that they were in the power of the enemy before they came over, and were sent from beyond sea, under command, as their comeing over upon that consideration could be noe crime, so their continewing in armes in the Bass after they came over could be no crime, seeing they were still under the same command and impression of fear.

5. Whereas it is lybelled that the pannalls did gett and take armes in the Bass, allways denyeing the same, it is not relevant, not only for the reasons foresaid, but also for this reason that the simple presence in armes with an enemy is not relevant to infer the pain of treason, unless there be some act of hostilitie or other public deed that did clearlie intimat their designe of opposing the government, and therfor it is that the lawes and acts of parliament lybelled, are only against oppen and nottorious rebels, which necessarilie imports that there must be some publict or open act of hostility, other then the simple having of armes to make a partie guilty of treason; and for that reason the lords of justiciary, in the case of *M^cLeod*, of Assint, who was conveyned for garisoning the house of Ardbreck, and convocating their majesties leidges, to the number of 400 men, they by interlocutor, in Ffebruarie, 1674, refused to sustain that indictment, in relation to the raising of men, or disposing any of them in companies, under collours, to be relevant, except it were alleadged that they were 200 men and upwards, and were under collours and mustered, or under weeklie or dayly pay, and that all this was done after the publication of the letters of fire and sword against him.

6. That alternative in the indictment, that at least the defenders continewed to abyde in the Bass, with the other persons that were in it, and gave them their presence, is not relevant, for if simple presence with armes be not relevant, farr less simple presence without armes, especially the defenders being sent to the Bass, from abroad, and being under command as said is.

7. Whereas it is lybelled, that James Midletoun and Willam Nicolson were with others charged to surrender the said fort under the paine of treason, yet they disobeyed, upon which they were denounced and intercomoned, and continewed to keep out the ffort, and aiding and assisting the garison y^r of it is not relevant; ffirst, because if it could be made appear that the defenders were in the Bass, no such

charge came to their knowledge. 2d. Albeit it had come to their knowledge, yet it was not in their power to have given obedience, because it was acknowledged by the indictment that they were under the command of Michael Middletoune, or some other commandant, and whatever effect a charge might have had against a commanding officer, yet it was never heard of that a single soldier in a garrison which was charged to render is guilty of treason, when the superior officer, whose commands he is obliged to obey so long as he is under his command, refuses to surrender the garrison; so that it not being in the defenders power to surrender the fort, their not doing it after the charge can never be imputed to them as a crime: 3. As it was not in their power to surrender the fort, so their staying there after the charge cannot be understood a keeping out of the fort, or aiding or assisting the garrison:—4. The pretended keeping out of the fort, or aiding and assisting the garrison after the charge, being only lybelled in general termes, is not relevant, unless some particular acts of keeping out, and aiding and assisting, had been condescended upon; and it is not lybelled, that after the said charge, the saids Middletoune or Nicolsone did use any acts of hostility, nor so much as that they did bear armes in the garison after that tyme; 5. The pretended charge is *ipso jure* null as to William Nicolson, seing he is not designed, but his name only sett doune blank Nicolsone; and it is clear by the act of parliament, that all executions where the pairtie, name and surname are not sett down with their designations, the same are null: 6. They gave obedience to the charge, seing it appears by the execution that the charge was given the fyfth of May; and it is acknowledged by the indytment, that the said James Midletoun and William Nicolson, came out after the 13th of the said moneth, which is some few days thereafter: so that if it could be made appear that they had been in the Bass, yet it is evident that they laid hold upon the first occasion to leave the garrison, seeing it is acknowledged, that they came out some few dayes thereafter: 7. As to James Midletoun, if it could be made appear, that he was in the Bass, which is denied, it is offered to be proven that he came out before the charge was given to surrender the said fort, the charge not being given till the fyfth of May, and he came out the sabbath day before the 2d of May.

8. Whereas it is alleadged as to William Wotham, that he came in about the tyme for-said, and was some tyme in the Bass, and did thereafter goe abroad to England, Flanders, France, in all these places corresponding and conspyreing against their majesties, and that he came back with intelligence, alwayes denyeing the same, yet it is not relevant, not only for the reasons forsaid, but lykewayes for thir reasons, that he being ane Englishman borne, he was but a young boy the tyme of the Revolution, about fourtein yeires of age, or

therby; and being att that tyme the earle of Dumbarton's padge, he went over to France with the earle, and gott a pass from the king to goe over to France, with his servants, and the pannall continowed with the earle till he died; and he is not yet above nyntein yeires of age, soe that he was incapable to conspyre or correspond against their majesties; 2. It is acknowledged by the indytment, that as he was none of these that surprysed the Bass, so he was not in it when the governour and other persons were charged, do delyver it, nor is he mentioned in the connell's ordour, which is the warrand of the charge; and albeit he had been once in the Bass, yet seing he left it some short tyme thereafter, as is acknowledged, his simple being there cannot inferr a crime against him, far less the crime of treason: 3. That the said William Wetham did conspyre and correspond against ther majesties and with ther enemies, being only in general termes, is not relevant, unless the particular acts of conspyreing and corresponding were condescended upon: 4. It is denied that he came back with intelligence, or gave any help to those in the Bass, nor is it relevant, the intelligence and helping not being condescended upon.

9. Whereas it is lybelled that the defenders did meitt together thinking to returne to the Bass, but were stoped; it cannot be so much as a qualification of the crime, for first what their designe was being *actus animi* is not punishable, nixt the pretended designe did take no effect, as is acknowledged, and soe can import no crime: 3. Their meitting together could be no evidence of their designe to goe to the Bass, for if they had such a designe they might have made it much more effectwall, by goeing single allon, then goeing altogethar; but it appears by the wholl tract of the affair, even as it is mentioned in the lybell, that if it could be made appear, that the defenders had been in the Bass, that they came out of it with a designe not to returne, for otherwayes they would not have come out.

10. The indictment of treason cannott be sustained against the pannalls; because it is denied that they were the king's subjects, and the lawes and acts of parliament against treason is only in relation to subjects who bare dew alleadgeance, seing the crime of treason takes only place where alleadgeance is dew, as is clear from all the lawiers that have written upon that subject, and particularlie Clarus. Lib. parag. Lese Majest. numb. 6, who is positive, 'Quod ille qui non est subditus principi, non dicitur contra eum Committere Crimen Lesiæ Majestatis et it eo licet aliquo particulari Jure ut offendi, veluti quis officatur de foro alicujus, principis si tamen ratione originis vell domicilij non sit subditus non dicitur Committere contra eum Crimen Legæ Majestatis.' And affirms it hes been many tymes so determined, and albeit fforraigners opposing any king or state, may be looked upon as enemies, yet they are not guilty of treason, as is clear from sir Edward Coke, in

his title of High Treason, page 11, where he makes a distinction betwixt a fforraigner, who is anemie, and a subject who ryces in rebellion, that anemie committing open hostility in the nation and taken, is only to be punished by the marshall lawe, or ransomed, but that he cannot be indicted of treason.

11. It is alleadged separatim for James Middleton, allwayes adhereing to the foresaid defences, that it is offered to be proven, that he is a fforraigner, being a Flandrian borne, att least holden and repute to be so, so that as to him there cannott be the least question, that the indytmment of treason can be sustained against him, and he can onlie be treated as a prisoner of ware; but there will be no neid of any such probatione, it being sufficient to give him the benefite of a prisoner of ware, seing that it is acknowledged that he came from abroad.

12. The indytmment as to William Wytham and Nicolson, always adhering to the foresaid defences, is not relevant, albeit it could be proven that they were subjects borne, yet they having quitte and deserted these nations, and haveing fixed and taken up their residence in fforraigne nationes *animo remanendi*, the said William Nicolson haveing gone abroad about 20 yeirs hence, and William Wytham when he was but 14 yeirs of age, they cannot now be considered as the king leidge men, but as fforraigners, it being the constant practice of all nations that 'Civis originarius renunciavit et domicilium' also 'transference [alio transferens] civis esse desinit:' as to all effects, as is clear from the common lawe, Leg. 5, parag. ult. dig. de captivo et post linum [postliminio] and Gail, Lib. 2, observ. 36, num 7, and the lawiers there by him cited, and Perez upon that title of Cod. de municipis, [municipibus] et originariis num. 19 and 20, so that the said William Nicolson and William Wetham upon that consideration lykewayes can onlie be looked upon as prisoners of warr, and are in the same case as if Ffrenchmen or other fforaigners had come to recruite the Bass, who if they had bein taken could not have bein convened for treason, but behooved to be used as prisoners of warr; and the lords of justiciarie may be pleased to consider, what may be the consequence of this if it were otherwayes sustained, for there are many thousands of people that come from France, and other parts of the French dominions, who had taken up their residence in Brittain and Ireland and other dominions belonging to the king of Brittain, who have absolutely quitt France and the French dominions, and are now no more looked upon to be French subjects, but subjects to the king of Brittain; and if any of those or others of the French refugees, whereof there are verie many in the king's armies, should be taken prisoners fighting against the French king, then by his rule they could have no quarter; but the French king might proceed against them for treason, and yet wee sei dayly that ther is no such thing practised, but when any of the refugees or others who were formerlie French

subjects are taken prisoners fighting against the French king, they are treated as prisoners of warr, and relieved and ransomed as other prisoners, and how many of the British subjects are in the French armie, and actwallie fighting against our king, yet when any of them comes to be taken prisoners they are not punished as traitors, but as prisoners of warr, and the king's practyse in those caices ought certainly to be the rule in this, and when there were many prisoners taken at Cromdale, when actwallie in armes feighting against the king, and albeit for the most part they were all Scots subjects, yet ther was none of them persewed for treason, but were all of them treated as prisoners of warr, and were sett at libertie upon finding caution only to live peaceable and not disturb the government; and the defenders, when they were apprehended, were not in armes nor useing any acts of hostility against the government, but were demaining themselves peaceable in the countrie, and they should not be worse treated then those who were taken in armes actwallie fighting against their majesties, and dewreing all the tyme of the late civil warres in Brittain, albeit there were many prisoners taken upon both syds, yet ther was non of them persewed for treason, but were used as prisoners of warr, and therfor the pannalls ought not to pass to the knowledge of ane inquest.

Sir James Ogilvie replies, that he oppons the lybell as declared by lord advocat, and which is relevant notwithstanding of the defences proponed, the crimes lybelled being expresslie contrair to the acts of parliament, condescended upon: And wheras it is pretended that the saids acts doe not meit the caise, it is answered, that ther is no disparitie condescended upon in the defence, and lybell and acts are opposed.

2. Wheras it is pretended that ther is no speciall tyme condescended upon, the indytmment, is opposed, wherin the yeires, moneths, and dayes are particularlie mentioned.

3. The pretence is no wayes relevant that the pannalls came from beyond sea, under the command of a superior officer, neither does he lybell, came onlie in these termes; for first, it is lybelled alternative that they came by commission or without it; and altho they had bein under command, that can no wayes warrand them for ryseing in armes against their native soveraigne, and assisting those who mantaine the flort of the Bass against authority, and wheras it is pretended that if they had disobeyed their superior officer they might have bein in hazerd of their lives, it is answered, first, that is denyed that they were in any such hazerd, but *esto* they had, they can blame non but themselves that they were in these circumstances.

4. The pretence that they were under fear and hazerd when in the Bass merits no answer, seing their goeing there and concurring with those who maintained it against the government, was in itself a crime.

5. The pretence is most frivolous that the lybell is not relevant unless an act of hostility were lybelled, for the lybell is opposed that they were within the Bass, bearing armes for holding of it out; And the case of M^cLeod of Assint is nowayes paralel with this, for he had only convocate some men for garisoning his house and defending himself against the earle of Seaforth, who was about to execute legall diligence against him, and therfor the lords did most justly sustaine the convocation only to be a deforcement, unless speciall acts of hostility were condescended upon, but the Bass was then, and is still maintained, against his majesties authoritie, and which is nottour.

6. Whereas it is pretended that simple presence is yet less relevant, it is answered, that in this circumstanciat case where one of his majesties fforts is surprysed and kept out, simple presence is unquestionable relevant, especially seing ther is no rationall occasion condescended upon for the pannalls their goeing there, so it is unquestionable clear that they were assisting and aiding captain Midletoun and others, who were in armes, mantaining the said ffort as said is.

7. As to what is pretended against the relevancie of that qualification of the lybell, that Midletoun and Nicolson were intercomuned, it is answered, that the intercomuning is only condescended upon as a qualification, seing the holding out of the ffort is as relevant to inferr treason, befor they were intercomoned as since, and that the charge came not to their knowledge is most frivolous, seing the heraulds and trumpets came to the foot of the rock and sounded their trumpets, and did give in the coppies and summons, so that non who was then in the ffort could be ignorant, but the intercomuning was mainelie designed for interPELLING his majesties oyr subjects from receiving, harbouring, or keeping correspondence with the pannalls, and those others, who were in rebellion with them.

And wheras it is pretended that they were under the command of their superior officer, and so could not give obedience, the former answer is opposed, viz. That they put themselves neidlesslie under this necessity; 2, *non constat*, that any other did command; And 3, no sojor is obleidged to obey his superior officer, if he be commanded to committe an act of rebellion, and if he doe it is on his perrill, and bothe he and the officer that commands are lyeable.

As to the pretence that the charge is null, in sua ffarr as concernes Wm. Nicolson, because the execution is only against blank Nicolson, without any farther designation; It is answered, that the execution is opposed, wherein he is designed blank Nicolson in the Bass, which is sufficient, but *esto* the charge were null, yet the lybell is relevant, altho he hade never bein charged, and the pannall cannot condescend on any other of that surname that was in the Bass at the tyme; whereas it is alleadged that the panall Middletoun and Nicolsone did

give obedience, because they were taken within some few dayes after they were charged; it is answered, this is nowayes relevant, unless they had actwallee come and surrendered themselves to some person in authority under their majesties, as ane sheriff or magistrat of ane burgh royall, and this is not so much as pretended.

Whereas it is alleadged for Wetham, that it is denyed that he was bringing intelligence; it is answered, that this is only condescended upon as a qualification, and appears to have bein truth, but his majesties advocat will not burden himself with the probation therof, the lybell being relevant without this aggravation.

As to the alleadgeance that he was but fourteen years of age att the Revolution, and that he was the earle of Dumbarton's servant, who got a pass for himself and the pannall, and his other servants to goe to France, it is answered, that his goeing to France is not any pairt of the lybell, seing what is offered to be proven against him is that he was in companie with the other rebels who were in armes within the Bass, and that he is not contained in the counells ordour meritits no answer, for that might have bein occasioned by the want of the true information of the matter of fact; but it is believed that he was not there att the time, but that he was out getting intelligence as said is, and was taken in his return, and to that pretence that there is no speciall act of conspiracie condescended upon, the advocat maks noe farther use therof but as ane qualification, and certainly noe person is guilty of perduellion, but is also guilty of conspiracie.

8. That they were goeing back to the Bass, is lykewayes only insert in the lybell as a qualification, and which has bein evidently true in matter of fact, seing they were taken and apprehended about Whitkirk, when they were travelling under night.

9. Wheras it is pretended that Midletoun was borne in Flanders; and therfor he is none of their majesties subjects, and oweth them noe alleadgeance, and so cannott be guilty of perduellion; it is answered, it is acknowledged to be the opinion of all lawiers that treason can only be committed by subjects, but here the pannall is presumed to be such, ffor first his parents wer borne in this kingdome, and he himself has a Scots name, and his mother-in-lawe does still live at Fakirk, and therfor he is presumed to have bein borne himself within the kingdom; but, 2. He was found in rebellion within the kingdome with severall others who were Scotsmen; and 3. There can be no instance given that ever the king's advocat was putt to prove that a person of a Scots sirename taken in rebellion within the kingdome was ane born subject: 4. Albeit it were proven that he were a ffraigner, yet haveing come to the kingdome to assist the subjects against their native soveraigne, he is therby airt and pairt of their crime.

Whereas it is pretended for Wetham and Nicolson, that although they hade bein Bri-

tish subjects, yet they had deserted his majesties dominions, and had actwallie settled residence elsewhere ; It is answered, *primo*, that the matter of fact is denied as being calumnious ; but, 2d. *Esto* it were true, yet it is no wayes relevant, because they were subjects *q̄b origine*, and therefor aré still bound to give alleadgeance, especiallie when found within the kingdome ; and 3. They were airt and pairt by concurring as said is.

Whereas it [is] pretended that it may be of dangerous consequence if the pannalls be sentenced, and undergoe the paines lybelled, seing the French refugees who were in his majesties service, some of whom are taken, may suffer upon this account ; it is answered, that the pannalls are nowayes concerned therewith, this being a measure of government, and their majesties may indemnifie, or ordour the exemption of the sentence as accords, but this can furnish them with no legall defence ; and whereas it is pretended that in the late civill warrs, noe person who was taken prisoner did ever suffer for their being in armes ; it is answered, that the contrair is too well known, seing the duke of Hamilton, the marques of Montrose, the earle of Holland, lord Capell, and several other subjects of the best rank and qualitie, were execute upon no other account, but that they had bein in armes.

And wheras it is pretended, that non of these taken at Cromdale were brought to a tryall ; it is answered, that first they were unquestionable in rebellion, and many who were in armes att that tyme are forfaulted upon that account, as particularlie the earle of Dumfermline, viscount of Dundie, viscount of Frandraith, the laird of Pitteur, and many others ; and if noe person did lose their life upon the forsaid account, it is but allenarlie the effect of their majesties clemencie and bounty, in respect wherof the defences ought to be repelled, and the pannalls ought to pass to the knowledge of the inqueist.

Sir *Patrick Hume* duplyes, that the defences are opposed, which stand relevant notwithstanding of the replie, and doeth fullie answer all that is now alleaged, only he will take notice of some few particulars for the farder clearing of the defences, and first, wheras it is alleaged, that the particular tyme is condescended upon, the lybell is opposed, which albeit it condescends upon moneths and yeires, yet seing the lybell takes in all the yeires, without condescending upon a particular tyme when it is alleaged the crimes were committed, it is all one as if it had bein lybelled, that the crime was committed on one or other of these yeires, and such a generall indictment can never be sustained.

2. Whereas it is alleaged, that the lybell mentions the crimes as paralell to those mentioned in the acts of parliament condescended upon ; it is answered, the acts are opposed, and the indytment being compared with the acts, it will appear that the case as it is lybelled

doe not meitt the precise termes of the acts of parliament.

3. Wheras it is alleaged that the lybell is alternative that the pannalls either with or without commission came over ; it is answered, that albeit the lybell bear that the pannalls came over, by or without commission, from the late king James, yet the lybell bears that the pannalls came under command of colonell Grahame, or some other persones from Dunkirk, it is sufficient to liberate the pannalls for treason that they came under command of superior officers whose commands they were obleidged to obey, and which by the laws and practice of all nations does liberat a person in that circumstance from a punishment dewe to a crime, and the pannalls were not to be blamed seeing they were souldiers in the French armies long before the Revolution, except as to Wetham, who went over with his master since that tyme, who having quitt his native countrie might lawfullie take on as a sojour of fortoun ; so that neither their comeing over nor goeing unto the Bass, being still under command as said is, could make them lyeable for any crime, farr less treason, neither the concurring to the holding out of the Bass, they being still under command ; and as to the instance in the case of Assint, the paralell holds exactlie in this case, and the pannalls are in a much more favourable case, seing Assint was there at his owen libertie, which the defenders were not.

Whereas it is alleaged ; that single presence in this circumstantiat cause is sufficient in keeping out any of the king's fforts, seing there was no rationall account of their goeing there ; it is answered, that naked presence with an enimie, was never sustained to inferr a crime, for, if that were sustained, then all persons present, whither enimies or freinds, might be guilty of treason, and the account of the defenders coming over is mentioned in the indytment itselfe, that they came from Dunkirk, and under command, and it is a verie rationall account that they behooved to come over when they were commanded.

Whereas it is alleaged, that the charge for rendering the Bass was sufficiently made known to the pannalls, it is absolutly denied, that the same came to their knowledge, for the execution beares only that it was only putt in a bucket, and the charge being made a principall ground of the indytment, if that was not valid the indytment must fall, especiallie as to Nicolsone, it being blank as to his Christian name, and does not bear that he was in the Bass ; but whither they were lawfullie charged or not, the indytment cannot be sustained, as to the defenders, seing they were not in capacity, in the circumstances they were in to give obedience, being under the command of others, and so soon as they gott opportunity they came out, and it was not necessarie for them to render themselves to a magistrat, there being noe such charge in the letters, but it was sufficient that they came out, and when they

were seized upon, they were peaceable be-
heaving themselves, and not making any
disturbance or act of hostility in the country;
Whereas it is alleged, that it is not necessary
for their majesties advocat to prove that Mid-
dletoun was a borne subject of this nation; It is
answered, that albeit, when Scotsmen dwelling
within the kingdom should rise in arms or do
any act of rebellion, there is no need to prove,
that they are borne subjects, because the pre-
sumption lies against them; but when per-
sons coming from abroad, especially when
they have been a long time abroad, the pre-
sumption lies then for them that they are
foreigners borne, and therefore my lord advocat
must prove that they are subjects, and it is
not enough that the said James Middletoun's
parents were borne in Scotland, and that he
himself is of a Scots name, for albeit his
parents had been borne in Scotland, yet he
himself might be borne abroad, as truly he
was, and there are many of Scots names, that
are foreigners borne; and if need be, it is
positively offered to be proven, that he is a
Flandrian borne. Whereas it is alleged that
the said James Middletoun and the other pan-
nalls their coming to the kingdom, and
joining with rebels in arms against the go-
vernment, is airt and part of the crime; it is
answered, that they cannot be principally ly-
able for the reasons forsaids, neither can they
be lyable as airt and part which can be no
farther extended, but only to consider them as
foreigners and strangers, and be no more
found guilty of airt and part to infer treason
than if native Frenchmen or other foreigners,
had come over to the assistance of the Bass,
in which case they could only have been treated
as prisoners of war when apprehended;
whereas it is alleged, that the pannalls being
subjects *ab origine*, are so obliged to give al-
leadgence, it is answered, that the former de-
fence as to that is opposed, and the defenders
especially Middletoun and Nicolson having
gone abroad before the war broke out, and
being actually in the French service, they
having quite all their interest in this king-
dom, and taken up their residence elsewhere,
they were no farther tied to alleadgence to
that prince where they were borne, as was
plead in the case of the bishop of Sarum.

And whereas it is alleged, that in the late
civil wars many persons of quality suffered;
It is answered, that they did not suffer properly
for being taken in arms, but as having done
other acts against the government for the time.
Next whatever may be alleged as to chief
commanders, who are their own masters and
at freedom, there can never be an instance
given, in the case of single soldiers, or other
inferior persons under command, and that
ever they were convened for treason or suf-
fered a capital punishment upon that account;
and albeit the viscount of Dundie, my lord
Dumfermline, and others were forfault, yet all
these were chief commanders; But none of
the soldiers under them, or who were taken

at Cromdale, were either forfault, or made
subject to any punishment, but were set at li-
berty, upon finding of caution to secure the
peace, and which was the practice of old, be-
the Israelites, wherein the case of the unjust war
of the king of Syria against the Israelites,
the army of the king of Syria having fallen in
the hands of the Israelites, the king of Is-
rael having enquired at the prophet Elisha, if he
should smite them, the prophet's answer was,
Thou shalt not smite them, wilt thou smite those
whom thou hast taken with thy sword and thy
bow; Set bread and water before them, and
let them eat and drink, and go to their
master. And if the defenders shall be other-
ways treated than prisoners of war, it might
be of very dangerous consequence, and this
being a military affair, it is proper to be deter-
mined by the rules and customs of war, and
therefore the defenders humbly desire that the
lords of justiciary would be pleased to re-
present the whole case as it now stands to his
sacred majesty, who knows exactly well
these affairs, that his majesty may declare
his royal pleasure, whether the defenders
should be treated as prisoners of war, and in
the meantime to delay any farther procedure
in this process till the king's pleasure be known.

Mr. John Frank alleges for Mr. Wetham,
that he being still minor he is not obliged to
answer to any crime, by which he may either
lose life or limb, as is most clear by the most
ancient of our laws recorded in the majesty,
book 2, cap. 42, parag. 11, if any minor is
challenged of felony and be within age, he
shall not be compelled to answer thereunto,
but when he is major he shall answer, much
less ought he to be obliged to defend in a
criminal pursuit, '*ubi colore juvenile po-
test dicere, vel tacere quod decere potest*.*
As our countryman M'Kenzie has observed,
and since by the late act of parliament, act
20, parl. 1st Charles 2, minors within sixteen
are not punishable with death, even for curse-
ing or beating of parents, which is an at-
trocious horrid crime plainly against the
light and law of nature, far less ought they
for such crimes as are '*in apicibus juris*' and
unquestionable by the learnedest doctors; and
we have an excellent rule in law, Leg. 108,
Dig. † *de regulis juris*, '*ferè in omnibus pona-
libus judiciis et ætati et imprudentiæ succuri-
tur*.' It is further alleged for Mr. Wetham, that
he being an Englishman borne, his circum-
stances do plead an exemption from the
crime for which he is indicted, in respect both
the nature of the crime and the probation, and
punishment thereof in England differs from the
law of Scotland.

* This should be '*ubi colore juvenili potest
dicere vel tacere quod ei nocere potest*.' It
occurs in Mackenzie's Criminals, Part. 1, tit.
1, s. 5.

† This should be Dig. Lib. 50, tit. 17, leg.
108.

My *Lord Advocat* triplies, to the answers and duplyes, the indytmēt and replyes are opposed, and as to the indytmēt not being speciall and particular, as to the tyme, day, and moneth, it is answered, that the crimes charged doe import a tract of tyme, some of the pannalls being longer and shorter tyme in their rebellion, but the lybell hath definit limits, and it does not appear that the pannalls are prejudged of any defence competent by the latitude contained in the indytmēt, in which case the persewer would have condescended more particularlie.

2. The crime subsumed upon are the same with these condemned by the act of parliament lybelled on.

3. The indytmēt beares the mainer of the pannalls their comeing to the Bass, because it was so formed upon their own confession before the councill, but it is not lybelled, that they came either by command or commission, but expresslie that they came by or without commission, and only under command of *Grahame*, which is ane aggravation, and noe extenuation, that they came in a formed companie to invade their own countrie, and assist rebels against their king and soveraigne, and tho' they hade come by command as is not lybelled, yet it hade been noe defence, since noe command, especiallie of a *fforraigne* prince, can defend in the case of treason; and if the defenders logick were good, a regement of Scotsmen, invading their native countrie by command of the French king, should be free of treason or rebellion, which is absurd, nor in such a case is there the least distinction betwixt commander and sojor, all these pretences being groundless in the case of treason.

4. Simple presence as lybelled, though it be not sollie, is yet relevant in that circumstantial case; where a companie of men possesses themselves of a ffort and holds it out against the government, and some joyne and abyde with them, and give noe account for what els they came there, and if simple presence in this caice should not be sustained, it might happen that the haill rebels might escape, because they might be seen and discovered, over the walls, and yet not one of them sein in armes, but the persewer is not straitned in this point.

5. The indytmēt lybells the charge and intercomoning only as ane aggravation, for though noe such charge hade been given, the keepers out of the Bass are nottorious rebels, who have shewed their hostility against their king and countrie, both by holding out the ffort forcible, and by many other nottour acts, and when rebels do aither take a ffort, or appear in the feilds in armes, the chargeing them to render or lay down is only ane act of favour, and the intercomoning enshewing is only to putt the leidges in *mala fide*; but the holding out of the ffort by armes, is rebellion, and the joining with such rebels in armes, are guilty thereof; but besyds, and for superabundance, the charge against *Nicolson* and all of them, is lawfull, because though it bear not his first

name, it designes him *Nicolson* in the Bass, and with the rebels there, and noe other *Nicolson* is condescended on, and the forsaid designation of all of them, is premised immediately to their names.

6. That *Middletoun*, or any of them, are not Scotsmen, is not incumbent to the persewer to prove; the persewar grants that it is a necessarie quality to the crime of treason, that the persone accused be aither *naturā aut Jure subditus*, but since *Middletoun* and all others, must be presumed to be haveing all the appearance of Scotsmen, and being found in companie with Scots rebels, holding out treasonable a fort within the kingdome, and that he cam from abroad signifies nothing, since the rest of the companie, that came with him, came lyke wayes from abroad, and yet are undoubtedlie Scotsmen, so that his comeing from abroad, in this manner, doeth rather presume him to be a Scotsman, seing Scotsmen and non else seem to have entered in that conspiracie.

But 7, tho he were a stranger all over, yet joing with Scotsmen in their treason or rebellion, he is airt and part of treason, and it were ane absurditie unheard of, to affirme that a stranger joining with unnatural traitors to take away the life of their prince, should not be guilty of treason, and for what is objected, that if he were principall actor he would not be a traitor, ergo he cannot be airt and pairt. It is a *non sequitur*, for even a woman assisting a man to the rapt of a virgine, would be airt and pairt of the rapt, and a spado assisting in the crime of adulterie would be airt and pairt of the adulterie, altho both incapable to be principal actors.

8. To affirme that a countrieman residing elsewhere, for never so long, wears out the character of his originall, or liberats him from his alleadgance, is against reason, and the opinion of all lawiers, nor is the instance of the pleading to the contrair, by reverend churchmen, worth the noticeing, and as for *Wetham*, tho ane Englishman, yet he is a *post natus*, which as to both priviledges and crimes, confounds the two kingdomes, and besydes he is a rebell here, against his naturall prince.

9. As to the late civill wares, it is certain that none were demained as traitors, *hinc inde*, and in *Monmouth's* invasion, it is weell enough knowen, hou privat souldiers were demained, and he is ill read in the wares betwixt the house of Lancaster and York, that hath not found hundreds of privat souldiers hanged on both sydes.

10. As to the instance of the Syrians, it seems the defender forgott that that companie was a companie of pure *fforrainers*, for any thing that appears.

11. As for the representation to the king, craved, the lords will noe doubt doe in that as they shall see cause, but for the consequences that this instance of justice may import, they will certainly be of advantage to the government, but cannott break the least measure of fair ware, ffor besyds that it may deter unna-

turall countriemen, wherof we have too many abroad, from invading their countrie; it may also be of singular influence to reduce the Bass; and as to the wares abroad, the rules are better laid down, and more certainly observed, on both syds, then that the case of the pannalls, which is everie way speciall, should make the least alteration; and in effect, hou fair and just soever a ware may be, yet traitors, as well as spyes, are knowen to be excepted on both sydes, and how this exception may be less, or more, observed in the clemencie or politick of the king's and princes, on both syds, it concernes not this tryeall and justice.

12. For what is objected out of the Majestie, it deserves noe answer, being absolet and in effect contrair to the knowen law of all the world, where minors are judged *doli capaces* as to crimes speciallie atrocious, crimes such as treason, in the first place, and though by our act of parliament a minor committing a crime under 16 yeirs of age be sometye excused a *pœnâ ordinariâ*, yet it signifies nothing in this caice, besides the Majestie speaks of ffellonie and not of treason; and the ffellonie appears to be some feudall delinquencie against the superior, or els the author its lyke hade not been soe farr out of purpose.

As to Wetham's youth, and being ane Englishman, it is allreadie answered, and therfor it is craved that the pannalls may pass to the knowledge of ane inqueist.

The Lords continow this tryeall till the twentie first instant att one a clock in the afternoon, and ordaines the pannalls to be caryed back to prison, and the witnesses and assysers to attend ilk persone under the paine of 200 merks.

Februarie 21, 1694.

My Lord Advocat declares he insists at this dyet against John Trotter and Alexander McCleish for the crimes lybelled against them, and craves interlocutor upon that pairt of the lybell.

INTERLOCUTOR.

The lords commissioners of justiciary having considered that part of the indytment against John Trotter and Alexander McCleish the pannalls, they find the same relevant as it is lybelled against them, to inferr the crime and paine of treason, and remitts the same to the knowledge of the assyse.

Sic Subscribitur, DAVID HOME, I. P. D. C.

My lord advocat craved the lords interlocutor upon John Trotter and Alexander McCleish's confessions emitted upon the nyneteinth instant in their lordships presence and before the whole assyse in face of court; whether the same be a judiciall and probative confession or nott.

The lords finds the forsaid confessions swa emmitted before them and the assyse to be both judicial and probative.

Sic Subscribitur, DAVID HOME, I. P. D. C.

VOL. XIII.

ASSISA.

Patrick McCara, late baily of ye Cannogat.
James Edmodstoun, merchant in Edinburgh.
Robert Hepburne, of Bearfoord.
William Somervail, wright in Edinburgh.
George Yorkstoun, goldsmith, there.
Sir Andrew Murray, of Murrayshall.
James Cleiland, younger, merchant in Edinburgh.
David Cathcart, of Glendusk.
Alexander Thomson Deacon, conveyener, there.
Thomas Young, late bailzie of Edinburgh.
Thomas Young, merchant in Edinburgh.
Thomas Hamiltoun, masson, there.
John Fergusson, tanner, there.
George Dalgleish, lorimer, there.
John Lindsay, merchant, there.

The Assyse lawfullie sworne, no objection of the law in ye contrair.

My lord advocat for probation adduced the witnesses after deponeing, viz.

James Douglas, vintiner in Edinburgh, aged threttie eight yeires, married purged and sworne, depones, that the three accompts marked by my lord Crocerig as præses of the court, are the deponents hand write, and two of them subscribed by him, and that he bought the trees with the butter and cheese mentioned in the accompt of ffyve and fyftie pund, att the pannall John Trotter's direction in the moneth of Aprill last past, and that the pannall gave the deponent the money for paying therof: that after the boat was taken at Aberdour, the pannall John Trotter told the deponent that the twelve trees or barrells that were bought, were designed to be sent into the Bass with beer or ale, that the said pannall sent the deponent to Cockennie to Normond Blackadder, younger, in summer 1692, when the English ship was at the Bass, to see if there was a boat come there to take away the things that were sent there, which Normond told there was, and that the things were gone, and depones he heard the things that were mentioned to be gone, were cheese, butter, and biscatt, that John Trotter payed the deponent's horse hyre when he went to Cockennie, depones John Trotter has been frequentlie in the deponent's house, and hes sein him drink king Jameses health, when it was begune to him by others, and hes seen Wetham, one of the pannalls, in the deponent's house, with Trotter, who passed under the name of Grein a cady in Lesslies regement, and depones that John Trotter did not tell the deponent, that the butter or cheese that he bought at his direction was to be sent or designed for the Bass, att that tyme or any other tyme, *causa scientiæ patet*; and this is the truth, as he shall answer to God.

Sic Subscribitur, J. DOWGLASS.

Normond Blackadder, younger, in Cockennie, aged 20 yeires, married, purged, and sworne, depones, that in the yeire 1692, there came to

the deponent's house some things, such as butter, cheese, and biskat, which James Douglas the former deponent, came to the deponent's house to enquire after, that the pannall John Trotter said to the deponent that he was to send these things to the north: depones that there came a boat from the Bass, to Portseatoun, and receaved these things from the deponent, which he knew thereafter to be the Bass boat: depones that John Trotter told him afterwards that these things were sent into the Bass: depones that John Trotter would have had him to send in more things to Bass, but he refused; and being interrogat if he saw the forsaid goods, depones that his servant lass receaved them, but he saw them not opened up, but he knew them to be provisions; and this is the truth as he shall answer to God.

Sic Subscribitur, NOR. BLACKADDER.

James Hay, latelie lievtennent, sone to the deceast collonell James Hay of Naughtoun, could not purge himselfe.

William Smaill, seaman, in Dunbarr, aged flourty-three yeires, married, purged, and sworne, depones that about two moneths or six weeks agoe he sawe the pannall John Trotter att Dumbar, and that at tyme the pannall Alexander M'Cleish was with Trotter: depones the pannall John Trotter: desired the deponent to cary him into the Bass, and offerred to hyre his boat for a twelve moneth to goe to and from the Bass, and when the deponent refused to cary Trotter into the Bass, Trotter threatned to cutt the lugs out of his head, and thereafter John Trotter sent for the deponent to James Hamiltoun's house in Dumbarr; that Alexander M'Cleish the pannall said to the deponent, that Trotter hade given him ten shillings to distribute to the deponent and his neighbours, and that when the deponent and other three of them returned from the Bass, the said M'Cleish gave each of them a shilling besid drink, that Alexander M'Cleish the pannall gave one of the crew called Robert Spevin a letter to carry to the Bass; depones that Alexander M'Cleish the pannall hyred the deponent and his companie to goe to the Bass with the letter, and that the said M'Cleish spoke to the deponent about goeing to the Bass with the letter, but did not see M'Cleish delyver the letter to Spevin; depones the letter was caryed to the Bass by the deponent and the rest of the crew, and was delyvered by Robert Spevin; depones Robert Spevin brought back ane answeere from the Bass, which he carryed to M'Cleish the pannall's house, but did not see him delyver it; depones that Alexander M'Cleish gave the deponent and everie oue of the crewe three shillings for that voyadge; depones that the Wednesday before Christinmass last, Alexander M'Cleish the pannall sent for the deponent and his crewe and spoke to them about caryeing two men aboard of a ship, depones that these two men, after the deponent and they were gone a little out to the sea, forced them to carye them into the Bass, and this was about ten

a-clock att night; depones Robert Spevin told the deponent that the pannall Alexander M'Cleish told him that these two men were goeing into the Bass, and that when they came to the Bass, one of the two men whisled, and the other called a Hackett! a Hackett! and the Bass answered them, and landed the two men at the Bass, and they gave the deponent and the other seamen a guinie; depones when they came ashore the pannall Alexander M'Cleish, changed their guinie, and gave everie one of them fyve shillings; depones that when the deponent went in with the letter to the Bass, the pannall, Alexander M'Cleish, would have them carye in a twentie pynt barrell of ale to the Bass, but they would not take it in, and that the rest of the deponent's crewe told him that he had brought it to the sand end for that effect, but he did not see it himselfe; depones that the pannall M'Cleish forbade him and the rest of the crewe to lett their goeing to the Bass be knowen, for it would hang them as weell as him; depones he cannot write; and this is the truth as he shall answeere to God.

Sic Subscribitur,

DAVID HOME.

Alexander Wood, fisherman, in Dumbarr, aged threttie yeires, married, purged, and sworne, depones that the Wednesday befor Christinmass last, Alexander M'Cleish, the pannall, desired the deponent and his crewe to carye two men aboard of a shipe, and desyred them to make haste, and he would pay them when they brought the goods ashore; that M'Cleish, the pannall, waited upon the two men to the boat, and kissed them before they went abroad; depones that when the boat was gone a litle off the shoare, the two men forced them to carrye them to the Bass, and that they landed the two men att the Bass, and the two men gave them a guinea; that when they came to the Bass the two men called a Hacket! a Hacket! And the Bass answered them; depones that when they came ashore againe they came to the pannall, Alexander M'Leish's house, and he changed the guinie to them, and they told M'Leish that they hade putt the two men to the Bass; depones that afterwards M'Leish the pannall sent for the deponent to come to the pannall, John Trotter, who then passed under the name of Dods, and the said Trotter passing under the name of Dods would have hyred the deponent and his crewe to carye him into the Bass, and offerred them money, and threatened to cutt the luggs out of their head when they refused; depones thereafter the pannall, Alexander M'Leish, hyred the deponent and the other seamen to goe in to the Bass with a letter, and gave to everie one of them a shilling in Bailzie ffaas cellar, and they went with the letter, and Robert Spevin caryed up the letter; and that the said Robert Spevin brought back ane answeere of ye letter, which Robert Spevin caryed to the pannall Alexander M'Leishes house, and the deponent sawe him delyver it to M'Leish, the pannall, in his owen hand; and the pannall, M'Leish, gave

everie one of them, when they came ashore with the letter, three shillings sterling and some ale; and at that tyme the pannall, M^cLeish, bade them keep their tongues to themselves; depones he cannot write; and this is the trueth as he shall answer to God.

Sic Subscribitur,

DAVID HOME.

George Kerr, wright and seaman, in Dumbar, aged thretty yeires and above, married, purged, and sworne, depones *conformis precedenti* against Alexander M^cLeish, the pannall, anent the caryeing the two men to the Bass, except that he did not see M^cLeish kiss the two men; and that he was one of them that caryed in the letter to the Bass att M^cLeish the pannall's desire, and when they returned with ane answer from the Bass, which was given to M^cLeish, M^cLeish gave everie one of them three shillings, and bade them keep the busienes quyet, because it was dangerous to make it known; depones, that he hes seen the pannall John Trotter, att Dumbar, and that he passed under the name of Dods; depons he cannot write; and this is the truth as he shall answer to God.

Sic Subscribitur,

DAVID HOME.

William Robertson, of Powcreick, seaman and skipper att Portseatoun, aged 25 yeires, unmarried, purged, and sworne; depones that in May last John Trotter, the pannall, sent to Portseatoun to the deponent to come to Wintoun to him, and att that tyme when the deponent came to George Hog's house in Wintoun, he found John Trotter, the pannall, in companie with M^cLean and M^cGowne, two Bass rebels; depones that att that tyme the pannall John Trotter proposed to the deponent to lett him have his boat, and he would furnish it with men, to goe seaze captain Burd's shipe, which was sett to guaird the Bass from getting provisions, and that he made faire offers to him for that purpose; and when the deponent refused the first proposall, then the pannall John Trotter, made a second to the deponent, that the deponent might carye in provisions himselfe to the Bass; and that the pannall John Trotter, was to give him money for providing therof, att Leith or Aberdour, to which proposall the deponent agreed, and at that tyme got a leg dollar from him, and the money that the deponent hes gott att severall tymes would amount to thretty-two pund scots, and immediatly after their being att Wintoun they mett a second tyme att Niddrie, and thereafter at Edinburgh, where the deponent gott a crowne from the pannall Trotter; depones that the deponent heard M^cGovan and M^cLean blame Trotter the pannall for haveing received thretty pund sterline for furnishing provisions for the Bass, and being negligent yr'in, depons that the money which the deponent received, was for his paines for goeing to the Bass; and this is the truth as he shall answer to God.

Sic Subscribitur,

WILLIAM ROBERTSON.

My Lord Advocate for farder probation adduced the pannall's judiciall Confession, wherof the tenors followes:

EDINBURGH, Feb. 19, 1694.

In presence of the lords commissioners of justiciarie and assizers sittand in judgment, John Trotter the pannall, confesses that since the moneth of August, 1691, he has frequently assisted the Bass with meat, drink, and other things comfortable to them, and hes held correspondence otherwayes with the rebels in the Bass frequently till the moneth of March last, and since March last he sent in a letter to the rebels in the Bass, which was none of his owen writing, and received ane answer from them; declares that for the tyme preceeding March last, it was but three tymes that he supplied them, viz. first in August, 1691, att which tyme he sent by Hacket and others of the saids rebels bisket and maill, which Hacket bought himselfe, and was shipt att Leith for the Bass and the pannall's pairt was to give Hacket his advice how to manadge his busienes; declaires that the boat was a Brun-tisland boat, but he knowes neither the name of the boat nor of the master; declaires the second tyme was in Februarie or March, 1692, att which tyme the pannall sent in some tobacco and other small things from Fisherawe with Grahame's man; and at that tyme he sent in two letters with Charles Maitland to the Bass; the third tyme was in December 1692, or Janwarie thereafter or therby, att which tyme some of the rebels came ashore and brought money with them, and the pannall directed them how they should gett butter and cheese, and bisket for their money; declares that about March last he mett with skipper Robertsons att Wintoun, and the skipper being to goe to the north, the pannall desyred him to speak with M^cGovan and M^cClean, two of the rebels in the Bass, and att their desyre he gave Robertson money; and he thinks the said Robertsons mett with them afterwards, and he himselfe told Robertsons that he thought they would propose to Robertsons to goe to the Bass, and they would gratifie him for it, and declaires that he gave Robertsons money to buye twelve barrells to carrye to Aberdour to fill with beer or ale for the Bass, which money he gott from the Bass men; declares that he believes the four dollars mentioned in ane accompt under his hand was given be him to the Bass men, and acknowledges the said accompt to be his hand write; and that it was accompt drawn up to send to the rebels in the Bass, that they might send out money to pay it, which he knew they hade in their hands as they said to him: and that the said memorandum was drawn out at yr desire; acknowledges the article of ffyftie-fyve pund mentioned in his accompt, payed to James Douglass for things to be sent to the Bass, but they were never sent to the Bass nor to Portseatoun; declaires that he sent from Dumbarr in the end of December or begining of Janwarie last, a let-

ter from a freind of Hacket's to Hacket then in the Bass; declaires that he gott a letter with the boat that returned from Midletoun, the present governour in the Bass; declaires they used to call him John Dods and he hes gotten the letters with that direction; confesses that the butter and cheese that he advised collonell Grahame the governour of the Bass man to buy for the Bass in December, 1692, were caryed to Portseatoun by Grahame's man, and by him and his neighbour transported to the Bass under collour that they were goeing to the English shipe lyeing in Cockenie road as the pannal was informed; confesses that all his correspondence and supplie was according to the dates above marked, viz. before March 1693, except the letters which he sent and received in December or Januarie last; he declines any defence, and throwes himselfe in their majesties mercy.

Sic Subscribitur, JO. TROTTER.

DAVID HOME, I. P. D. C.

Alexander M^cLeish, the pannall, confesses that he sent in a boat with two men to the Bass in December last, and that the men were caryed in and left there; and that the seamen when they came back told him they hade gott a guinie for their paines, and he chainged the guinie for them; that he sent in this boat at Charles Maitland's desyre, who said to him that he was warranted by my lord chancellor to send in the boat, for bringing out of the Bass goods belonging to Charles Maitland, and that Maitland said to the pannall, that the two men were to sett out the goods and come out themselves, and never to returne againe; confesses that in Januarie last he gott a letter from the pannall John Trotter, directed to Hacket one of the Bass rebels, and delyvered it to a seaman to carye it into him, but knowes not what wes in the letter; confesses that the seamen brought back ane answere and gave it to him, which he gave to the pannall John Trotter; confesses that the seamen that caryed in the letter to the Bass, spoke to the pannall to send in a barrell of ale to the Bass, and that he did provid a twentie pint barrell, but it was never given to them; confesses he gave the seamen twentie shilling starling of the money he gott from John Trotter for caryeing in the letter to the Bass; confesses that Charles Maitland told him that one of the two men that he sent into the Bass was Hacket, and that the seamen told him that when they came near to the Bass the two men in the boat cryed a Hacket! a Hacket! and that Maitland did not tell him at the tyme when the two men went in that one of them was Hacket, but told it him afterwards. He declines any defence and throwes himselfe upon mercie.

Sic Subscribitur, ALEXANDER MACLISH.

DAVID HOME, I. P. D. C.

INTERLOQUITOR.

The Lords declaires the confessions of John Trotter and Alexander M^cLeish are not receaved by the lords as a submission, in regaird my

lord advocat declaires he is to adduce other probation,

Sic Subscribitur,

DAVID HOME.

The lords ordaine the assize to inclose, and returne their verdict to-morrow at twelve a'clock.

Verdict against Trotter and M^cLeish; Feb. 22, 1694.

The said day the persons who past upon the assize of John Trotter and Alexander M^cCleish, prisoners, for supplieing and corresponding with the rebels in the Bass, returned their verdict in presence of the saids lords, whereof the tenor followes: The Assize haveing elected and choisen Thomas Young, late Bailzie, in Edinburgh, their Chancellor, and Robert Hepburne, of Bearfoord, their clerk, and haveing heard and considered the lybell, and the lords their interloquitor therupon, they all, with one voice, find the pannall John Trotter, what be his owen confession in judgement, and the witnesses depositions adduced against him, guilty of treasonable supplyeing, furnishing, corresponding, and keeping intilligence with the rebels in the Bass, several tymes before the letters of intercommuning, dated the 13th of Aprill, 1693, and since by keeping correspondence with the said rebels, by sending in of a leiter to them, and be receaving ane answere to the said letter from them; and sicklyke the said assyse, all with one voice, finds the pannall Alexander M^cLeish what be his owen confessione in judgement, and be the depositions of the witnesses adduced against him, guilty of keeping correspondence with the rebels in the Bass, be sending in of a letter to them, and of receaving a letter from them, and of sending in of men to them, in witness wherof those presents are subscrivved be the said chancellor and clerk, att Edenburgh, the 21st of Februarie, 1694.

Sic Subscribitur, THOMAS YOUNG, Cha.

ROBERT HEPBURNE, Clerk.

The Lords continow the pronouncing of doome and sentence against the saids pannalls till the twentie sixt instant att two a clock in the afternoon.

February 26, 1694.

The lords commisssioners of justiciarie haveing considered the verdict of assise returned against John Trotter and Alexander M^cLeish, prisoners, whereby the said John Trotter is found guilty of treasonable supplyeing, furnishing, corresponding, and keeping intilligence with the rebels in the Bass, severall tymes before the letters of intercomuning, dated the 13th of Aprill, 1693, and since by keeping of correspondence with the saids rebels, by sending in of a letter to them, and receaving ane answere of the said letter from them; and the said Alexander M^cLeish is found guilty of keeping correspondence with the rebels in the Bass, be sending in a letter to them and of receaving a letter from them, and of sending in men to

them, the saids lords therefore, be the mouth of John Ritchie, dempster of court, decerne and adjudge the saids John Trotter and Alexander M'Leish to be taken to the mercat croce of Edinburgh upon Wednesday the 28th day of March next to come, betwixt two and four aclock in the afternoon, and there to be hang-ed on a gibbet till they be dead, and ordaines their names, flame, memorie, and honours, to be extinct, their blood to be tainted, and their armes to be riven furth and de-late out of the books of armes, so that their posterity may not have place nor be able here-after to braike or joyse any honours, titles, offices or dignities within this realme in tyme comeing, and to have forfaitured, ammitted and tint all and sundrie their lands, heretages, tacks, steedings, rouses, possessions, goods and gear whatsoever pertaining to them, to our soveraigne lord and lady to remaine perpetwal-lie with their majesties in proprietie, which is pronounced for doome.

Sic Subscribitur, DAVID HOME. P.
C. Campbell, Jo. Lauder, Ar. Hope,
J. Falconar.

Intran'

Capt. James Middleton,
William Wothame, Prisoners.
William Nicolsone,

Indyted and accused for the treasonable keeping out of the rock and fort of the Bass, against their majesties and their government, and other treasonable crymes lybelled against them, *ut in diebus precedantibus*.

Pursuers.—Sir James Stewart ther majesties advocat; sir James Ogilvie.

Procurators in defence.—Sir Patrick Hume; Mr. John Frank.

The lords commissioners of justiciary having considered the indytment raised and pursued att the instance of their majesties advocat against captain James Middleton, William Nicolsone, and William Wotham, prisoners, with the debate therupon, they find the indytment relevant to infer the paynes lybelled; and having considered the speciall defence pro-posed for captain James Middleton, that he was born abroad in Flanders, finds the same relevant to take off the cryme of treason, but not to liberat him from a capitall punishment; but if he can make it appear, that he or his commander when they entered the Bass, were cloathed with a commissione from the common enemy in this declared warr, the lords remitts the punishment to his majestie, and repells the hail remanent defences and duplyes prepared for the pannalls, and remitts the interloquitor to the knowledge of the assyse.

Sic Subscribitur, DAVID HOME, I. P. D. C.

ASSISA.

Sir Patrick Nisbet, of Dean.
James M'Lurg, late dean of Gild, of
Edinburg.

Robert Hepburn, of Whitburgh.
Samuell M'Lellan, merchant, in Edinburgh.
James Clelland, merchant in Edinburgh.
Pat. Thomson, merchant, in Edinburgh.
Sir David Carnegy, of Pittarow.
George Clerk, late baillie, of Edinburgh.
Patrick Johnson, merchant, there.
Thomas Young, merchant, there.
Robert Cutburt, merchant, in Edinburgh.
George Hume, late baillie of Edinburgh.
Thomas Fisher, merchant, there.
Thomas Hamilton, mason, there.
Sir Thomas Kennedy, of Kirkhill.

The Assyse lawfully sworne, noe objectione of the law in the contrair.

My Lord Advocat, for probatione adduced the witnesses after deponeing, viz.

Esplan Crawford, lieutenant to captain Alexander Stevenson, in sir James Moncreiff's regi-ment, aged threttie six years, unmarried, purg-ed, and sworne, depones that about Jully past a twelve moneth, the deponent went to the Bass to bring out some Dutch seamen, which a French Caper brought up to the Bass, and that att that tyme the pannall, captain James Middle-toune, came out from the Bass in a boat to the deponent, and asked the deponent if there was any commissionat officer aboard the boat, in which the deponent was; and the said pan-nell did then delyver a letter or open memo-randum, to signifie to the government, that the saids prisoners were in the Bass and desyreing them to releive them as prisoners of warr, which letter or memorandum the deponent re-ceived from him, and being interrogat if he sawe the said pannall or any other of his com-panie in the boat with him have armes, depons he saw them have noe armes, and depones that in the said moneth or in the moneth of August thereafter the deponent by order from sir Tho-mas Livingstone, did goe a second tyme to the Bass to receave the saids prisoners, and at that tyme he did see the pannell, captain James Middleton, in the Bass, and spoke with him, and the pannell came out with the deponent to Castletoune and thereafter went away in his skift towards the Bass, and depons that in Fe-brewary sixteen hundred and nynty three, the deponent saw the pannall James Middleton a third tyme upon the rock of the Bass, the deponent having gone in there by order from my lord chancellor to bring out James Hay, and that when he parlied with the governour, the pannell was present with the governor, as one of his company, and all ther present, the pannell as weell as others, so far as the depo-nent remembers, did say that James Hay being one of their own number, and a deserter, was not a prisoner of warr, and the deponent left the pannall in the Bass; depones that the deponent in the saids moneths of Jully and August, sixteen hundred and nynty two, and February, sixteen hundred and nynty three, was commander of the pairtie, that was lying att Castletoun, as a guard against the rebels in the Bass, as being then in rebellione; depones he saw the rebels

in the Bass take a bark and cary her up to the Bass in the hinder end of harvest 1692, depones that in conference with the Bassmen, he heard them say that they would keep out the Bass as long as they had bread and water. *Causa scientie patet*, and this is the truth as he shall answer to God.

Sic Subscribitur,

ESPLAN CRAWFORD.

Gavin Johnstone, sone to John Johnstone, messenger, in Dumfries, late souldier in the Bass, aged thretty-four yeares, married, purged, and sworne; depones, That in August, 1691, the deponent himselfe went into the Bass, and about four moneths thereafter, the three pannells, captain James Middletoun, William Nicolsone, and William Wothame, arryved att the Bass, in company with leivtennant collonell William Grahame, and were received by the garrisone as friends, and continued there for some moneths; but that they did not cary armes, neither did the governor himselfe cary arms, nor any others but the common soldiers when they stood centries; and that the three pannells were all reckoned gentlemen, and distinguished from the rest of the commonality of the Bass. Depones, that the said leivtennant collonell William Grahame, in whose company the pannalls came to the Bass, brought king Jameses commissione alongst with him, and the deponent heard it read, but there was no other present but himselfe when he heard it read; and that the said commissione made Michael Middletoun governour. Depones, that he knowes the Bass was holding out against the government of their majesties king William and queen Mary; depones, that he exprest his desyre to gett out of the Bass to Michael Middletoun the governour, but he refused it, and spoke sharpie to him, but the deponent blamed the rest of the gentlemen of the Bass, and particularly the pannells for keeping him in. Depones, that he sawe the pannells Midletoun and Nicolsone all the tyme in the Bass, frae the tyme they came to it till May last, and that he cannot be positive when it was that Wotham came out of the Bass, *causa scientie patet*, and this the truth as he shall answer to God.

Sic Subscribitur,

GAWEN JOHNSTON.

Robert M'Farlane, souldier in major Monro's company in sir James Moncreiff's regiment, aged twenty-two yeares, married, purged, and sworne; depones, that when leivtennant Crawford went in to the Bass anent the Dutch seamen in August, 1692, the deponent went alongst with him, and did see the pannell James Middletoun in the Bass; and at the same tyme he came ashoar to Castletoun with leivtenant Esplan Crawford, and thereafter saw him goe off towards the Bass again, *causa scientie* he was one of the souldiers of the garrisone of Castletoun that was watching against the Bass: depones he sawe the pannall Middletoun with noe armes but a short baygonet; depones he cannot wryte. And this is the truth as he shall answer to God.

Sic Subscribitur,

DAVID HOME, P.

James Hay, lately leivtennant, sone to the decest collonell James Hay, of Naughtoun, aged thretty-two yeares, unmarried, purged, and sworne; depones, that the deponent came in company with collonell Grahame from Dunkirk, to recruit the Bass, and that Middletoun, Nicolson, and Wotham, the pannells, were in the company with them; and that when they arryved att the Bass it being in the night tyme, and the Bassmen supposing they might be enemies, did at first refuse them entrance, but after they understood them to be friends they receaved them all as recruits to the garrisone; depones that they arryved att the Bass in the moneth of December, 1691; depones, that during the tyme that the deponent was in the Bass, which was till the March thereafter, he sawe the three pannells in armes upon duty by turnes as it fell them; depones he did hear king James's commissione read in the Bass, and that all that were in the Bass were called to the reading of it, and that the pannells brother Michael Middletoun's name was filled up with consent of all present. Depones, that the three pannells were upon duty by order of Michael Midltoun, governour, after his name was filled up, and that by carying of armes, and that the Bass did at that tyme hold out against their majesties king William and queen Mary, as they still doe; and the deponent when he came out of the Bass, he left them there, and they were in the Bass with him all the tyme he was there; depons that in Febrwary, 1693, the deponent went back to the Bass, and at that tyme he did see the pannells Midletoun and Nicolsone in the garrisone of the Bass, and at that tyme he was made prisoner by the garrisone; depones, that when he went in to the Bass last he went in by order of the government, *causa patet*; and this is the truth as he shall answer to God. And being interrogat, if the deponent or any in his company came to the Bass be vertue of a commissione from the French king, depones, that the deponent knowes of noe commissione, except one from St. Germans, signed by the English sub-secretary there, which appointes the deponent by name and Mr. Nicolsone the pannell with others to be pitched upon to come to the Bass.

Sic Subscribitur,

J.A. HAY.

William Robertstone of Powcreiff, skipper or seaman, at Portseatoun, *nichil novit*.

John Reid, servant to sir William Baird, of Newbyth, aged thretty yeares, married, purged, and sworne; depones that about the twenty third day of May last, about nine aclock at night, the deponent being at a place called Jagg, in East Lothian, with some company taking a drink of ale, the three pannells went by at the tyme, haveing in company two swords, two baygonets, and a gunn, and the deponent and his company observing them, followed them to Bankhead, and overtooke them att the east end of the toune, and asked them who they were, and where they were

goeing, and they said they were goeing to Tunninghame, and the deponent asked who they knew there, and the pannells could tell of none they knew there, nor give any good account of themselves; whereupon the deponent and some other company did apprehend them, without making any resistance, *causa scientie patet*, and this is the trueth, as he shall answer to God.

Sic Subscribitur,

JOHN REID.

William Burne, gardner to sir William Baird, of Newbyth, aged twenty fyve yeares, married, purged, and sworne, depones *conformis precedenti in omnibus*.

WILLIAM BURN.

DAVID HOME, P.

The lords ordaines the Assyze to inclose and returne their verdict to-morrow, at twelve a'clock.

February 27, 1694.

The said day, the persones who past upon the assyze of captain James Midletoune, William Nicolsone, and William Wothame, prisoners; returned their Verdict, in presence of the saids lords, whereof the tenor followes:

The Assyze having elected and choesen sir Thomas Kennedy, of Kirkhill, their chancellor, they all in one voice find it proven by the depositions of the witnesses, That the three pannells, viz. Captain James Midletoune, William Nicolsone, and William Wotham, arryved at the Bass in December, 1691 years, in company with leivtt. coll. William Grahame, and continued and abode there severall moneths with Michael Middletonne, who commanded the Bass, by virtue of a commissione from the late king James, holding out against the government of their majestie's king William and queen Mary; as witness thir presents, subscribed by the said sir Thomas Kennedy, as chancellor, and the said Robert Hepburne their clerk, att Edinburgh, the twenty sixth day of

February, sixteen hundred and nyntie four yeares.

Sic Subscribitur, THO. KENNEDY, CANC.

ROB. HEPBURNE, Clerk.

Continued till the 1st March.

March 1, 1694.

The lords commissioners of justiciary having considered the verdict of assyze, returned against captaine James Midletoune, William Nicolsone, and William Wotham, whereby it is found proven by the depositions of the witnesses, that the saids three pannells arryved at the Bass, in December, sixteen hundred and nyntie one yeares, in company with leivtenant collonell William Grahame, and continued and abode there severall moneths with Michael Middletonne, who commanded the Bass, by virtue of a commission from the late king James, holding out against the government of their majesties king William and queen Mary; the saids lords therefor, be the mouth of John Ritchie, dempster of court, decerne and adjudge the saids captain James Midletoune, William Nicolsone, and William Wotham, to be taken to the marcat crose of Edinburgh, upon Fryday, the sixth day of Apryle next, to come betwixt tuo and four a'clock in the afternoon, and there to be hanged on a gibbett, till they be dead, and ordaines their names, fame, and memory, and honours, to be extinct, their blood to be tainted, and their armes to be riven furth, and delete out of the book of armes, sua that their posterity may never have place, nor be able heirafter to bruike or joyse any titles, dignities, or offices, within this realme, in tyme comeing, and to have forfait, amitted, and tint all and sundry their lands, heretages, tacks, steidings, rouns, possessions, goods, and gear whatsoever pertaining to them, to our sovereign lord and lady, to remaine perpetually with their majesties in propertie, which is pronounced for doom.

Sic Subscribitur,

DAVID HOME, P.

C. Campbell, Jo. Lauder, A. Hope, J. Falconer.

400. Proceedings in the Parliament of Scotland respecting the MASSACRE OF GLENCO: 7 WILLIAM III. A. D. 1695. [Collection of State Tracts published in the Reign of King William the Third.*]

COMMISSION for Trial of the Slaughter committed at Glenco, upon the 13th day of February, 1692.

GULIELMUS Dei Gr. Mag. Brit. &c. Omnibus probis hominibus, ad quos præsentēs Literæ nostræ pervenerint, salutem. Quandoquidem nos considerantes, quod etiamsi nos,

* “ From an Article entitled, “ The Massacre of Glenco : Being a True Narrative of the barbarous murder of the Glenco men in the highlands of Scotland, by way of military execution, on the 13th of February, 1692. Containing the commission under the great seal of Scotland, for making an inquiry into that horrid murder : the proceedings of the parliament of Scotland upon it : the report of the commissioners upon the inquiry, laid before the king and parliament, and the address of the parliament to king William for justice upon the murderers. Faithfully extracted from the Records of Parliament, and published for undeceiving those who have been imposed upon by false accounts.”

The Narrative is preceded by a Letter as follows :

“ Sir ; In answer to yours of the 1st of October, I herewith send you from the Records of our parliament, a true and authentic Account of the Massacre of Glenco, as you righteously call it. I wish this matter could have been forgotten to eternity ; but since you say it is altogether needful for the vindication of the justice of our country, against many false, slanderous accounts that are daily given of that business in England, I am willing you print what I now send you ; and that you may be furnished to answer all objections against the truth of this Narrative, you may inform any Englishman of quality, that is willing to be satisfied in the matter, that the Report of the Commission, the Address of our Parliament herewith sent you, and the Duplicates of the lord Stair's Letters, are, or were at least in the Scots Secretaries Office at London : or if they should happen to be withdrawn from thence, they may inform themselves fully in the truth of this from Mr. Johnston, who was at that time secretary of state for Scotland, and had particular directions from the late queen Mary to push on this inquiry, and search into the bottom of that horrid murder ; for her majesty was grieved at the heart, that the reputation of the king her husband should have suffered so much by that affair. I would not, however,

‘ Anno Dom. 1693. per expressam instructionem, potestatem concessimus de mortuo Gulielmo Duci de Hamilton, aliisque, pro examinando et inquirendo de cæde quorundam Cognominis de Macdonald aliorumque de Glenco. Anno Dom. 1692. et de modo et de methodo Commissionis ejusdem ; nihilominus Inquisitio quæ tunc facta erat in prosecu-

that Mr. Johnston should know any thing of your design to publish this : for though you know as well as I that his diligence to serve and obey the queen in this matter, was always judged here to be one of the chief causes of our nation's losing that able and honest minister ; yet he is so nice in point of honour, that he chused rather to be unjust to himself, and to lie under imputations, than to give any part of those papers to be published, though frequently urged to it, because he said it would be undecent in him, that had once been his majesty's secretary, to do any such thing. Therefore, though you are carefully to conceal this matter from him till it be published, yet as soon as it is, I must pray you, if you think it proper, to go and tell him, that I beg his pardon for making this appeal to him, without his leave : and though I may suffer in his good opinion by what I have done, yet if this publication may any ways oblige him to do himself, his late master, and his country further justice, by telling what he knows more of the matter, I shall be the easier under his displeasure. I had almost forgot to notice, that the duke of Athol, the lord Chancellor, and marquiss of Anandale, all now at London, were members of the commission, who made the inclosed report ; and howsoever scrupulous they may have been in point of honour, to communicate any papers relating to this matter, they cannot in honour but own that this history is authentic, if any of the English nobility think fit to inquire of them about it : but you must be careful to let none of them know any thing of your design to publish it, or which way you have this information ; though if they should come to know it, I chuse rather to incur their displeasure, by appealing to them, than to omit any thing that lies in my power to vindicate the honour and justice of our country.”

“ Edinburgh, Nov. 1, 1703.”

And at the end of the Narrative are subjoined the following Observations :

“ It is said that some of the persons did get a remission from king William ; concerning which it is to be observed, first, that the taking

‘ tione dictæ Instructionis defectiva erat, nosque
 ‘ etiam perpendentes, quod Methodus maxime
 ‘ efficax pro plena Informatione accipienda de

of a remission is a tacit acknowledging of the crime, and taking upon them the guilt: next, that any such remission is null and void, and will not defend them, because it did not proceed upon letters of Slains, nor is there any assithment made to the nearest of kin; it being expressly provided by the 136 act, par. 8 Jac. the 6th, that remissions are null, unless the party be assithed; and by 157 act, par. 12. Jac. 6. And it is farther to be observed from that act, that albeit respites and remissions had been formerly granted for several enormous crimes, yet the defendants were ordained to be criminally pursued notwithstanding of the same; and the said act is ratified by the 173 act, par. 13, Jac. 6, against the granting of remissions and respites to the committers of murder, slaughter, and other atrocious crimes therein mentioned, where there are not sufficient letters of Slains shewn; and that no respite or remission be admitted in judgment, except the same be compounded with the treasurer, and subscribed by him, at least past his register. And act 178, it is provided, that no respite or remission be granted for slaughter, until the party skaithed be first satisfied; and if any respite or remission shall happen to be granted before the party grieved be first satisfied, the same shall be null by way of exception or reply, without any further declarator. Thirdly, It is to be observed, that the parliament having declared, that the killing of the Glenco-men was a murder under trust; it is clear by the 51 act, par. 11, Jac. 6, that murder and slaughter of a person under trust, credit, assurance and power of the slayer, is treason: so that by the said act, these that had accession to, or were any ways airt and part of the slaughter of the Glenco-men, are guilty of treason.”

Of this horrible transaction various accounts are in print. It is very pathetically related by Gilpin in his *Tour in Scotland*.

Mr. Laing (*Hist. of Scotland*, vol. 4, p. 241) observes of it:

“ The outcry against the massacre of Glenco was not confined to Scotland; but by the industry of the jacobites, it resounded with every aggravation through Europe. Whether the inhuman rigour, or the perfidious execution of the orders were considered, each part of the bloody transaction discovered a deliberate, treacherous, and an impolitic cruelty, from which the king himself was not altogether exempt. Instead of the terror which it was meant to inspire, the horror and universal execration which it excited, rendered the highlanders irreconcilable to his government, and the government justly odious to his subjects. His friends endeavoured, by the plea of inadvertence and haste, to transfer the blame to his ministers; and his ministers were equally earnest to vindicate the orders as strictly legal; or as analogous to

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‘ veris circumstantiis Rei antedictæ, erit com-
 ‘ missio in hunc effectum, cumque nobis abunde
 ‘ satisfactum sit de facultatibus et aptitudine per-

letters of fire and sword, which the privy council had been accustomed to grant. But when a second order, signed and countersigned by the king with such unusual precaution, is combined with the impunity which his ministers enjoyed, no doubt can remain that, however the execution might exceed his intentions, the measure was not concerted without his knowledge and previous consent. No enquiry was made at the time, no punishment was inflicted afterwards, on the authors of the massacre. On the contrary, it is asserted that the officers most active in the execution were preferred. The best and perhaps the just explanation of the transaction is, that William, beset with ministers inured to the sanguinary measures of the former government, was betrayed for once into an act of cruelty inconsistent with his character, and with the mild and merciful tenor of his reign.”

That the parliament, which met in September 1692, omitted to investigate the Massacre, he ascribes to the detection of Neville Pain's correspondence, which at once intimidated the Jacobites from opposition, and indisposed the Presbyterians (to whom their establishment had been recently restored) to thwart the government, while the Jacobites were plotting to subvert. And of the measures which were in 1695 taken as related in the text concerning the massacre, he thus writes:

“ On the death of Hamilton and Queensberry, the marquis of Tweeddale was appointed commissioner to parliament, which was never summoned except to provide supplies. The money voted for new levies, but not appropriated in the former session, had been ungenerously diverted to other purposes; and the troops intended for internal defence were employed to recruit the regiments abroad. The nobility were thus disappointed of commissions for themselves and their friends. The people were disgusted at William's supine inattention to Scotland; and an enquiry into the massacre of Glenco was so loudly demanded, that some extraordinary concessions were required from the crown. An enquiry was no sooner proposed, than the parliament was informed that a commission had been issued to investigate the massacre; and thanks were returned for a measure obviously intended to supersede a public examination, and to screen the offenders from public justice. But the result of the enquiry, by the artifices of the ministers to supplant a rival, was reported to parliament at its repeated request; and after a diligent investigation, the guilt of the massacre was transferred to Dalrymple. The king was literally tried, and acquitted, by a vote that his instructions contained no warrant for the slaughter; but the offenders, instead of being surrendered to public justice, as the parliament requested, were par-

‘sonarum infra nominatarum in fines supra expressos; sciat is igitur nos nominasse et constituisse tenoreque presentium, nominare et

donec or preferred. The necessary supplies and levies were provided. The episcopal clergy were permitted, on accepting the oaths to government, to remain exempt from the jurisdiction of presbyteries, and 106 who were persuaded to qualify, retained their livings under the protection of the king.”

In the “*Complete History of Europe, &c.*” for the year 1707, in which year lord Stair died, is given an encomiastic account of him; to which is appended a defence against “two things commonly objected against this earl.” With the first, “that being lord advocate to king James, he had framed a proclamation in Scotland for a toleration, wherein the king’s absolute and dispensing power was very highly asserted,” the bloody proceedings at Glenco have no immediate connection.

“The other charge against the earl,” proceeds his advocate, “was that the peremptoriness and severity of his letters, when he was secretary of state, was the cause of the barbarous massacre of the Glenco men; a matter of fact, which, if considered with regard to the merit of the persons or their number, was inconsiderable, but has been very much taken notice of by all the writers of the life of king William, and others, partly because the officers entrusted in the execution of a military command, did not only exceed the warrant they had, but broke in upon the undeniable rules of hospitality and humanity; and partly because the circumstances of that matter have been greatly aggravated, to serve the turns of a party for disparaging and persecuting the late earl of Stair. The matter was carried on with that heat, as to draw the late king William directly into question in the parliament of Scotland, which the enemies to the memory of that great prince have laboured to improve to his disadvantage. It were too long to account for that here: as for the king himself, it is ridiculous for men of common sense to imagine that so great a prince should have singled out a low and obscure mean sept of thieves, who could in no ways either be an object of his vengeance or jealousy, but as they were enemies to the government; nor can any man of candour and ingenuity imagine, that the earl of Stair, who had neither estate, friendship, nor enmity in that country, nor so much as knowledge of these persons, and who was never noted for cruelty in his temper, should have thirsted after the blood of these wretches, and it is as little conceivable how a commission under the great seal was directed to no magistrates, nor court of judicature, nor to any persons having power and authority by law, to enquire into this matter for several years after it was past: nor how these entrusted with this commission came to tread the very steps of the court of inquisition, in having taken an oath

‘constituere fidelissimos et dilectissimos nostros Consanguineos et consiliarios, Joannem marchionem de Tweddale supremum nostrum

of secrecy among themselves and having imposed it upon their clerks; how they came to make use of different tools to give light to that matter (as they pretended) more especially Roman Catholics then in rebellion, and Glen-gary in particular the chief of them, and manager of a great part of the intrigue, who besides his Catholicity, is and was known to be one of the most obstinate enemies to king William’s person and government? Or how these gentlemen came to adventure to take testimonies concerning the honour and life of any subject, and much more of any employed in his majesty’s service, and yet most of all, which concerned the king’s honour directly, without giving so much as an opportunity to any body concerned to see that things were fairly and honestly done, or to justify themselves or their friends. And yet all these circumstances are no less undeniable and certain than they are surprising.

“When these inquisitors had thus prepared matters, reports were spread of great and strange discoveries, and then some men out of zeal for the king, whom the enemies of his government would have loaded with these cruelties, moved the parliament that the proceedings of the commission might be laid before the House, to which the king’s commissioner was pleased to give very ready compliance. A just deference to that great assembly forbids too particular a disquisition of all that past upon that subject. Thus much is certain; the thing itself being horrible, some body was to be blamed. The king could not be charged, and indeed it is undeniable, that though his royal orders were given after the breach of a pacification, and in very precise terms, yet they did contain a warrant for mercy according to circumstances, and it was not possible, that the king could know that his troops were received hospitably by the people whom that warrant principally concerned.

“The blame then must lie either upon the secretary, the king’s general in Scotland, or the officer that executed the order. To lay it upon the officer that executed the order, where indeed it justly lay, was of no consequence against the earl of Stair, and did not answer some men’s design: to lay it upon the general was hard, for truly he had been prevailed with to furnish the commission with a good many of the earl’s principal letters and the king’s principal instructions. And though the dispensing of the mercy, mentioned in the king’s order, did belong to the general, and so the excess seemed more naturally to touch him, yet the report of the commission licked him clean, for the barbarity of the fact consisted in one circumstance, viz. that officers received in hospitality for several days, and kindly entertained by their landlords, fell upon them unexpectedly and murdered them. Now the general

‘ Cancellarium, et Gulielmum Comitem d’ An-
 ‘ nandale, et fideles et dilectos nostros Consilia-
 ‘ rios, Joannem Dominum Murray, Dom. Ja-

‘ cobum Stuart, advocatum nostrum, Adamum
 ‘ Cockburn de Ormiston nostrum Justitiarium
 ‘ Clericum, Magistrum Archib. Hope de Ran-

being at Edinburgh, and but lately returned from London, the commission presumed that he was ignorant of the troops being friendly received in Glencoe.

“ It remained that the earl, then master of Stair, must be guilty; but seeing what was done against him was neither by way of process nor sentence, and was carried with so much haste, when he was in Flanders, attending the king, that there was no time left for publishing a case in his defence by his friends. And that a case being printed late that evening when the vote passed, and some copies of it being delivered to some members before the House rose, the earl’s brother, though a member himself, was fain to ask forgiveness of the House rather than be sent to prison; which to a man sickly and weak as he was then, was present death, besides abandoning of his friend’s just defence. I say then, that what was done in parliament not being done judicially, nor by way of legislature, and during the earl’s absence, leaves the matter still entire; and not to enter into a detail of that whole matter, the earl’s friends made the following remarks.

“ 1. That the orders for using military execution against Glencoe were not so much as countersigned by the earl of Stair. 2. That all his letters, as well those which accompanied the orders, as those that preceded the military execution, made mention of the power the general had to shew mercy according to occasion, and that those clauses of the earl’s letters were omitted in the report of the commission. 3. That the earl’s letter writ after the execution, or a few days before it, from London, could never be the cause or warrant of any excess; because it was impossible in nature, that those letters could come to the general, much less to the knowledge of the officers entrusted with the execution, seeing the post in those places with the best expedition must require 7 or 8 days in coming and as much in going. 4. The warmth expressed in the earl’s letters against Glencoe, being always tempered with a power to the general to show mercy, could not so much as be the occasion, much less the cause of the excesses committed: and the indignation expressed even in the later letters after the execution, was yet excusable, upon the supposition of his being ignorant of the troops being received friendly at Glencoe, which was more natural and easy for the commission to have presumed, than that the general then at Edinburgh should have been ignorant of it. 5. Another great circumstance which aggravates the barbarity committed on Glencoe, was his taking the oaths, but as to this it is to be observed, that neither the king, nor any about him, had the least intimation of it at granting of the orders, and yet upon the supposition that

they might come in, even after the time for taking the oaths, and lay down their arms, there was power for dispensing mercy both in the order and in the letters that related to it. And in the next place it was unjustifiable in the commissioners or inquisitors concerning the matter of Glencoe, to pretend that they proceeded for the vindication of the government, and yet to draw their chief lights from Glengarry and Keppoch, persons notoriously disaffected to it. While at the same time they overlooked the council books, where they would have found at large the rise and circumstances of all that matter, and that the king having entered into a pacification with the highlanders, then in arms, on condition that they should submit and take the oaths by the first of January 1691-2, and that this pacification (which was traversed by diverse interests well known to some of the inquisitors) not being likely to have all the desired effect; the king put out two very solemn proclamations, intimating that after the day none of the rebels should be received into mercy, but treated with the rigours of war; so that neither Glencoe nor any of them, had any reason to complain of unfair dealing. 6. By the story, as it is pieced together by these inquisitors, it is very plain, that old Glencoe did not come in till the end of December, the day indeed they thought fit to omit for reasons best known to themselves. When he did come in, he did not offer himself to any one empowered to tender the oaths, but old colonel Hill governor of Inverlochy, who told him, he had no such power. This governor being the person by whom any order could be put in execution, Glencoe according to his cunning, thought that if he kept a little correspondence with him, without directly submitting to the government, he should be safe, but to make all sure, he was forced to make a step further, and some days after the time went to the sheriff’s deputy of Argyleshire, where he took and subscribed the oaths, and got a certificate at the bottom of the paper, of his having taken them of that date from the sheriff’s deputy which was intrusted with himself, and was sent by him, with his son, to be presented to the privy council. But they having positive orders to admit of nobody after the day, the clerks would not receive the certificate, and these were sufficient warnings for Glencoe to have made his application to the general or to the council, to have his case represented. But having some dependence upon his intelligence with the governor of Inverlochy, and as it appears being willing to play fast and loose, he was content to keep his oaths in his pocket, and to make a fair appearance of friendship during the winter, that he might be safe at home till it was time to go to the field; nor will this subtilty seem any ways a thing extraordinary to persons that

‘ keiller, et Dom. Guliel. Hamiltone de White-
 ‘ law Senatores nostri Collegii Justitiæ, Dom.
 ‘ Jacobum Ogilvy, Sollicitatorem nostrum, et

‘ Adamum Drummond de Meggins (quorum
 ‘ quinque Numerus erit legitimus, ac cum po-
 ‘ testate iis Clericum suum eligendi) Commis-

are conversant with the genius of that sort of people. In this state of affairs some foot were sent from the garrison of Inverlochy to quarter in Glencoe, which does not appear to have been by any order. These troops Glencoe received with all the appearances of friendship, and the officer having received his orders during the time he was there entertained, had not resolution or honesty enough either to declare fair war, or lay down his commission, rather than imbrue his hands in the blood of his landlord and his children, but chose to take the opportunity of an order given by persons wholly ignorant of the hospitality and submission of these unhappy wretches, and executed it in a way that is for ever unjustifiable. In this, and this only, consisted the atrocity of that matter, and had the inquiry been directed to find out truly where the matter lay, the officers had received condign punishment. It is true, the report of the commission does charge these officers for their behaviour, but as the report bore hard in laying the blame where it was not, the king suspected the sincerity of the whole, and nothing followed upon it.

Lastly, the keenness and asperity that appears in the earl's letters, proceeded from a cause very different from what his enemies have endeavoured to possess the world of; and the truth of it is, he had pretty good reasons to wish, that if the highlanders should break the pacification, and draw upon a whole country the severity and cruelties of war, it should rather light upon an obscure small sept of tennants, considerable for nothing but their noted robberies and murders, who being treated with the rigours of war might procure an easy submission from the rest. And the earl was the more concerned, because he was thought to have a considerable part in advising the pacification, whereby the broken and desperate men in the highlands, some whereof were in rebellion, even before king James went away, and had defeated a party of his troops, who were commanded to assist in executing of a sentence upon a civil contract, might be brought in to be good subjects, and to have liberty and property in their native country: but for this counsel the earl was very liberally blamed by the enemies of the government, because it indeed broke their interests, nor have they ever made any considerable appearance since; and by others, because the thing was not done by them. And these people did not fail to solicit the late king to severities, and to disparage the pacification, as being very dishonourable; and upon that occasion the merits of Glencoe were set forth to the full, and a certain person was sent commissioner to manage that affair at court, who was witness at all the deliberations before the military order was drawn up.

To conclude, it is plain to any man who considers the matter, that it must appear very

strange, that ever the king or his ministers should have been suspected accessory to so mean a cruelty."

Sir John Dalrymple in his relation of Stair, says, that the scheme for cutting off by the means of "Letters of fire and sword, an inhuman but illegal weapon," all the highland rebels who should not take the oaths within the time prescribed, was suggested by lord Breadalbane, adopted by Dalrymple, and assented to by the king. And he adds, that "Glenco with all his clan was peculiarly obnoxious to lord Breadalbane, because there had been frequent wars between their people. And sir John Dalrymple thought that mercy would be thrown away upon them, because they had been in the irreclaimable habit of making incursions into the low countries for plunder, and because he had himself obtained a pardon for them from king William, when one of the tribe having discovered his accomplices in a crime, the rest had tied him to a tree, and every man in the tribe had stabbed him with a durk, Glenco the chieftain giving the first blow." I perceive not that Dalrymple refers to any distinct authorities for this circumstantial account, the latter part of which is somewhat indistinctly expressed.

Burnet states that the proposition of military execution upon the Glenco men originated from Breadalbane, and that the severe order concerning the separation of that clan from the rest of the highlanders, was signed by the king, without any inquiry about it, "for he was too apt to sign papers in a hurry without examining the importance of them;" the consequence of his suffering that sort of business to accumulate, till it became necessary to dispatch a great deal in a very little time. And he refers the king's permitting the matter to escape public investigation to the operation of his tenderness upon discovering how many had participated in the transaction.

In Dalrymple's Appendix to part 2, book 5, he has inserted some curious documents relative to the treaty with the Highlanders, and other proceedings about this time respecting them. The following are those most nearly connected with Glenco:

Secretary Stair to Lord Breadalbane.

My lord; London, Dec. 2, 1691.

"Yours of the 16th past was very uneasy; it is a little qualified by that of the 19th.—I know not by what I was moved to write to you eight days ago, as if I had known what these letters brought me; and though what I wrote then was only to hasten matters, the lingering being of ill consequence, yet I never thought there was danger in the miscarrying of it. I

‘ sionarios nostros, pro capienda precognitione
 ‘ et Inquisitionem faciendo de Cæde prædicta,
 ‘ per quos et quomodo, et per quam Coloratam

* Authoritatem commissæ erat, atque in ordine
 ‘ ad detectionem ejusdem cum potestate dictis
 ‘ Commissionariis, requirendi omnia Warranta

confess I was desirous of your return, upon the finishing of your negociation; but without that, or the having prevailed with one man, is what I never wish to see. I am convinced it is neither your fault, nor can any prejudice arise to their majesties service by the change of measures, but only ruin to the Highlanders; but yet at the present settlement it would do yourself and your friends no advantage. That person you suspect to have blown up the M'Leans, hath great access, and wants nothing but such an occasion to introduce him, and to make him in a manner necessary to do what you cannot. I doubt not all will come right; but though it is necessary you do seem to come hither, that they may rue, yet you had not best, in my opinion, leave it; and here you cannot be before our settlement, as I apprehend, is in readiness. I shall not repeat my thoughts of your doited cousin; I perceive half sense will play a double game, but it requires solidity to embrace an opportunity, which to him will be lost for ever; and the garrison of Inverlochy is little worth, if he can either sleep in his own bounds, or if he ever be master there. I repent nothing of the plan; but what account can be given why Argyle should be forced to part with Ardnamurchan, to which Lochiel hath no more pretence than I? you cannot believe with what indifference the king heard this matter, which did alarm and surprise us all, and confirmed the bold assertions of others against you. I hope you will be able to document sir Ewen's and Mr. John M'Lean's commissions, which are necessary for your vindication. Lieut. col. Hamilton, deputy governor of Inverlochy, is a discreet man, you may make use of him. I should be glad to find, before you get any positive order, that your business is done, for shortly we will conclude a resolution for the winter campaign. I do not fail to take notice of the frankness of your offer to assist. I think the clan Donnell must be rooted out, and Lochiel. Leave the M'Leans to Argyll. But before this, Leven and Argyll's regiment, with two more, would have been gone to Flanders. Now all stops, and no more money from England to entertain them. God knows whether the 12,000*l.* sterling had been better employed to settle the Highlands, or to ravage them; but since we will make them desperate, I think we should root them out before they can get that help they depend upon. Their doing, after they get K. J. allowance, is worse than their obstinacy; for these who lay down arms at his command, will take them up by his warrant. Be assured no papist will be exempted from this oath of allegiance; and in Ireland they must take it, by act of parliament now made, since the supremacy is out of it. You may assure yourself, in our settlement of government, you are not forgot by your friends, though I must tell you some are again emboldened, who had

given over to object against your being assumed.
 My dear lord, adieu.

Secretary Stair to Lord Breadalbane.

My lord, London, Dec. 3, 1691.

“ The last post brought Tarbat letters from Glengarry, or from his lady, and Rorry upon a message. Glengarry had sent to him to Edinburgh. This hath furnished him with opportunity to discourse the king on all these matters. He tells me he hath vindicated you; only the share that the M'Donalds get is too little, and unequal to your good cousins, (really that's true) and he would have the money given to Glengarry, and leave Argyll and him to deal for the plea. He thought his share had only been 1,000*l.* sterling. I have satisfied the king in these points, that his share is 1,500*l.* sterling, and that he nor none of them can get the money, if Argyll consent not; for that destroys all that is good in the settlement, which is, to take away grounds of hereditary feuds: to be brief, I will assure you that I shall never consent any body's meddling shall be so much regarded, as to get any of your terms altered. By the next I expect to hear either these people are come to your hand, or else your scheme for mauling them; for it will not delay. On the next week the officers will be dispatched from this, with instructions to garrison Inver-garry, and Buchan's regiment will join Leven's, which will be force enough; they will have petards and some cannon. I am not changed as to the expediency of doing things by the easiest means, and at leisure, but the madness of these people, and their ungratefulness to you, makes me plainly see there is no reckoning on them; but *delenda est Carthago*. Yet who have accepted, and do take the oaths, will be safe, but deserve no kindness; and even in that case, there must be hostages of their nearest relations, for there is no regarding men's words whom their interest cannot oblige. Menzies, Glengarry, and all of them, have written letters, and taken pains to make it believed, that all you did was for the interest of king James. Therefore look on, and you shall be satisfied of your revenge. Adieu.

Lord Basil Hamilton to the Duke.

London, 9th Jan. 1692.

“ I know not if the news of the Highlanders taking the oaths will put a stop to the marching of the troops that were designed for that purpose, but I believe it will not; but that the orders for their campaign will still go on.

Proposals concerning the Highlanders, by lord Breadalbane.

“ The last opinion given to your majesty, concerning the settling of the Highlanders, having had good success, by their submitting to your government, laying down arms, and

‘ seu directiones quæ eatenus concessa fuere,
 ‘ atque etiam examinandi omnes personas, quæ
 ‘ in re antedicta Negotium habuere; atque

taking the oath of allegiance; it remains now to propose to your majesty, how to make them useful and serviceable to you, and to take up arms for your majesty in case of any insurrection at home, or invasion from abroad, or that your majesty think it fit to use some of them in foreign parts.

“ 1st, The law obliges the nation to rise in arms when required, and to continue in arms forty days.

“ 2d, That your majesty by virtue of this law, ordain all the highland landlords and chieftains to have such a proportion of men ready, as their estates and interest may easily raise and provide, without making the levy too heavy for them, which levy may be, according to the calculation made thereof, four thousand good and effective men.

“ 3d, That these men, both officers and soldiers, be enrolled, and thereby ready to be called for when required. And to that end,

“ 4th, That your majesty give commission to some principal man in the highlands, to have the charge of raising, enrolling, and bringing them to the field, and placing of fit inferior officers over them, according to the number that every tribe sends out.

“ 5th, That this principal person have the pay of a general officer, but that only when he is employed, to defray his expence; who is to receive his orders from your majesty, or your government, or from the commander in chief of your standing forces in that kingdom.

“ 6th, That Lochzeal, in respect of his experience and skill, and his interest in the other clans besides his own, may have the next command over this militia, and have the pay of a colonel while he is employed, in regard he is ambitious to serve your majesty, and he is a protestant.

“ 7th, That there be forty captains set over the four thousand, of such as every tribe may have one of their own to command them, and these to have a gratuity at their return home, after they are dismissed, as they behave themselves, and do keep their men in good discipline; and this gratuity to be bestowed by the advice of your majesty’s government, the commander in chief of your forces, and of the person who has the principal command of the highlanders. That as soon as your majesty settles your government of that kingdom these two commissions be given, that they may immediately thereafter go about the enrolling of the men, according to the proportions to be charged by proclamation on every landlord and chieftain, to be ready when called for.

“ 8th, As this establishment will encourage the highlanders to be faithful, and serve your majesty, being commanded by persons of themselves, and in whom your majesty may confide; so it will extremely discourage such as design to give disturbance to the peace of that

‘ etiam Testes prout necessarium inveniatur,
 ‘ sive per eorum Juramenta, sive Declarationes,
 ‘ et tunc postea dicti Commissionarii nobis

kingdom, and to embarrass your government there, when they find that your majesty has engaged a formidable force of highlanders ready to fall on them, contrary to their expectation, and endeavours of keeping them from coming in.

“ 9th, Your majesty has these forces without any charge, except for a few officers, and that only when employed, and that but for a short time, which will discuss any commotion can be in that nation; and it may be asserted, that there cannot be better militia men than they are.

“ 10th, Your majesty has not a fund in that kingdom, nor can have, to maintain above three thousand standing forces, which are so few, that it is a great encouragement for all ill designs, especially in your majesty’s absence. But this addition of four thousand highlanders will alter the case exceedingly, will strengthen your government, encourage your standing forces, and disappoint your enemies; for they may be so ordered as to be ready to march on few days advertisement.

“ 11th, It will be fit there be a major or two in constant pay, for attending and looking after these forces, and to serve as adjutants for raising, bringing them to the field, and to keep them from prejudicing the countries.

“ 12th, That in pursuance of this diligence, and that the discontented disaffected parties in that kingdom may see that your majesty will trust and employ the highlanders, (if these force you to it) your majesty will be pleased to dispatch Lochziel home, contented, and obliged to your majesty’s royal bounty: it is but a small sum he pretends, and your majesty will find it very well bestowed.

“ 13th, In case your majesty, at any time, think it fit to employ a regiment of highlanders abroad, they may be detached out of this body of men; and in that case, it is humbly offered to your majesty, that they be allowed to use their own apparel, and their own arms, and to be disciplined in their own fashion, and to be commanded by persons having their language, and who have interest with them.

List of Chieftains to which the Proposals relate.

	Men.
The earl of Seafort, - - - - -	200
The viscount of Tarbat, - - - - -	50
The lord Lovitt, - - - - -	150
The earl of Sutherland, - - - - -	100
The lord Rhea, - - - - -	50
The laird of Ballingoun, - - - - -	100
The laird of Fouls, - - - - -	50
The laird of Straglasse, - - - - -	20
The laird of Glenmoriston, - - - - -	30
The laird of M’Intosh, - - - - -	100
M’Pherson of Clunie,	
The laird of Kilravock, - - - - -	150
The laird of Grant, - - - - -	200
The laird of Balmdaloch, - - - - -	20

transmittent verum statum rei antedictæ, una cum Probationibus et Testimoniis coram ipsis adducendis, uti post debitam et plenam informationem, necessarias Directiones, eatenus concedamus prout nobis congruum videbitur. In cujus Rei Testimonium, presentibus, magnum Sigillum nostrum appendi mandavimus. Apud Aulam nostram de Kensington, vigesimo nono die Mensis Aprilis, Anno Domini,

Millesimo Sexcentesimo Nonagesimo quinto Annoque Regni nostri Septimo.

Per Signaturam Manu S. D. N. Regis superscriptam.

Written to the Great Seal and Reg. May 20, 1695. DON. RANNALD, Deput.

Sealed at Edinburgh, May 20, 1695.

JO. DICKSONE.

The duke of Gordon,	- - - - -	300
The earl of Mar,	- - - - -	200
The marquis of Atholl,	- - - - -	300
The laird of Ashintullie,	- - - - -	30
The laird of Weem,	- - - - -	50
The laird of Garntully,	- - - - -	50
The laird of Strowan,	- - - - -	20
The earl of Perth,	- - - - -	150
The earl of Murray,	- - - - -	100
The earl of Monteath,	- - - - -	100
The marquis of Montrose,	- - - - -	150
The laird of Luss,	- - - - -	50
The laird of Macfarlane,	- - - - -	30
The earl of Argyle,	- - - - -	500
The earl of Breadalbane,	- - - - -	250
The laird of Calder,	- - - - -	100
The laird of M'Lane,	- - - - -	100
The laird of Locheal,	- - - - -	150
The captane of Clanronald,	- - - - -	100
Sir Donald M'Donald, of Fleat,	- - - - -	100
The laird of M'Leod,	- - - - -	100
The laird of Glengary,	- - - - -	100
The laird of M'Finzony,	- - - - -	30
M'Donald of Keppoch,	- - - - -	50
The laird of Appine,	- - - - -	50
The tutor of Appine,	- - - - -	30
The laird of Lochbouy,	- - - - -	30

One of the Highland Chieftain's Commissions to treat.

"I Col. MacDonell, of Keppoch, doth hereby, in my own name, and in name of Ranald M'Donell of Insh, Ronald M'Donall of Froets, Donald M'Donald Coldonarge, Aeneas M'Donell of Bohurtmy, Aeneas M'Donell of Killbrihonatt, Aeneas M'Donell of Tulloch, Alex. M'Donell of Inveroy, Neil Kennedy of Kearuthan, Alex. M'Donell of Tirnoderish, and the rest of my kinsmen and friends, earnestly desire and request, impower and commissionate the right hon. John earl of Breadalbane, to treat and conclude with the present government, for procuring to me and my foresaids friends such lending and concessions as he may obtain from them; hereby promissing, upon my oath, in my own name, and for them, that I and they shall stand and adhere to such terms as his lordship will procure for me and them. In witness whereof I have written and sealt thir presents, the twenty-fourth of June, 1691.

"COLL. MACDONALD."

One of the Highland Chieftain's Obligations to keep Peace.

"I Coll. MackDonell of Keppoch doth for myself, and on behalf of Ronald Mackdonald

of Insh, Ronald M'Donald of Fensett, Alex. M'Donell of Inveroy, Donald M'Donell of Cleonaige, Aeneas M'Donell of Bohuntine, Aeneas M'Donell of Killiehonat, Aeneas MacDonell of Tulloch, Neil Kennedy of Leonurhane-more, Alex. Kennedy of Leoruthan-beig, Alex. MacDonell of Firrnadross, Aeneas MacDonell of Auchnacochine, and all the rest of my kinsmen, friends, and followers, engage, on my faith and word, that I and they shall submit to the present government, live peaceably, and commit no acts of hostility nor depredations, nor join with any forces from abroad, or within the country, to commit any such acts until the first day of September next, providing that such proposals and terms as shall be made by the earl of Breadalbane to the present government be granted to me and those above-mentioned, against the foresaid day: providing also, that no act of hostility or depredations be committed against me, or any of my said friends or kinsmen, before the abovesaid first day of September next. To these conditions I do hereby oblige myself to stand and adhere: In witness whereof I have written and subscribed these presents, the 24th of June, 1691.

"COLL. MACKDONALD."

"There is a tradition, whether true or not I know not, that when lord Nottingham afterwards wrote to lord Breadalbane to account for the 12,000*l.* which had been given him to be divided among the Highlanders, he answered the letter in these words: 'My lord, the Highlands are quiet: the money is spent: and this is the best way of accounting between friends.'"

But, according to Burnet, Breadalbane had honestly brought back the money.

The following anecdote is highly creditable to human nature:

"During the rebellion, in the year 1745, the clan of Glenco were quartered near the house of lord Stair. The Pretender being afraid they would remember, that the warrant for the massacre of their clan had been signed by the earl's father, sent a guard to protect the house. The clan quitted the rebel army, and were returning home: the Pretender sent to know their reason. Their answer was, that they had been affronted; and when asked what the affront was, they said, 'the greatest of any; for they had been suspected of being capable of visiting the injuries of the father upon the innocent and brave son.'"

In English thus :

‘ William, by the grace of God, king of Great Britain, &c. To all good men to whom these presents shall come, greeting. Whereas we have taken into consideration, that though in the year of our Lord 1693, we gave power, by express instructions, to William duke of Hamilton deceased, and others, to examine and inquire into the slaughter of certain people of the name of Macdonald and others in Glenco, in the year 1692, and into the way and manner how the same was committed, yet nevertheless, the inquiry then made, pursuant to the said instructions, was defective ; and considering likewise, that the most effectual method for receiving full information of the true circumstances of the matter aforesaid, must be by a commission to that effect ; and being very well satisfied of the abilities and fitness of the persons under-named, for the ends before expressed : know ye therefore that we have named and constituted, and by the tenor of these presents do name and constitute, our right trusty and well-beloved cousin and counsellor, John marquis of Tweddale, our high-chancellor, and William earl of Annandale, and our trusty and beloved counsellors, John lord Murray, sir James Stuart our advocate, Adam Cockburn of Ormiston our justice clerk, Mr. Archibald Hope of Rankeiller, and sir William Hamilton of Whitelaw, senators of our college of justice, sir James Ogilvy our solicitor, and Adam Drummond of Meggins, (of whom five shall be a quorum, and granting them power to chuse their own clerk) our commissioners, to take precognition and make enquiry into the slaughter aforesaid, by whom and how, and by what colour of authority the same was committed : and in order to the discovery of the same, we give power to the said commissioners to send for all warrants and directions granted for that end : and likewise to examine all persons that had any hand in the business aforesaid, and likewise to examine witnesses as shall be found necessary, either upon oath or declaration ; and afterwards the said commissioners shall transmit to us the true state of the matter aforesaid, together with the proofs and evidence that shall be brought before them, that after due and full information, we may give such directions thereupon, as to us shall seem meet and necessary. In testimony whereof, we have commanded our Great Seal to be appended to these presents. Given at our court at Kensington, the 29th day of April, 1695, and of our reign the seventh.

‘ Superscribed by the signature of the handwriting of our most serene lord the king.

‘ Written to the Great Seal, and registered the 20th day of May, 1695.

‘ DON. RANALD, Deput.’

‘ Sealed at Edinburgh, May 20, 1695.

‘ JO. DICKSONE.’

PROCEEDINGS IN PARLIAMENT.

Upon the 22d of May, 1695, this commission was read in parliament, and the House voted *nem. con.* That his majesty’s high commissioner transmit the humble thanks of the parliament to his Majesty, for ordering an inquiry into that matter, whereby the honour and justice of the nation might be vindicated.

It being urged that the commission should proceed with diligence, as being a national concern, and that the discovery be made known to the House before its adjournment ; his grace assured them, that he doubted not of his majesty’s giving satisfaction to his parliament in that point, and that before they parted.

The commissioners proceeded according to order, and made the following Report :

REPORT of the Commission given by his majesty, for inquiring into the slaughter of the men of Glenco, subscribed at Halvud-house the 20th day of June, 1693.

John marquis of Tweddale, lord high chancellor of Scotland, William earl of Annandale, John lord Murray, sir James Stuart his majesty’s advocate, Adam Cockburn of Ormiston, lord justice clerk, sir Archibald Hope of Rankeiller, and sir William Hamilton of Whitelaw, two of the senators of the college of justice, sir James Ogilvy his majesty’s solicitor, and Adam Drummond of Meggins, commissioners appointed by his majesty, by his commission under the great seal of the date the 29th of April last past, to make inquiry, and to take trial and precognition about the slaughter of several persons of the surname of Macdonald and others in Glenco, in the year 1692, by whom and in what manner, and by what pretended authority the same was committed, with power to call for all warrants and directions given in that matter ; as also to examine all persons who had a hand therein, with what witnesses they should find necessary, either upon oath or declaration, and to report to his majesty the true state of the said matter, with the evidence and testimonies to be adduced before them, as the said commission more amply bears : having met and qualified themselves by taking the oath of allegiance and assurance, conform to the act of parliament, with the oath *de Fidei*, as use is in such cases, did according to the power given to them, chuse Mr. Alexander Monro of Beircroft to be their clerk ; and he having also qualified himself as above, they proceeded into the said inquiry, to call for all warrants and directions, with all such persons as witnesses, that might give light in the said matter ; and having considered the foresaid warrants and directions produced before them, and taken the oaths and depositions of the witnesses undernamed, they with all submission lay the report of the whole discovery made by them before his majesty in the order following. And, first, of some things that preceded the said slaughter. Secondly, of the

matter of fact, with the proofs and evidence taken, when and in what manner the same was committed. Thirdly, of the warrants and directions that either really were, or were pretended for the committing it. And, Lastly, The commissioners humble opinion of the true state and account of that whole business.

The things to be remarked preceding the said slaughter, were, that it is certain that the lairds of Glenco and Auchintriaten, and their followers, were in the insurrection and rebellion made by some of the highland clans, under the command first of the viscount of Dundee, and then of major general Buchan in the years 1689 and 1690. This is acknowledged by all. But when the earl of Braidalbin called the heads of the clans, and met with them in Auchallader in July 1691, in order to a cessation, the deceased Alexander Macdonald of Glenco was there with Glengary, sir John Macleane and others, and agreed to the cessation, as it is also acknowledged: But the deceased Glenco's two sons, who were at that time with their father in the town of Auchallader, depone, that they heard that the earl of Braidalbin did at that time quarrel with the deceased Glenco about some cows that the earl alledged were stolen from his men by Glenco's men; and that though they were not present to hear the words, yet their father told them of the challenge. And the two sons, with Ronald Macdonald, indweller in Glenco, and Ronald Macdonald in Innerriggen in Glenco, do all depone, that they heard the deceased Glenco say, that the earl of Braidalbin at the meeting of Auchallader threatened to do him a mischief, and that he feared a mischief from no man so much as from the earl of Braidalbin, as their depositions at the letter A in the margin bears. And Alexander Macdonald, second son to the deceased Glenco, doth farther depone, that he hath often heard from his father and others, that there had been in former times blood betwixt Braidalbin's family and their clan, as his deposition at the same mark bears. And here the commissioners cannot but take notice of what hath occurred to them in two letters from secretary Stair to lieutenant colonel Hamilton, one of the 1st, and another of the 3d of December, 1691, wherein he expresses his resentment from the marring of the bargain that should have been betwixt the earl of Braidalbin and the highlanders to a very great height, charging some for their despite against him, as if it had been the only hindrance of that settlement: Whence he goes on in his of the 3d of December to say, that since the government cannot oblige them, it is obliged to ruin some of them to weaken and frighten the rest, and that the Macdonalds will fall in this net; and, in effect, seems even from that time, which was almost a month before the expiring of the king's indemnity, to project with lieutenant colonel Hamilton that some of them should be rooted out and destroyed. His majesty's proclamation of indemnity was published in August 1691, offering a free indem-

nity and pardon to all the highlanders who had been in arms, upon their coming in and taking the oath of allegiance betwixt that and the 1st of January thereafter: And in compliance with the proclamation, the deceased Glenco goes about the end of December 1691, to colonel Hill, governor of Fort William at Inverlochie, and desired the colonel to minister to him the oath of allegiance, that he might have the king's indemnity. But colonel Hill in his deposition, marked with the letter B, doth farther depone, that he hastened him away all he could, and gave him a letter to Ardkinlas to receive him as a lost sheep; and the colonel produces Ardkinlas's answer to that letter, dated the 9th of January, 1691, bearing, that he had endeavoured to receive the great lost sheep Glenco, and that Glenco had undertaken to bring in all his friends and followers, as the privy council should order: and Ardkinlas further writes, that he was sending to Edinburgh, that Glenco, though he had mistaken in coming to colonel Hill to take the oath of allegiance, might yet be welcome, and that thereafter the colonel should take care that Glenco's friends and followers may not suffer, till the king and council's pleasure be known, as the said letter marked on the back with the letter B. bears. And Glenco's two sons above named do depone in the same manner, that their father went about the end of December to colonel Hill, to take the oath of allegiance; but finding his mistake, and getting the colonel's letter to Ardkinlas, he hasted to Inverary as soon as he could for the bad way and weather, and did not so much as go to his own house in his way to Inverary, though he past within half a mile of it, as both their depositions at the letter B bears. And John Macdonald, the eldest son, depones farther at the same mark, that his father was taken in his way by captain Drummond at Barkaldin, and detained 24 hours.

Sir Colin Campbel of Ardkinlas, sheriff-deputy of Argile, depones, that the deceased Glenco came to Inverary about the beginning of January, 1692, with a letter from colonel Hill to the effect above mentioned, and was three days there before Ardkinlas could get thither, because of bad weather; and that Glenco said to him, that he had not come sooner, because he was hindered by the storm. And Ardkinlas farther depones, that when he declined to give the oath of allegiance to Glenco, because the last of December, the time appointed for the taking of it, was past, Glenco begged with tears that he might be admitted to take it, and promised to bring in all his people within a short time to do the like; and if any of them refused, they should be imprisoned or sent to Flanders. Upon which Ardkinlas says, he did administer to him the oath of allegiance upon the 6th of January, 1692, and sent a certificate thereof to Edinburgh, with colonel Hill's letter to Colin Campbel, sheriff clerk of Argile, who was then at Edinburgh; and further wrote to the said Colin that he should write back to him, whether Glenco's taking of the oath was

allowed by the council or not, as Ardkinlas's deposition at the letter B testifies. And the said Colin, sheriff clerk, depones, that the foresaid letters, and the certificate relating to Glenco, with some other certificates relating to some other persons all upon one paper, were sent in to him to Edinburgh by Ardkinlas; which paper being produced upon oath by sir Gilbert Elliot, clerk of the secret council, but rolled and scored as to Glenco's part, and his taking the oath of allegiance, yet the commissioners found that it was not so delete or dashed, but that it may be read that Glenco did take the oath of allegiance at Inverary, the 6th day of January, 1692. And the said Colin Campbell depones, that it came to his hand fairly written, and not dashed; and that with this certificate he had the said letter from Ardkinlas (with colonel Hill's above mentioned letter to Ardkinlas inclosed) bearing, how earnest Glenco was to take the oath of allegiance, and that he had taken it upon the 6th of January, but that Ardkinlas was doubtful if that the council would receive it: and the sheriff clerk did produce before the commissioners the foresaid letter by colonel Hill to Ardkinlas, dated at Fort William the 31st day of December, 1691, and bearing, that Glenco had been with him, but slipped some days out of ignorance; yet that it was good to bring in a lost sheep at any time, and would be an advantage to render the king's government easy. And with the said sheriff clerk, the lord Aberuchil, Mr. John Campbell, writer to the signet, and sir Gilbert Elliot, clerk to the council, do all declare, That Glenco's taking the oath of allegiance, with Ardkinlas's foresaid certificate, as to his part of it, did come to Edinburgh, and was seen by them fairly written, and not scored or dashed; but that sir Gilbert and the other clerk of the council refused to take it in, because done after the day appointed by the proclamation. Whereupon the said Colin Campbell, and Mr. John Campbell, went, as they depone, to the lord Aberuchil, then a privy counsellor, and desired him to take the advice of privy counsellors about it; and accordingly they affirm that Aberuchil said he had spoke to several privy counsellors, and partly to the lord Stairs, and that it was their opinion that the foresaid certificate could not be received without a warrant from the king, and that it would neither be safe to Ardkinlas, nor profitable to Glenco, to give in the certificate to the clerk of the council; and this the lord Aberuchil confirms by his deposition, but doth not name therein the lord Stair. And Colin Campbell, the sheriff clerk, does farther depone, that with the knowledge of the lord Aberuchil, Mr. John Campbell, and Mr. David Moncreif, clerk to the council, he did by himself, or his servant, score or delete the foresaid certificate, as now it stands scored, as to Glenco's taking the oath of allegiance, and that he gave it in so scored or obliterate to the said Mr. David Moncreif, clerk of the council, who took it in as it is now produced. But it doth not appear by all these depositions, that the

matter was brought to the council board, that the council's pleasure might be known upon it, though it seems to have been intended by Ardkinlas, who both writ himself, and sent colonel Hill's letter for to make Glenco's excuse, and desired expressly to know the council's pleasure.

After that Glenco had taken the oath of allegiance, as is said, he went home to his own house; and, as his own two sons above named depone, he not only lived there for some days quietly and securely, but called his people together, and told them he had taken the oath of allegiance, and made his peace, and therefore desired and ingaged them to live peaceably under king William's government, as the depositions of the said two sons, who were present, marked with the letter E. bear.

These things having preceded the slaughter, which happened not to be committed until the 13th of February, 1692, six weeks after the deceased Glenco had taken the oath of allegiance at Inverary, the slaughter of the Glenco men was in this manner, viz. John and Alexander Macdonalds, sons to the deceased Glenco, depone, That Glengary's house being reduced, the forces were called back to the south, and Glenlyon, a captain of the earl of Argyle's regiment, with lieutenant Lindsay, ensign Lindsay, and six score soldiers, returned to Glenco about the 1st of February, 1692, where, at their entry, the elder brother John met them with about 20 men, and demanded the reason of their coming; and lieutenant Lindsay shewed him his orders for quartering there under colonel Hill's hand, and gave assurance that they were only come to quarter; whereupon they were billeted in the country, and had free quarters and kind entertainment, living familiarly with the people until the 13th day of February. And Alexander further depones, that Glenlyon being his wife's uncle, came almost every day and took his morning drink at his house; and that the very night before the slaughter, Glenlyon did play at cards in his own quarters with both the brothers. And John depones, That old Glenco his father had invited Glenlyon, lieutenant Lindsay, and ensign Lindsay, to dine with him upon the very day the slaughter happened. But on the 13th day of February, being Saturday, about four or five in the morning, lieutenant Lindsay, with a party of the foresaid soldiers, came to old Glenco's house,* where having called in a friendly manner, and got in, they shot his father dead with several shots as he was rising out of his bed; and the mother having got up and put on her clothes, the soldiers stripped her naked, and drew the rings off her fingers, with their teeth; as likewise they killed one man more, and wounded another grievously at

* Aubrey, in his *Miscellanies*, relates that Archibald Mackeanysers alias Mackdonald, a second-sighted seer, had warned Glencoe, "that he would be murdered in the night time in his own house, three months before it happened."

The same Author makes mention that

the same place. And this relation they say they had from their mother, and is confirmed by the deposition of Archibald Macdonald indweller in Glenco; who farther depones that Glenco was shot behind his back with two shots, one through the head, and another through the body; and two more were killed with him in that place, and a third wounded and left for dead. And this he knows, because he came that same day to Glenco's house, and saw his dead body lying before the door, with the other two that were killed, and spoke with the third that was wounded, whose name was Duncan Don, who came there occasionally with letters from the brae of Mar.

The said John Macdonald, eldest son to the deceased Glenco, depones, the same morning that his father was killed, there came soldiers to his house before day, and called at his window, which gave him the alarm, and made him go to Innerriggen, where Glenlyon was quartered, and that he found Glenlyon and his men preparing their arms, which made the deponent ask the cause; but Glenlyon gave him only good words, and said they were to march against some of Glengary's men, and if there were ill intended, would not he have told Sandy and his niece? meaning the deponent's brother and his wife; which made the deponent go home and go again to his bed, until his servant, who hindered him to sleep, raised him. And when he rose and went out, he perceived about twenty men coming towards his house, with their bayonets fixed to their muskets; whereupon he fled to the hill, and having Auchnaion, a little village in Glenco, in view, he heard the shots wherewith Auchintriaten and four more were killed; and that he heard also the shots at Innerriggen, where Glenlyon had caused to kill nine more, as shall be hereafter declared. And this is confirmed by the concurring deposition of Alexander Macdonald his brother, whom a servant waked out of sleep, saying, It is no time for you to be sleeping, when they are killing your brother at the door; which made Alexander to flee with his brother to the hill, where both of them heard the foresaid shots at Auchnaion and Innerriggen. And the said John, Alexander, and Archibald Macdonald do all depone, that the same morning there was one serjeant Barber and a party at Auchnaion, and that Auchintriaten being there in his brother's house with eight more sitting about the fire, the soldiers discharged upon them about eighteen shot, which killed Auchintriaten and four more; but the other four, whereof some were wounded, fall-

Glencoe had received concerning a former danger previous notice from the same seer, which had been equally neglected and equally verified. It may, however, be thought by most readers of this first prediction, that the danger might have been foreseen without preternatural intelligence, and that compliance to the warning might have been given without any stupidity of superstition or of credulity.

ing down as dead, serjeant Barber laid hold on Auchintriaten's brother, one of the four, and asked him if he were alive? He answered, that he was, and that he desired to die without rather than within: Barber said, that for his meat that he had eaten, he would do him the favour to kill him without; but when the man was brought out, and soldiers brought up to shoot him, he having his plaid loose, flung it over their faces, and so escaped; and the other three broke through the back of the house, and escaped: and this account the deponents had from the men that escaped. And at Innerriggen, where Glenlyon was quartered, the soldiers took other nine men, and did bind them hand and foot, killed them one by one with shot. And when Glenlyon inclined to save a young man of about twenty years of age, one captain Drummond came and asked how he came to be saved, in respect of the orders that were given, and shot him dead. And another young boy of about thirteen years ran to Glenlyon to be saved, he was likewise shot dead: and in the same town there was a woman and a boy about four or five years of age killed: and at Auchnaion there was also a child missed, and nothing found of him but the hand. There were likewise several killed at other places, whereof one was an old man about eighty years of age. And all this the deponents say they affirm, because they heard the shot, saw the dead bodies, and had an account from the women that were left. And Ronald Macdonald, indweller in Glenco, farther depones, that he being living with his father in a little town of Glenco, some of Glenlyon's soldiers came to his father's house, the said 13th of February in the morning, and dragged his father out of his bed, and knocked him down for dead at the door; which the deponent seeing, made his escape, and his father recovering after the soldiers were gone, got into another house; but this house was shortly burnt, and his father burnt in it: and the deponent came there after, and gathered his father's bones, and burnt them. He also declares, that at Auchnaion, where Auchintriaten was killed, he saw the body of Auchintriaten and three more cast out and covered with dung. And another witness of the same declares, that upon the same 13th of February, Glenlyon and lieutenant Lindsay, and their soldiers, did in the morning before day fall upon the people of Glenco when they were secure in their beds, and killed them; and he being at Innerriggen, fled with the first, but heard shots, and had two brothers killed there, with three men more and a woman, who were all buried before he came back. And all these five witnesses concur, that the foresaid slaughter was made by Glenlyon and his soldiers, after they had been quartered, and lived peaceably and friendly with the Glenco men about 13 days, and that the number of those whom they knew to be slain were about 25; and that the soldiers after the slaughter did burn the houses, barns and goods, and carried away a

great spoil of horse, nolt, and sheep, above a thousand. And James Campbel, soldier in the castle of Sterling, depones, that in January 1692, he being then a soldier in Glenlyon's company, marched with the company from Inverlochie to Glenco, where the company was quartered, and very kindly entertained for the space of fourteen days; that he knew nothing of the design of killing the Glenco men, till the morning that the slaughter was committed; at which time Glenlyon and captain Drummond's companies were drawn out in several parties, and got orders from Glenlyon and their other officers to shoot and kill all the countrymen they met with: and that the deponent being one of the party which was at the town where Glenlyon had his quarters, did see several men drawn out of their beds, and particularly he did see Glenlyon's own landlord shot by his order, and a young boy of about twelve years of age, who endeavoured to save himself by taking hold of Glenlyon, offering to go any where with him if he would spare his life, and was shot dead by captain Drummond's order: and the deponent did see about eight persons killed, and several houses burnt, and women flying to the hills to save their lives. And lastly, sir Colin Campbel of Aberuchil depones, that after the slaughter, Glenlyon told him that Macdonald of Innerriggen was killed with the rest of the Glenco men, with col. Hill's pass or protection in his pocket, which a soldier brought and shewed to Glenlyon.

The testimonies above set down being more than sufficient to prove a deed so notoriously known, it is only to be remarked, that more witnesses of the actors themselves might have been found, if Glenlyon and his soldiers were not at present in Flanders with Argile's regiment. And it is farther added, that lieutenant colonel Hamilton, who seems by the orders and letters that shall be hereafter set down, to have had the particular charge of this execution, did march the night before the slaughter with about 400 men; but the weather falling to be very bad and severe, they were forced to stay by the way, and did not get to Glenco against the next morning, as had been concerted betwixt major Duncason and lieutenant colonel Hamilton; so that the measures being broke, lieutenant colonel Hamilton and his men came not to Glenco till about eleven of the clock, after the slaughter had been committed, which proved the preservation and safety of the tribe of Glenco, since by this means the far greater part of them escaped: and then the lieutenant colonel being come to Cannelochleven, appointed several parties for several posts, with orders that they should take no prisoners, but kill all the men that came in their way. Thereafter some of the lieutenant colonel's men marched forward in the Glen, and met with major Duncason's party, whereof a part under Glenlyon had been sent by lieutenant colonel Hamilton to quarter there some days before; and these men told how they had

killed Glenco and about thirty six of his men that morning, and that there remained nothing to be done by the lieutenant colonel and his men, save that they burnt some houses, and killed an old man by the lieutenant colonel's orders, and brought away the spoil of the country. And this in its several parts is testified by John Forbes, major in colonel Hill's regiment, Francis Farquhar and Gilbert Kennedy, both lieutenants in that regiment, who were all of the lieutenant colonel's party, as their depositions more fully bear.

It may also be here noticed, that some days after the slaughter of the Glenco men was over there came a person from Campbel of Balcalden, chamberlain, i. e. steward to the E. of Braidalbin, to the deceased Glenco's sons, and offered to them, if they would declare under their hands, that the earl of Braidalbin was free and clear of the said slaughter, they might be assured of the earl's kindness for procuring their remission and restitution, as was plainly deposed before the commissioners.

It remains now to give an account of the warrants, either given or pretended to be given for the committing of the foresaid slaughter; for clearing whereof it is to be noticed, that the king having been pleased to offer by proclamation an indemnity to all the highland rebels, who should come in and accept thereof by taking the oath of allegiance, betwixt and the first of January 1692, after the day was elapsed, it was very proper to give instructions how such of the rebels as had refused his majesty's grace should be treated; and therefore his majesty, by his instructions of the date of the 11th of January 1692, directed to sir Thomas Levingston, and supersigned and countersigned by himself, did indeed order and authorize sir Thomas to march the troops against the rebels, who had not taken the benefit of the indemnity, and to destroy them by fire and sword (which is the actual stile of our commissions against intercommuned rebels) but with this express mitigation in the fourth article, viz. 'That the rebels may not think themselves desperate, we allow you to give terms and quarters, but in this manner only, that chieftains and heritors, or leaders, be prisoners of war, their lives only safe, and all other things in mercy, they taking the oath of allegiance: and the community taking the oath of allegiance, and rendering their arms, and submitting to the government, are to have quarters and indemnity for their lives and fortunes, and to be protected from the soldiers,' as the principal paper of instructions produced by sir Thomas Levingston bears.

After these instructions there were additional ones given by his majesty to sir Thomas Levingston upon the 16th of the said month of January, supersigned and countersigned by his majesty, and the date marked by secretary Stair's hand, which bear orders for giving of passes, and for receiving the submission of certain of the rebels; wherein all to be noticed to the present purpose is, that therein his majesty doth judge it much better that these who took

not the benefit of the indemnity in due time, should be obliged to render upon mercy, they still taking the oath of allegiance : and then its added, if Mackean of Glenco and that tribe can be well separated from the rest, it will be a proper vindication of the public justice to extirpate that sect of thieves.* And of these additional instructions, a principal duplicate was sent to sir Thomas Levingston, and another to colonel Hill, and were both produced ; and these were all the instructions given by the king in this matter.

But secretary Stair, who sent down these instructions, as his letters produced, written with his hand to sir Thomas of the same date with them, testify, by a previous letter of the date of the 7th of the said month of January, written and subscribed by him to sir Thomas, says, You know in general that these troops posted at Inverness and Inverlochier will be ordered to take in the house of Innergarie, and to destroy entirely the country of Lochaber, Locheal's lands, Kippochs, Glengaries and Glenco ; and then adds, ' I assure you your power shall be full enough, and I hope the soldiers will not trouble the government with prisoners.'† And by another letter of the 9th of the said month of January, which is likewise before the instructions, and written to sir Thomas as the former, he hath this expression, That these who remain of

* This Order is thus given in the Memoirs of the Massacre of Glenco :

" WILLIAM R.

" As for Mac-Jan of Glenco and that tribe, if they can be well distinguished from the rest of the Highlanders, it will be proper, for the vindication of public justice, to extirpate that set of thieves.

" W. R."

" This was directed to sir Thomas Levingston and colonel Hill. And the parliament has voted that Levingston or Hill's orders did not exceed these instructions ; nor, indeed, could they ; for what can exceed extirpation !"

† In the Memoirs of the Massacre of Glenco, is given the following Letter from major Duncanson to captain Campbell :

" Ballacholis, Feb. 12, 1692.

" Sir ; You are hereby ordered to fall upon the rebels, the Mac Donalds of Glenco, and put all to the sword under seventy. You are to have especial care that the old fox and his sons do upon no account escape your hands. You are to secure all the avenues that no man escape. This you are to put in execution at five o'clock in the morning precisely, and by that time, or very shortly after it, I will strive to be at you with a stronger party ; if I do not come to you at five you are not to tarry for me, but to fall on. This is by the king's special command, for the good and safety of the country, that these miscreants may be cut off, root and branch. See that this be put in execution, without feud or favour, else you may expect to be treated as not true to the king or govern-

the rebels, are not able to oppose, and their chieftains being all papists, it is well the vengeance falls there ; for my part I could have wished the Macdonalds had not divided, and I am sorry that Kippoch and Mackean of Glenco are safe. And then afterwards we have an account, that Locheal, Macnoughton, Appin and Glenco took the benefit of the indemnity at Inverary, and Kippoch and others at Inverness. But this letter of the 11th of January, sent with the first instructions to sir Thomas hath this expression, I have no great kindness to Kippoch nor Glenco, and it's well that people are in mercy ; and then just now my lord Argile tells me, that Glenco hath not taken the oath, at which I rejoice ; it is a great work of charity to be exact in rooting out that damnable sect, the worst of the highlands. But in his letter of the 16th of January, of the same date with the additional instructions, though he writes in the first part of the letter, The king does not at all incline to receive any after the diet, but on mercy ; yet he thereafter adds, But for a just example of vengeance, I entreat the thieving tribe of Glenco may be rooted out to purpose. And to confirm his by this letter of the same date, sent with the other principal duplicate, and additional instructions to colonel Hill, after having written that such as render on mercy might be saved, he adds, I shall intreat you that for a just vengeance and public example, the tribe of Glenco may be rooted out to purpose. The earls of Argile and Braidalbin have promised that they shall have no retreat in their bounds, the passes to Ronoch would be secured, and the hazard certified to the laird of Weems to reset them ; in that case Argile's detachment, with a party that may be posted in island Stalker, must cut them off, and the people of Appin are none of the best.

This last letter, with the instructions for colonel Hill, was received by major Forbes in his name at Edinburgh ; and the major depones, that by the allowance he had from the colonel, he did unseal the packet, and found therein the letter and instructions as above, which he sent forward to colonel Hill : and that in the beginning of February 1692, being in his way to Fort-William, he met some companies of Argile's regiment at Bellishiel's, and was surprized to understand that they were going to quarter in Glenco, but said nothing till he came to Fort-William, where colonel Hill told him that lieut. col. Hamilton had got orders about the affair of Glenco, and that therefore the colonel had left it to lieutenant colonel Hamilton's management, who, he apprehends, had concerted the matter with major Duncanson. And colonel Hill depones, that he understood

ment, nor a man fit to carry a commission in the king's service. Expecting you will not fail in the fulfilling hereof, as you love yourself, I subscribe these with my hand.

" ROBERT DUNCAISON."

" For their majesties service, to captain Robert Campbell, of Glenlyon."

that lieutenant col. Hamilton and major Duncason got the orders about the Glenco men, which were sent to lieut. col. Hamilton; that for himself he liked not the business, but was very grieved at it; that the king's instructions of the 16th of January 1692, with the master of Stair's letters of the same date, were brought to him by major Forbes, who had received them, and unsealed the packet at Edinburgh, as these two depositions do bear.

Yet the execution and slaughter of the Glenco men did not immediately take effect, and thereafter on the 30th of the said month of January, the master of Stair doth again write two letters, one to sir Thomas Levingston, which bears, I am glad that Glenco did not come in within the time prefixed; I hope what is done there may be in earnest, since the rest are not in a condition to draw together to help; I think to harry (that is to drive) their cattel, and burn their houses, is but to render them desperate lawless men to rob their neighbours, but I believe you will be satisfied it were a great advantage to the nation, that thieving tribe were rooted out, and cut off; it must be quietly done, otherwise they will make shift for both their men and their cattel; Argyle's detachment lies in Letrickweel to assist the garison to do all of a sudden. And the other to colonel Hill, which bears, Pray when the thing concerning Glenco is resolved, let it be secret and sudden, otherwise the men will shift you, and better not meddle with them than not to do it to purpose, to cut off that nest of robbers, who have fallen in the mercy of the law, now when there's force and opportunity, whereby the king's justice will be as conspicuous and useful as his clemency to others. I apprehend the storm is so great, that for some time you can do little, but so soon as possible I know you will be at work, for these false people will do nothing but as they see you in a condition to do with them.

Sir Thomas Levingston having got the king's instructions, with secretary Stair's letter of the 16th of January, and knowing by a letter he had from the master of Stair of the date of the 7th of January 1692, that lieutenant colonel Hamilton was to be the man employed in the execution of the Glenco men, in pursuance of the secretary's letter, he writes to lieutenant colonel Hamilton upon the 23d of the said month of January, telling him, that it was judged good news that Glenco had not taken the oath of allegiance within the time prefixed; and that secretary Stair in his last letter had made mention of him, and then adds, 'For, Sir, here is a fair occasion for you, to show that your garrison serves for some use; and seeing that the orders are so positive from court to me not to spare any of them that have not timely come in, as you may see by the orders I send to your colonel, I desire you would begin with Glenco, and spare nothing which belongs to him; but do not trouble the government with prisoners:' as this letter produced by lieutenant colonel Hamilton bears.

And sir Thomas being heard upon this letter,

declared that at that time he was immediately returned from his journey to London, and that he knew nothing of any soldiers being quartered in Glenco, and only meant that he should be prosecuted as a rebel standing out, by fair hostility: and in this sense he made use of the same words and orders written to him by secretary Stair. Thereafter colonel Hill gives his order to be directed to lieutenant colonel Hamilton, in these terms: 'Sir, you are with 400 of my regiment, and the 400 of my lord Argyle's regiment, under the command of major Duncason, to march straight to Glenco, and there put in due execution the orders you have received from the commander in chief. Given under my hand at Fort William, the 12th day of February, 1692.' And this order is also produced by lieutenant colonel Hamilton.

Then the same day lieutenant colonel Hamilton wrote to major Duncason in these terms: 'Sir, pursuant to the commander in chief and my colonel's orders to me, for putting in execution the service against the rebels of Glenco, wherein you with a party of Argyle's regiment, now under your command, are to be concerned, you are therefore to order your affairs so that you be at the several posts assigned you by seven of the clock to-morrow morning being Saturday, and fall in action with them; at which time I will endeavour to be with the party from this place at the post appointed them. It will be necessary that the avenues minded by lieutenant Campbell on the south side be secured; that the old fox nor none of his cubs get away: the orders are, that none be spared, nor the government troubled with prisoners;' and the copy of this last order is produced under lieutenant colonel Hamilton's own hand, and accordingly the slaughter of Glenco and his poor people did ensue the next morning, being the 13th of February, 1692, in the manner narrated.*

And upon the whole matter, it is the opinion

* The author of the *Memoirs of the Massacre of Glenco*, says, that he had copies of Dalrymple's nine letters (viz. to col. Hamilton, two dated 1st and 3d December, 1691; to sir Thomas Levingston five, dated 7th, 9th, 11th, 16th, 30th January 1692; and to col. Hill, two dated on the same days with the last two to Levingston) which were produced respecting this massacre; but I do not observe that he states from them any new matter, unless it be the following passages:

"The winter is the only season in which we are sure the Highlanders cannot escape us, nor carry their wives, bairns, and cattle to the mountains."

"It is the only time that they cannot escape you, for human constitutions cannot endure to be long out of houses. This is the proper season to maul them in the cold long nights."

"I expect you will find little resistance but from the season."

"I am confident you will see there are full powers given you in very plain terms, and yet

of the commission ; First, That it was a great wrong that Glenco's care and diligence, as to his taking the oath of allegiance, with Ardkinlas's certificate of his taking the oath of allegiance on the 6th of January 1692, and colonel Hill's letter to Ardkinlas, and Ardkinlas's letter to Colin Campbel, sheriff clerk, for clearing Glenco's diligence and innocence, were not presented to the lords of his majesty's privy council, when they were sent into Edinburgh in the said month of January ; and that those who advised the not presenting thereof were in the wrong, and seem to have had a malicious design against Glenco ; and that it was a further wrong that the certificate, as to Glenco's taking the oath of allegiance, was delete and obliterate after it came to Edinburgh ; and that being so obliterate, it should neither have been presented to, or taken in by the clerk of the council, without an express warrant from the council. Secondly, That it appears to have been known at London, and particularly to the master of Stair, in the month of January 1692, that Glenco had taken the oath of allegiance, though after the day prefixed ; for he saith in his letter of the 30th of January to sir Thomas Livingston, as is above remarked, I am glad that Glenco came not in within the time prescribed. Thirdly, that there was nothing in the king's instructions to warrant the committing of the foresaid slaughter, even as to the thing itself, and far less as to the manner of it ; seeing all his instructions do plainly import, that the most obstinate of the rebels might be received into mercy, upon taking the oath of allegiance, though the day was long before elapsed, and that he ordered nothing concerning Glenco and his tribe, but that if they could be well separated from the rest, it would be a proper vindication of the public justice to extirpate that sect of thieves : which plainly intimates that it was his majesty's mind that they could not be separated from the rest of these rebels, unless they still refused his mercy by continuing in arms and refusing the allegiance ; and that even in that case they were only to be proceeded against in the way of public justice, and no other way. Fourthly, That secretary Stair's letters, especially that of the 11th of January 1692, in which he rejoices to hear that Glenco had not taken the oath, and that of the 16th of January, of the same date with the king's additional instructions, and that of the 30th of the same month, were no ways warranted by, but quite exceeded the king's foresaid instructions ; since the said letters, without

the method left very much to your own discretion."

"Till we see what is done by the chiefs, it is not time to receive their tenants, or admitting them to take the oaths or hoping for pardon, till they give evidence that they are willing to pay their rents to you, and to take tacks for their former duties. Who will not do so, and were in the rebellion, must feel the dismal consequences of it."

any insinuation of any method to be taken that might well separate the Glenco men from the rest, did, in place of prescribing a vindication of public justice, order them to be cut off and rooted out in earnest, and to purpose, and that suddenly, and secretly, and quietly, and all on a sudden ; which are the express terms of the said letters ; and comparing them and the other letters with what ensued, appear to have been the only warrant and cause of their slaughter, which in effect was a barbarous murder, perpetrated by the persons deponed against. And this is yet farther confirmed by two more of his letters, written to colonel Hill after the slaughter committed, viz. on the 5th of March 1692, wherein, after having said that there was much talk at London, that the Glenco men were murdered in their beds after they had taken the allegiance, he continues, For the last I know nothing of it ; I am sure neither you, nor any body impowered to treat or give indemnity, did give Glenco the oath ; and to take it from any body else after the diet elapsed, did import nothing at all ; all that I regrave is, that any of the sort got away, and there is a necessity to prosecute them to the utmost. And another from the Hague, the last of April 1692, wherein he says, For the people of Glenco, when you do your duty in a thing so necessary to rid the country of thieving, you need not trouble yourself to take the pains to vindicate yourself by shewing all your orders, which are now put in the Paris gazette ; when you do right you need fear nobody ; all that can be said is, that in the execution, it was neither so full nor so fair as might have been. And this their humble opinion the commissioners, with all submission, return and lay before his majesty, in discharge of the foresaid commission.

Sic Subscribitur, TWEDDALE, ANANDALE (now marquiss of Anandale, and president of the privy council.) MURRAY, (now duke of Athol and lord privy seal.) JA. STUART (her majesty's advocate.) ADAM COCKBURN (late lord treasurer deput.) W. HAMILTON (lord Whitelaw, one of the lords of the session.) JA. OGILVIE (now earl of Seafield and lord high chancellor.) A. DRUMMOND.

The Report being agreed on, and signed by the commissioners, several members moved in parliament on the 24th of June, that the said report should be laid before the house.

Upon which his majesty's high commissioner acquainted the parliament, that the report of the commission, for inquiring into the business of Glenco, being sent to his majesty on Thursday last, he would lay the same before them, with the depositions of the witnesses, and other documents relating thereto, for their satisfaction and full information ; and if they thought fit to make any other use of it, he made no doubt it would be with that deference and submission to his majesty's judgment, that becometh so loyal and zealous a par-

liament, in vindication of the justice and honour of his majesty's government.

Then the report from the commission for inquiring into the slaughter of the Glenco men, was read, with the depositions of the witnesses, the king's instructions, and the master of Stair's letters, for instructing the said report.

After hearing the said report, it was voted, *Nemine contradicente*, that his majesty's instructions of the 11th and 16th days of January 1692, touching the highland rebels, who did not accept in due time of the benefit of his indemnity, did contain a warrant for mercy to all without exception, who should take the oath of allegiance and come in upon mercy, though the first day of January 1692, prefixed by the proclamation of indemnity, was passed; and that therefore these instructions contained no warrant for the execution of the Glenco men, made in February thereafter. Then the question was stated and voted, If the execution of the Glenco men in February 1692, as it is represented to the parliament, be a murder or not? and carried in the affirmative.

Moved, That since the parliament has found it a murder, it may be inquired into who were the occasion of it, and the persons guilty and committers of it, and in what way and manner they should be prosecuted. And after some debate thereon, the method of the said prosecution was delayed, and resolved, That this House will again take the same under consideration first on Monday next: and the master of Stair's letters were ordered to be put in the clerk's hands, and any members of parliament allowed an inspection thereof.

June 26, 1695.

The inquiry into the persons who were the occasion of the slaughter of the Glenco men was again proponed, and motioned that before any further procedure in that affair, there may be an address sent to his majesty on what is already past. And after some debate thereon, the question stated, proceed further in the inquiry before addressing his majesty, or address upon what is already past without any further procedure? And carried, proceed further before address.

Thereafter the question stated and voted, if they should first proceed to consider the master of Stair's letters, or the actors of the murder of Glenco men? and carried, First to consider the master of Stair's letters.

Then the master of Stair's letters, with the king's instructions to sir Thomas Levingston and col. Hill, and the 4th article of the opinion of the commission relating to the master of Stair, was read; and after some debate the question was stated, whether the master of Stair's letters do exceed the king's commission, towards the killing and destroying the Glenco men, or not? And carried in the affirmative.

June 28, 1695.

The president of parliament represented, That there was a print dispersed, intituled, 'Information for the Master of Stair,' reflect-

ing upon the commission for inquiring into the slaughter of the Glenco-men, and arraigning a vote of parliament: and therefore moved, That it may be inquired who was the author of it, and that both he and the said print may be censured. Mr. Hugh Dalrimple, brother to the master of Stair, and a member of parliament, acknowledged himself to be the author, and gave an account of his mistakes, protesting that he therein intended no reflection on the commission, and that the paper was written before the vote past in parliament, though printed and spread thereafter.

Resolved, That first the author and then the print be censured. And Mr. Hugh was ordered to ask his grace and the parliament pardon; which he did, again declaring, that what was offensive in that paper had happened through mistake.

Thereafter agreed that the said print was false and calumnious. And the question being stated, If the print spread abroad amongst the members of parliament, intituled, 'Information for the Master of Stair,' ought to be condemned as false and calumnious, and therefore burnt, or only that the print should be so marked in the minutes of parliament; it carried, That the print should be marked in the minutes of parliament to be false and calumnious.

Then the parliament proceeded farther in the inquiry of the slaughter of the Glenco-men. And in the first place, as to the orders given by sir Thomas Levingston, in two of his letters directed to lieutenant colonel Hamilton: and the said letters being read, after debate thereon it was put to the vote, proceed or delay, and carried proceed.

Then the question was stated, Whether sir Thomas Levingston had reason to give such orders as were contained in these letters, or not? and was carried in the affirmative, *nemine contradicente*.

July 8, 1695.

The parliament having resumed the inquiry into the slaughter of the Glenco-men, and who were the actors; and in the first place about lieutenant colonel Hamilton, and that part of the report of the commission relating to him, and the orders he got, and the orders he said he gave, with the depositions taken before the said commission: and after some debate thereon, the question was stated and put to the vote; if from what appears to the parliament, lieutenant colonel Hamilton be free from the murder of the Glenco-men, and whether there be ground to prosecute him for the same, or not? and carried, he was not clear, and that there was ground to prosecute him.

Then the question was stated and voted as to major Duncason, at present in Flanders, if the king should be addressed, either to cause him to be examined there about the orders he received, and his knowledge of that matter; or that he be ordered home to be prosecuted therefore, as his majesty shall think fit, or no? and carried in the affirmative.

Then that part of the report of the commission, as to Glenlyon, captain Drummond, lieutenant or adjutant Lindsay, ensign Lundy, and serjeant Barber, read with the depositions of the witnesses against them; and the question stated and voted, If it appeared that the said persons were the actors of the murder of the Glenco-men under trust; and that his majesty be addressed to send them home to be prosecuted for the same according to law, or not? And carried in the affirmative.

Therefore voted, If it should be remitted to the committee for the security of the kingdom to draw this address, or a new committee elected for drawing thereof? and carried remit.

The report from the committee for security of the kingdom in favours of the Glenco-men, read and remitted to the said committee; that there be a particular recommendation of the petitioner's case to his majesty brought in by the said committee.

July 10, 1695.

The Address about the slaughter of the Glenco-men to be sent to the king, read, with several of the master of Stair's letters to sir Thomas Livingston and colonel Hill: and after some debate upon the paragraph touching the master of Stair, it was voted, approve the paragraph as brought in from the committee, or as offered with amendments: it carried, approve as brought in from the committee. Thereafter the whole Address was put to the vote, and approved as follows:

The ADDRESS of the Noblemen, Barons and Burroughs in Parliament, humbly presented to his most Sacred Majesty upon the Discovery communicate to them, touching the Murder of the Glenco-men in February, 1692.

"We your majesty's most loyal and dutiful subjects, the noblemen, barons and burroughs assembled in parliament, do humbly represent to your majesty that in the beginning of this session, we thought it our duty, for the more solemn and public vindication of the honour and justice of the government, to inquire into the barbarous slaughter committed in Glenco, Feb. 1692, which hath made so much noise, both in this kingdom and your majesty's other dominions: but we being informed by your majesty's commissioner, that we were prevented in this matter by a commission under the great seal for the same purpose, we did upon reading the said commission, unanimously acquiesce to your majesty's pleasure, and returned our humble acknowledgments for your royal care in granting the same; and we only desired that the discoveries to be made should be communicated to us, to the end that we might add our zeal to your majesty's for prosecuting such discoveries; and that in so national a concern, the vindication might be also public as the reproach and scandal had been; and principally that we, for whom it was

most proper, might testify to the world how clear your majesty's justice is in all this matter.

"And now your majesty's commissioner, upon our repeated instances, communicated to us a copy of the report transmitted by the commission to your majesty, with your majesty's instructions, the master of Stair's letters, the orders given by the officers, and the depositions of the witnesses, relating to that report; and the same being read and compared, we could not but unanimously declare, that your majesty's instructions of the 7th and 16th of January 1692, touching the highlanders who had not accepted in due time of the benefit of the indemnity, did contain a warrant for mercy to all without exception, who should offer to take the oath of allegiance, and come in upon mercy, though the 1st of January 1692, prefixed by the proclamation of indemnity was past; and that these instructions contain no warrant for the execution of the Glenco-men made in February thereafter. And here we cannot but acknowledge your majesty's signal clemency upon this occasion, as well as in the whole tract of your government over us; for had your majesty, without new offers of mercy, given positive orders for the executing the law upon the highlanders, that had already despised your repeated indemnities, they had but met with what they justly deserved.

"But it being your majesty's mind, according to your usual clemency, still to offer them mercy; and the killing of the Glenco men being upon that account unwarrantable, as well as the manner of doing it being barbarous and inhuman, we proceeded to vote the killing of them a murder, and to inquire who had given occasion to it, and were the actors in it.

"We found in the first place that the master of Stair his letters had exceeded your majesty's instructions towards the killing and destruction of the Glenco-men: this appeared by the comparing the instructions and letters, whereof the just attested duplicates are herewith transmitted; in which letters the Glenco-men are over and again distinguished from the rest of the highlanders, not as the fittest subject of severity, in case they continued obstinate, and made severity necessary according to the meaning of the instructions; but as men absolutely and positively ordered to be destroyed, without any further consideration, than that of their not having taken the indemnity in due time; and their not having taken it, is valued as a happy incident, since it afforded an opportunity to destroy them; and the destroying of them is urged with a great deal of zeal, as a thing acceptable and of public use; and this zeal is extended even to the giving of directions about the manner of cutting them off; from all which it is plain, that though the instructions be for mercy to assist all that will submit, though the day of indemnity was elapsed, yet the letters do exclude the Glenco-men from this mercy.

"In the next place we examined the orders given by sir Thomas Livingston in this matter,

and were unanimously of opinion that he had reason to give such orders for cutting off the Glenco-men, upon the supposition that they had rejected the indemnity, and without making them new offers of mercy, being a thing in itself lawful, which your majesty might have ordered; but it appearing that sir Thomas was then ignorant of the peculiar circumstances of the Glenco-men, he might very well understand your majesty's instructions in the restricted sense which the master of Stair's letters had given them, or understand the master of Stair's letters to be your majesty's additional pleasure, as it is evident he did by the orders which he gave, where any addition that is to be found in them to your majesty's instructions, is given not only in the master of Stair's sense, but in his words.

"We proceeded to examine colonel Hill's part of the business, and were unanimous that he was clear and free of the slaughter of the Glenco-men; for though your majesty's instructions, and the master of Stair's letters were sent strait from London to him, as well as to sir Thomas Livingston, yet he knowing the peculiar circumstances of the Glenco-men shunned to execute them, and gave no orders in the matter, till such time as knowing that his lieutenant-colonel had received orders to take with him 400 men of his garrison and regiment, he, to save his own honour and authority, gave a general order to Hamilton, his lieutenant-colonel, to take the 400 men, and to put in due execution the orders which others had given him.

"Lieutenant-colonel Hamilton's part came next to be considered, and he being required to be present, and called, and not appearing, we ordered him to be denounced, and to be seized on wherever he could be found; and having considered the orders that he received, and the orders which he said before the commission he gave, and his share in the execution, we agreed that from what appeared, he was not clear of the murder of the Glenco-men, and that there was ground to prosecute him for it.

"Major Duncason, who received orders from Hamilton, being in Flanders, as well as those to whom he gave orders, we could not see these orders; and therefore we only resolved about him, that we should address to your majesty, either to cause him be examined there in Flanders about the orders he received, and his knowledge of that affair, or to order him home to be prosecuted therefore, as your majesty shall think fit.

"In the last place, the depositions of the witnesses being clear, as to the share which capt. Camphel of Glenlyon, capt. Drummond, lieutenant Lindsey, ensign Lundie, and sergeant Barber had in the execution of the Glenco-men, upon whom they were quartered; we agree that it appeared that the said persons

were the actors in the slaughter of the Glenco-men under trust, and that we should address your majesty to send them home to be prosecuted for the same according to law.

"This being the state of that whole matter as it lies before us, and which, together with the report transmitted to your majesty by the commissioner (and which we saw verified) gives full light to it; we humbly beg that considering that the master of Stair's excess in his letters against the Glenco-men has been the original cause of this unhappy business, and hath given occasion in a great measure to so extraordinary an execution, by the warm directions he gives about doing it by way of surprize; and considering the high station and trust he is in, and that he is absent, we do therefore beg that your majesty will give such orders about him for vindication of your government, as you in your royal wisdom shall think fit.

"And likewise considering that the actors have barbarously killed men under trust, we humbly desire your majesty would be pleased to send the actors home, and to give orders to your advocate to prosecute them according to law; there remaining nothing else to be done for the full vindication of your government of so foul and scandalous an aspersion as it has lain under upon this occasion.

"We shall only add, that the remains of the Glenco-men, who escaped the slaughter, being reduced to great poverty by the depredation and vastation that was then committed upon them, and having ever since lived peaceably under your majesty's protection, have now applied to us that we might intercede with your majesty, that some reparation may be made them for their losses. We do humbly lay their case before your majesty, as worthy of your royal charity and compassion, that such orders may be given for supplying them in their necessities, as your majesty shall think fit.

"And this the most humble Address of the estates of parliament is, by their order and warrant, and in their name, subscribed by, may it please your majesty, your majesty's most humble, most obedient, and most faithful subject and servant, "ANNANDALE, P. P."

"July 10, 1695. This Address voted and approved."

Then it was recommended to his majesty's commissioner, to transmit to the king the said address, with duplicates of the king's instructions, and of the master of Stair's letters.

Moved, That his majesty's commissioner have the thanks of the parliament for laying the discovery made of the matter of Glenco before them, and that the commissioners have the like for their careful procedure therein; which being put to the vote, approve, or not, carried in the affirmative, *nemine contradicente*; which his majesty's commissioner accepted of.

401. Proceedings against THOMAS AIKENHEAD, for Blasphemy :
8 WILLIAM III. A. D. 1696. [Now first printed from the
Records of Justiciary in Edinburgh, and MSS. the property
of Lord King.*]

CURIA JUSTICIARIE, S. D. N. Regis tenta in
Pretorio Burgi de Edinburgh, vigesimo
tertio die mensis Decembris 1696, per ho-
norabiles viros Adamum Cockburne de
Ormistoune Justiciarium Clericum, Do-
minos Colinum Campbell de Aberuchill,
Davidem Hume de Crocerig, Joannem
Lauder de Fountainhall, et Archibaldum
Hope de Rankeiller, Commissionarios
Justiciarij dicti S. D. N. Regis.

Curia legitime affirmata.

Intran'

Thomas Aikenhead,† sone to the deceast
James Aikenhead, chirurgion, in Edinburgh,
prisoner in the Tolbuith thereof.

YOU are indyted and accused, att the in-
stance of sir James Stewart, his majesties ad-
vocat for his highnes interest, and by speciall
order of the lords of his majesties privy coun-
cill, that where by the laws of God, and by the

* These MSS. for the use of which I am
indebted to his lordship, appear to have belonged
to the great Locke, the maternal uncle of lord
chancellor King.

† "No counsel appeared for the prisoner; nor
does it seem that one word was urged in his be-
half during the course of the trial. Four or
five witnesses were examined, one of them a
writer in Edinburgh, the rest students at the
University, lads from eighteen to twenty, or
twenty-one years of age. They proved most
of the articles of the libel, with this addition,
that the prisoner said he was confident Chris-
tianity would be utterly extirpated by the year
1800. There was however a material defect
in the evidence. The article most highly cri-
minal, viz. the railing against God, and cursing
our Saviour, was not proved at all, but was an
inference drawn by the jury from the prisoner's
cursing Ezra, and saying that the inventors
of the scriptural doctrines would be damned, if
there be such a thing as damnation.

"The jury unanimously found the pri-
soner guilty of railing against God, railing at
and cursing Christ, and of the whole other
articles in the libel. This verdict the jury, even
by the statute, were not warranted to pro-
nounce.—The railing against God, and cursing
Christ, ought to have been facts directly proved,
and not inferences drawn from cursing the in-
ventors of scriptural doctrines; and as for
denying any of the persons of the Holy Trinity,
it was not the denial, but obstinately persisting

lawes of this and all other well-governed
Christian realmes, the cryme of blasphemy
against God, or any of the persons of the blessed
Trinity, or against the holy Scriptures, or our
holy religione, is a cryme of the highest na-
ture, and ought to be severely punished:
Lykeas by the act of parliament, first parlia-
ment Charles 2d, act 21, Intituled, act against
the cryme of blasphemie, it is statute and or-
dained, that whosoever not being distracted in
his witts shall rail upon or curse God, or any
of the persons of the blessed Trinity, shall be
processed before the cheife justice, and being
found guilty, shall be punished with death;
and by 11th act, 5 session of the present cur-
rent parliament, the forsaid act is not only rati-
fied, but it is farder statute, that whosoever
shall in their wryteing or discourse denye, im-
pugne or quarrell, or argue, or reason against
the being of God, or any of the persons of the
blessed Trinity, or the authority of the holy
Scriptures, of the Old and New Testaments, or

therein, which by the statute subjected the
offender to a capital punishment.

"Besides these defences, had the court been
endued with the humanity to appoint counsel
for the prisoner, it would undoubtedly have
been pled for him, that these were rash words,
drawn from him in the heat of controversy,
which by no means coincided with his serious
notions; and that he heartily repented of
the warmth which betrayed him into expressions
so dissonant from his own sentiments, and so
offensive to the feelings of others.—Had these
defences been offered for him, the jury could
not, without being guilty of perjury, have con-
victed him of obstinately persisting to deny the
Trinity, which the statute required." Arnot,
326.

According to Arnot the following passage
in Fountainhall relates to the father of this
Thomas Aikenhead:

"April 20. James Aikenhead apothecary in
Edinburgh is pursued before the privy council,
for selling poisonous and amorous drugs and
philters to provoke lust, whereby a woman had
narrowly escaped with her life, had not doctor
Irvine given her an antidote. The council re-
ferred the trial and report thereof to the college
of physicians, as being *periti in arte*; who
thought such medicaments not safe to be given
without first taking their own advice."

Of the case of this man, (miscalled Aiken)
there is a short report in Macclaurin.

the Providence of God in the government of the world, shall for the first fault be punished with imprisonment, ay, and while he give public satisfaction in sackcloth to the congregation within which the scandall is committed; and for the second fault be ffyned, besydes his being imprisoned as above, and for the third should be punished with death, as an obstinat blasphemer: Nevertheless it is of verity, that you Thomas Aikenhead, shakeing off all fear of God and regaird to his majesties lawes, have now for more than a twelvemonth by past, and upon severall of the dayes within the said space, and ane or other of the same, made it as it were your endeavour and work in severall compaines to vent your wicked blasphemies against God and our Saviour Jesus Christ, and against the holy Scriptures, and all revealed religion, in soe far as upon ane or other of the dayes forsaid, you said and affirmed, that divinity or the doctrine of theologie was a rapsodie of faigned and ill-invented nonsense, patched up partly of the morall doctrine of philosophers, and pairtly of poetical fictions and extravagant chimeras, or words to this effect or purpose, with severall other such reproachfull expressions; Lykeas you scoffed at, and endeavoured to ridicule the holy scriptures, calling the Old Testament Ezra's fables, by a profane allusione to Esop's fables, and saying that Ezra was the inventer therof, and that being a cunning man he drew a number of Babylonian slaves to follow him, for whom he made up a feigned genealogie as if they had been descended of kings and princes in the land of Canaan, and therby imposed upon Cyrus who was a Persian and stranger, persuading him by the devyce of a pretendit prophecy concerning himself; and as for the New Testament, you not only scoff at it, but in your scoffing did most blasphemously raill upon our Lord and Saviour Jesus Christ, calling the said New Testament the History of the Impostor Christ, and affirming him to have learned magick in Egypt, and that coming from Egypt into Judea, he picked up a few ignorant blockish fisher fellows, whom he knew by his skill and * phisognomie, had strong imagnations, and that by the help of exalted imaginatione he play'd his pranks as you blasphemously terme the working of his miracles: Lykeas you affirmed Moses, if ever you say ther was such a man, to have also learned magick in Egypt, but that he was both the better arteist and better politician than Jesus; as also you have cursed Ezra, Moses, and Jesus, and all men of that sort, affirmeing the holy Scriptures to be so stuffed with maddness, nonsense, and contradictions, that you admired the stupidity of the world in being soe long deluded by them: Lykeas you reject the mystery of the blessed Trinity, and say it is not worth any man's refutation, and you also scoffe at the mystery of the incarnation of Jesus Christ, affirming blasphemously that Theantropos is as great a

contradictione as Hircus Cervus, or a quadratum to be a rotundum; and as to the doctrine of redemptione by Jesus, you say it is a proud and presumptuous devyce, and that the inventars therof are damned, if after this life ther be either rewaird or punishment; you also deny spirits, saying that the notion of a spirit is a contradiction, and you have maintained that God, the world, and nature, are but one thing, and that the world was from eternity; and you assert that man's imaginatione duely exalted by airt and industry can do any thing, even in the infinite power of God: you have lykwayes in discourse preferred Mahomet to the blessed Jesus, and you have said that you hoped to see Christianity greatly weakened, and that you are confident that in a short tyme it will be utterly extirpat, and you have been so bold in your forsaid blasphemies, that when you have found yourself cold, you have wished to be in the place that Ezra calls Hell, to warme yourself there: and these blasphemous raillings and expressions in the words above sett down, or words to the like purpose, you have wickedly uttered in severall companies without the least provocatione, but meerly prompted by your irreligious and devilish malice against God and our blessed Saviour, and the most concerning truths of the holy Christian religion. By all which, it is manifest, that you are guilty airt and pairt of horrid blasphemy, railling against and cursing our Lord and Saviour Jesus Christ, and impugneing and denying the truth of the holy Scriptures, and the quarrelling and argueing against the being of God and against his providence in making and governing the world, which being found by the verdict of an Assize, you ought to be punished by death, and the confiscation of your moveables, to the example and terror of others to committ the lyke in tyme coming.

Sic Subscribitur,

JA. STEWART.

Pursuer—Sir James Stewart, his Majesties Advocate.

My Lord Advocate produced an act of council for pursueing the pannal, wherof the tenor followes:

Act and Remitt of. Council for pursuing Thomas Aikenhead before the Lords of Justiciary for Blasphemy, &c.

EDINBURGH, November 10, 1696.

The lybell at the instance of sir James Stewart, his majesty's advocate, against Thomas Aikenhead, sone to the deceast James Aikenhead, apothecary, for Blasphemy, being this day called in presence of the lords of his majestie's privy council, and the lord advocate and sir Patrick Hume his majesties sollicitor, compearing personally for his majesty's interest; and the defender compearing also personally, the lybell and answers therto being read, the saids lords of his majestie's privie councill have remitted and hereby remitts the said Thomas Aikenhead defender to be pursued befor the

* So in the Original.

lords commissioners of his majestie's justiciary for the said cryme of Blasphemy, and appoynts the said lord advocate to intent and prosecute the said process against the said Thomas Aikenhead for his lyfe: extracted by me.

Sic Subscribitur,

GILBERT ELLIOT,
Cls. St. Cons.

INTERLOQUITOR.

The lords justice clerk, and commissioners of justiciary, having considered the indytment pursued at the instance of his majestie's advocate against Thomas Aikenhead prisoner, they find the cursing or railleing upon any of the persones of the blessed* relivant to inferr the paine of death; and finds the other crymes lybelled relevant to inferr an arbitrary punishment, and remitts the indytment to the knowledge of the Assyse.†

Sic Subscribitur, AD. COCKBURN, I. P. D.

* So in the Record.

† It appears that Aikenhead before his trial endeavoured by the following Petition and Retraction, to prevail upon the Court of Justiciary to desert the diet against him:

Unto the right honourable the Lord Justice General, Justice Clerk, and remanent Lords Commissioners of his Majesty's Justiciary. The Supplication of Thomas Aikenhead, now prisoner in the Tolbooth of Edinburgh.

"Humbly Sheweth; That your petitioner being indicted and cited to appear before your lordships to underly the law for the crimes contained in the criminall indictment raised against me, and which crimes therein contained are so odious and abominable in themselves, that I do not only from my very heart abhorre and detest them, but I do tremble and abhorre either to repeat the samen myself, or to hear the samen repeated and objected against any person born of Christian parents. And therefore your petitioner doth with all humility and ingenuity represent to your lordships, that he doth ingenuously acknowledge it to be his greatest happiness that he was born and educat in a place where the gospell was professed and so powerfully and plentifully preached, upon a true improvement of which benefite he doth truly believe the salvation of his immortall soul doth intirely depend. (2.) I do firmly believe the immortality of the soul, and that ther shall be a resurrection of my body at the last day, at which time they shall be again united, and thereafter either made eternally happy in heaven, or otherwise condemned in everlasting and endless torments. (3.) I do firmly own and believe in the unity and Trinity of the Godhead, and that ther is no salvation to be expected otherwise than by the blood and merits of our Lord and Saviour Jesus Christ, and by a firm believing and relying upon the samen. (4.) I do also profess and ingenuously believe the scriptures of the Old and New Testament to be cannonicall, and written and dictated by holy men in-

ASSISA.

James Bowden, late baillie, of Edinburgh.
George Clerk, late baillie, there.
Michael Allan, late dean of Gild, there.
Charles Charters, late baillie there.

spired by the Holy Ghost, and to be of divine authority and set down as a rule for our obedience and faith, and by believing whereof a happy immortality may be obtained, and no otherways. And I do also believe, and assent to the whole other principles of our holy Protestant religion, such as the celebration of baptism and the holy sacrament of the Lord's supper, as truly institute and ordained by our blessed Saviour, and thereafter practised by his holy Apostles and their successors to this very hour, and that the said sacraments are to this moment celebrated with the greatest purity in our reformed Protestant churches in Britain and Ireland.

"All which premises I do not only own and acknowledge to be the true grounds of my own faith and beleif. but that I am obliged to own and mantain the samen albeit with the hazard and loss of my life and all things earthly, and I do believe, own, and acknowledge the haill heads of our reformed religion, contained in our confession of faith as approven by act of parliament. And I firmly believe that in case I should hapen to depart from a true belief of the premises or any part thereof, the just punishment due therefore could be no less than the eternall ruine and tormenting of my body and immortall soul in hell for ever, as is threatned by our blessed Lord and Saviour in his holy Evangells.

"This being premised, it is furdur represented to your lordships, that denying the haill articles of the indictment raised against me as they are lybelled, so whatever expressions might have escaped me relateing to any of the articles in the said indictment, the samen was uttered or expressed by me not as my own privat sentiments and opinions, but were repeated by me as sentiments and opinions of some atheisticall writers whose names I can particularly condescend upon, and whose books I did receive from who is not only insert in the list of the witnesses to be adduced against me, but was the cheif and principall instrument who constantly made it his work to interrogat me anent my reading of the said atheisticall principles and arguments therein contained, and of which I am now very sensible and heartily sorry for: and am convinced that these books are most villanous and atheisticall, and ought neither to be printed nor exposed to public view: but I absolutely deny that ever the expressions contained in the indictment were uttered by me in the terms lybelled, at least that ever they were spoken by me as my own privat opinions or sentiments, but that whatever expressions I had relating to what is lybelled, were only expressed by me as the arguments, set down in the said atheisticall books, which had unhappily

Robert Forrester, late Kirk treasurer there.

Adam Broun, late baillie of Edinburgh.

Alexander Thomsone, late deacon conveneer.

Jerom Robertstone, perivig-maker, there.

James M^cClurg, late dean of Gild.

Patrick Thomsone, late thesaurer.

William Pattoune, late baillie of Edinburgh.

Robert Elphingstone, of Lopnes.

George Mossman, stationer, there.

George Fullertoune, of Dreghorne.

James Dunlop, merchant, in Edinburgh.

The assyse lawfully sworne, noe objection of the law in the contrair.

Five persons summoned on the jury refused to attend, and were fined 100 merks each.

His *Majestie's Advocate* for probation adduced the witnesses after deponeing, viz.

Mr. *Adam Mitchell*, student, in Edinburgh, aged twenty years, not married, purged of malice, prejudice, and partial counsell; depones he has bein severall tymes in company with Thomas Aikenhead, pannall, when he heard him affirme that divinity or the doctrine of theology was ane rapsodie of feigned and ill invented non-

fallen in my hands as said is, and seing I was at the time lybelled minor, and as yet am so, and under age, and that I do perfectly desist and abhorre the atheistical expressions lybelled against me, and do truely believe the articles above represented as the true principles of my faith and religion, and am content to testify my sorrow and remorse to the world for my former escap as to any thing contained in the indictment, hoping by the blessing and assistance of our blessed Saviour, not only to be delivered from all such snares and temptations in time coming, but likewise to lead a life suteable to the gospel and the expectation of eternal life, through the blood and merits of our dear and only Saviour.

"May it therefore pleas your lordships seriously to consider the premisses, and to have compassion on my young and tender years (not being as yet major), and that I have been so innocently betrayed and induced to the reading of such atheistical books, and after reading therof, being exceedingly imposed upon to give an account of the abominable and atheistical principles contained and asserted in them, and that I do truely own the true Protestant religion as the only means and way to eternal life and happyness, and do abhorre all atheistical principles, and others whatsoever any way contrair therto, and am resolved by the assistance of Almighty God to make my abhorrence of what is contained in the said lybell, appear to the world by my subsequent life and conversation, and in respect of my said minority and non-age, and what is above represented, and that this is only the first time, that ever I was questioned upon such an account, to desert the dyet against me. And your petitioner shall ever pray, &c." Lord King's MSS.

sense, within the tyme lybelled, which is a twelve moneth, and that he has heard him scoff at the Scriptures of the Old Testament, calling them Ezra's Romances; depons that he heard him say that our Saviour wrought no miracles but what any other man might have wrought by ane exalted fancie; and speaking of Moses, he called him a magitian, and comparing him with Jesus he called him the better artist and polititian of the two; depons that he heard him deny our Saviour Jesus to be the sone of God, and that the Apostles were a company of silly witless fisher-men; and he heard him say that he wondered the world was so long deluded with their contradictions and nonsense; farder depons, that he has heard him reject the mystery of the holy Trinity, and that oftner than any other thing; and that he heard him reject Theanthropos or God-man as a contradictione, and it was as absurd as Hircus Servus, that is a goat and ane hart in one animall; depons that he heard him maintaine that man's imaginatione, raised by airt and industry to a high pitch, could doe as much as our blessed Saviour did; and this is the truth as he shall answer to God.

Sic Subscribitur,

A. MITCHELL.

Mr. *John Neilson*, wryter, in Edinburgh, aged near to twenty years, unmarried, purged of malice, prejudice, and partial counsell, and solemnly sworne; depons that within the tyme lybelled he has frequently heard the pannall affirme that divinity or the doctrine of theologie was a cheat and rapsodie of ill-invented nonsense; as also he has heard him frequently scoff at the holy Scriptures, and ridicule the Scriptures of the Old Testament, and call them Ezra's Fables, and that Ezra was the inventer of them; as also he has severall tymes heard him say that Ezra being a cunning man, he drew a number of Babylonian slaves to follow him, for whom he made up a feigned genealogie, as if they had bein descendit of kings and princes in the land of Canaan, and imposed upon Cyrus who was a Persian and stranger, persuadeing him by the pretendit devyce of a prophecie concerning himself, and gott a great quantity of gold from Cyrus, and gold vessels that was never in the temple, upon pretence that they had bein taken out of the temple of Jerusalem, wheras truely it was not soe; depones he has heard him scoff at the New Testament, and affirme that our Saviour had learned magick in Egypt, and that coming from Egypt unto Judea he picked up a few blockish ignorant fisher fellows, whom he knew by his skill in phisognomy had strong imaginations, none having stronger imaginationes than ignorant people, and that our Saviour by his own and his Apostles imaginationes played his pranks; he also heard the pannall affirm, that Moses (if ever ther was such a man) had also learned magick in Egypt; depons he heard the pannall curse Ezra and all the inventers of the Scriptures, and all the promoters of them, ministers and others, and he has

heard him affirme that the Scriptures were full of contradictions; depons he has heard him several tymes deny that our blessed Lord was the sone of God, and affirme that God-man was a contradiction, and compare Theanthropos to a squire triangle, and he has heard him say that if ther was any punishment after this life, surely Ezra and his followers, whom he called Ezraits, were damned; and farder heard him assert that man's imaginatione exalted might doe any thing; and also heard him say, that within some hundreds of years the whole world would be converted to his opinion, and the Christian religion would be wholly ruined; and depones that he heard him say one night in August last, when he was cold, he wished to be besyde the place Ezra called hell to warme himself there, *causa patet*; and this is the truth as he shall answer to God.

Sic Subscribitur,

JO. NEILSON.

Mr. Patrick Midletoune, student, at the colledge of Edinburgh, aged twenty years, unmarried, purged and sworne; depones that he has heard the pannall, within the tyme lybelled, severall tymes affirme that the Scriptures were Ezra's Fables or Romances, and that Ezra and the Jewes were a number of vagabounds, such as Ogyptians, Goths or Vandals, and imposed upon Cyrus and gott from him gold and jewells, pretending that they were brought from the temple at Jerusalem; depons he has heard him scoff at the Scriptures of the New Testament, and say the history of them was a fable, and the Revelation was ane alchimy book for finding out the philosophers stone. And that our Saviour was a magician, and did all his miracles by his imaginatione, and the lyke could be done by naturall causes, and that he choysed twelve fishers that were ignorant, whom he knew to have strong imaginationes by which he wrought his wonders; depons that he heard him call Moses ane magitian, and that Mahamet was both the better airtist and polititian than Jesus; and he heard him curse Ezra, and has heard him say that as many pages as was in the Scriptures ther was as many contradictions in it; and heard him say that the Trinity of the persons was a great contradiction, and lykways that the incarnation was as great a contradictione as Hircus-Cervus, and that the authors and propagators of the doctrine of Redemption by Jesus, was the damnedst crew in the world, and that they would have the most perplexed thoughts of any for ever; and has heard him affirme that God, the world, and nature, are but one thing, and that the world was from eternity; and also heard him assert, that man's imaginatione duely exalted by airt and industry could doe any thing, even in the infinite power of God, and that he hoped to see Christianity greatly weakened, and that he was confident that in the year 1800 it would be utterly extirpat; depones, that about the midle of August last, about eight o'clock at night, going by the Tron kirk, he hard him (being cold) say that he wished to be in the place Ezra called

hell, to warme himself there; and farder depons, that he has heard him say that he could make himself immortall, and that the ascention of our Saviour was but a progresse to the world in moon; and this is the truth, as he shall answer to God.

Sic Subscribitur,

P. MIDLETONE.

Mr. John Potter, student, aged 18 years, unmarried, purged of malice, prejudice, partiall councill, and solemnly sworne; depones *nihil novit*.

Mr. Mungo Craig, student, in Edinburgh, aged twenty one yeares, unmarried, purged of malice, prejudice, and partiall councill, and solemnly sworne; depones that within the tyme lybelled he has heard Mr. Aikenhead, the pannall, several tymes affirme that the studie of divinity and the doctrine of theologie was a rapsodie of feigned and ill contrived nonsense, and that it was worse than the fictions of the poets, for they had some connexion, but the Scriptures had none; depones he has heard him scoff at, and ridicule the holy Scriptures, and frequently call the Old Testament, Ezra's Fables, and that Ezra was the inventer of the books thereof; and depones he has heard him revile the books of the New Testament, and call them the books of the imposter Jesus Christ; and that he expressed it in a scorning and jeiring manner, and affirmed that Christ had learned magick in Egypt, and called him a magician, and that returning from Egypt to Judea, he picked up a few blockish ignorant fisher-fellows who had strong imaginationes, and that by the help of ane exalted imagination he played his pranks as he termed our Saviour's miracles, and that if ther was any such man as Moses, that he had studied magick, being bred up in the king's court, and was a better airtist and pollitician than Jesus, and that he heard him curse Moses, Ezra, and particularly our Saviour Jesus, and if ther was any punishment after this life the deserved the worst, and all the inventors of the doctrine of redemption; and he made it his frequent discourse that the holy Scriptures were stuffed with such contradictions that the stupidity of the world was admirable in having believed them so long; and farder depones that he used to condemne and reject the mystery of the Trinity, and that God-man was as great a contradictione as a *quadratum rotundum*, and heard him call the doctrine of Redemption a proud and presumptuous devyce, and that the inventers of it were damned if ther were any punishment after this life; depones he asserted that God, the world, and nature, were all one thing, and that the world was from eternitie; and has heard him frequently assert that man's imaginatione duely exalted by airt and industry might creat a world, and produce any thing produceable; depones he heard him say, he hoped to see Christianity greatly weakened, and shortly to be extirpated, and that farder heard him curse those that baptizmed him, and say that baptisme was a magicall ceremony

that tyed children's imagination to that religion wherto they were baptised; and further, if he were banished, he would make all Christianitie tremble, and would wryte against Christianity, and that if he or any other needed a familar genius he could call for it; and this is the truth as he shall answer to God.

Sic Subscribitur, M. CRAIG.
AD. COCKBURNE, I. P. D.

The lords ordaine the assyse to inclose and returne their verdict to-morrow at twelve a clock, and ordaines the pannall to be carryed back to prison.

December 24th, 1696.

Intran'

Thomas Aikenhead,

Indyted and accused for the cryme of blasphemy committed be him in manner mentioned in his indytment.

The said day the persons who past upon the assyse of Thomas Aikenhead, for blasphemy, returned their verdict in presence of the saids lords, wherof the tenor follows:

The Assyse having elected and chosen George Clerk, late baillie, their chancellor; and Adam Brown, their clerk, doe unanimously find it proven that the pannall, Thomas Aikenhead has railed against the first persone, and also cursed and railed our blessed Lord the second persone of the holy Trinity, and farder finds the other crymes lybelled proven, viz. The denying of the incarnatione of our Saviour, the holy Trinity, and scoffing at the holy Scriptures. This is subscribed by the chancellor and clerk at the appoyntment of the above written assysers, at Edinburgh, the 23rd day of December, 1696 years.

Sic Subscribitur, GEO. CLERK, Chancellor.
ADAM BROWN, Clerk.

Efter opening and reading of the quhilk verdict of Assyse, the lords justice clerk, and commissioners of justiciary therfor, by the mouth of John Ritchie, dempster of court, decerne and adjudge the said Thomas Aikenhead, to be taken to the Galowlee betwixt Leith and Edinburgh, upon Friday the eight day of January next to come, betwixt two and four a clock in the afternoon, and there to be hanged on a gibbet till he dead, and his body to be interred at the foot of the said gallows, and ordaines all his moveable goods and gear to be escheat and inbrought to his majesty's use, which is pronounced for doom.

Sic Subscribitur, AD. COCKBURNE.—
C. Campbell, David Home, Jo. Lauder,
A. Hope.

Among lord King's MSS. is the following Paper indorsed: "Copy Petition for Thomas Aikenhead, to the Privy Counsell."

To the Right Hon. the Lord High Chancellor, and remanent Lords of his Majesties most Hon. Privy Councell: The Supplication of Thomas Aikenhead, prisoner in the Tolbooth of Edinburgh.

"Humbly Sheweth; That your petitioner being sentenced by the lords of justiciary, to be executed upon the 8th day of January next, he doth in all humility acknowledge the justice of the said sentence, pronounced against him, and that the blasphemous and wicked expressions, for which he is sentenced to death, ought not to be so much as named, and he doth ingenuously acknowledge, that from his very soul he perfectly abhors the same, but your petitioner being as yet a minor, and having the misfortune to have got some atheistical books belonging to others in his custody, the reading whereof did prompt him to these extravagances for which he is now most justly sentenced. And seing it hath pleased Almighty God, to begin so far in his mercy, to work upon your petitioner's obdured heart, as to give him some sense and conviction of his former wicked errors, and that he doth expect through the mercys of our blessed Jesus to be dayly more and more convinced thereof, and that he doth intirely rely upon our blessed Saviour's death and merits for the salvation of his immortall soul, and that if time were allowed, he doth expect through the merits of Jesus, by a true remorse and repentance, to be yet reconciled to his offended God and Saviour.

"May it therfore pleas your lo'ps, for God's sake to consider and compassionat my deplorable circumstances, and tender years (I being as yet minor), and to prorogat the day appointed for my execution, for such time as your lo'ps shall think fitt, that I may have the opportunity of conversing with godly ministers in the place, and by their assistance be more prepared for an eternal rest. And for his sacred majesty and your lo'ps happines and welfare, your petitioner shall ever pray, &c."

The following Letter, (among the same MSS.) containing Observations on Aikenhead's Case, appears to have been written by Mr. Locke to his friend sir Francis Masham.

"London, Feb. 27, 1696-7.

"Sir;

"You have enclosed (to satisfie your curiosity) the evidence against Aikenhead, and two of his petitions. If the process come, you shall have it, or it shall be left where you shall order. The Flying Post bore that he had not retracted till the day of execution, which you see is false.

"The first act of parliament in Scotland against blasphemy is act 21 parl. 1, sess. 1, Ch. 2d, anno 1661, which has two articles. By the first 'Railing upon, or cursing God, or any of the persons of the Trinity is punishable with death,' these are the words, and here retracting availeth nothing. The next article

is, that ' Denying God, or any of the persons
' of the Trinity, and obstinately continueing
' therein, is punishable with death.'

" The next act is the 11th of Tweeddal's
session of parliament, two years agoe, and was
obtained by trick and surprise. It ratifies the
former act, and adds, that ' Whether by writing
' or discourse, to deny, impugne, querrell, ar-
' gue, or reason against the being of God, or
' any of the persons of the Trinity, or the au-
' thority of the scriptures, or a providence, is
' for the first fault punishable with imprison-
' ment, till they retract in sackcloth in the
' church, ffor the second, with imprisonment,
' and a year's rent till as in the first case, and
' for the third, they are to die as obstinat blas-
' phemers.' So that retracting after the third
fault signifys nothing.

" It is plain Aikenhead must have died by
the first act, since it was his first fault, as he
himself pleads in his petition, and that he did
retract, which delivers him from the second
article of the first act. Now the words of the
first article being ' railing' and ' cursing,' no
evidence except that of Mr. Mungo Craig's (in
which he is said to have called Christ an im-
posture) seems to answer the meaning of those
words, and as to this Craig, Aikenhead in his
speech, in which he owns other things, denies
his evidence, and no doubt he is the decoy who
gave him the books and made him speak as he
did, and whose name is not put in the copy of
the petition to the justiciary sent to you, be-
cause the writer would spare Craig.

" The age of the witnesses is observable, and
that none of them pretend, nor is it laid in the
indictment, that Aikenhead made it his busi-
ness to seduce any man. Laws long in dessue-
tude should be gently put in execution, and the
first example made of one in circumstances that
deserve no compassion, whereas here ther is
youth, levity, docility, and no designe upon
others. Farewell.

" My respects to my lady Masham."

Among the same MSS. is the following
Letter indorsed " L. Anstruther," and address-
ed " Mr. Robert Cuninghame, to be left with
Mr. Allexander Jonstoun."

" Aden, Jan. 26, —97.

" Sir ;

" I hope you will pardon me that I hav not
writ to you these several posts, for I hav been
kept more busie than ordinar, by the frequent
meeting of *exchequer*, upon the falling short of
the fonds. I thank you heartely for the trouble
you hav put yourself to, in giving me account
of what cannot be known by publick neues. I
am afraid it will look like too much imposing
upon your good nature to desire a continuance
of it, especially when I can propon no com-
pensation, this being a place scarsly known
abroad, and in publick transactions folowing al-
ways the fate of England, but for my part, I would
contribute to be at the expense with all my

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heart for a plenipotentiary at the treaty of
peace for this natione ; indeed the fittest person
I know, would be your friend Mr. Jonstoun, I
wish it had been moved last parliament. To di-
vert you with some remarkable things fallen
out of late, it is confidently asserted here, that
the river of Clyd went dray for 14 miles, so that
children went over it, which ran with a most
impetuous current immediatly before ; I doe
think this must hav fallen out by some chasma
in the earth, into which the river hath run into
some subterraneous vacuity, till which time that
was filled up it could not return to its former
course, I am told it was once so befor. I
doubt not you hav heard of a gentleman's
daughter in the west, who I think is possessed
with a devil, and continues so still, she is 12
yeers of age, her body is put into strange
shapes, and instantly perfectly well: she vo-
mits hot coals, stons, iron, hair, bones, et cet.
Somtime ago, I sent up an exact account of
this, attested by ministers to my Lo. Tullibar-
den, which you may call for if you please: we
had latly an anomely, and monster of nature
I may call him, who was execut for cursing
and reviling the persons of the Trinity, he was
18 yeers of age, not vicious, and extreemly stu-
dious. Fountionehall and I went to him in
prison, and I found a work on his spirit, and
wept that ever he should maintained such
tenets, and desired a short reprieve, for his eter-
nall state depended upon it ; I plead for
him in counsel, and brought it to the chan.
vote, it was told it could not be granted unless
the ministers would interced, I am not for con-
sulting the church in state affairs, I doe think
he would have proven an eminent christian
had he lived, but the ministers out of a pious
tho I think ignorant zeal spok and preached for
cutting him off. I find capital punishments
inflicted most against crimes that disturb the
society and government, and not against the
heinousness of the sin against God, for layers
say ' Satis est Deum labere ultorem ;' and so
stealing a sheep when one is hungry, or speak-
ing against the K. er punish'd by death,
wheras cursing, lying, slandering, drunkenness,
et cet. are scarcely taken notice of by our law,
but our ministers generally are of a narrow sett
of thoughts and confined principles and not
able to bear things of this nature. I hav sent
you inclosed his speech. I am on all occa-
sions, Sir,

" Your most humble servant."

The following two articles among the same
MSS. are written continuously, and indorsed,
" Aikenhead's Speech, and his Letter to his
Friends, 1697 ;"

Thomas Aikenhead's Paper.

[The words betwixt crotchets are added to
make the sense clear.]

Christian People ;

Verity or truth, generally in all things is a
quality most appetable, but especially in mat-

ters of great consequence, where fancy can not have place; for where it can have way, it doth not much concern whether the thing be real in itself or not. Hence it is a principle innate and co-natural to every man to have an insatiable inclination to truth, and to seek for it as for hid treasure, which indeed had its effect upon me, and my reason therein so mastered me, that I was forced of necessity to reject the authoritys and testimonys, both of my parents and others, instilled into me. So that I went further, and examined the point more reasonably, that I might build my faith upon uncontrovertible grounds, and so I proceeded untill that the more I thought thereon, the further I was from finding the verity I desired; so that after much ponderings I found my education altogether wrong, not only because it was impossible for me or any that I conversed with, to produce any grounds really sufficient to confirm the same; but with the greatest facility sufficient ground could be produced for the contrair. And this I profess and declare, was the only cause, that made me assert the things, that I asserted, and deny the things that I denied. And tho' for the most part such persons [scepticks] are stained, and charged with some great and numerous villanys, and immoralities, which that they may have free liberty to act, without any trouble within or without them, causes them to apostatise or not conform, and to attempt to prove the matter [of religion] vain. But I can charge the world, if they can stain me, or lay any such thing to my charge, so that it was out of a pure love to truth, and my own happiness [that I acted.] And this I proposed to myself, when I was very young, as I remember, about ten years of age, I have been ever, according to my capacity, searching good and sufficient grounds whereon I might safely build my faith, which at first I received, *gratis dictum*; So that after my general doubting, the first thing or head that I fell to work with was, whether or not man was capable of offending *Ens entrum*, or of any immorality as the thing which must be the basis (next to the existence of God) in such matters. Which after much and serious reasonings, and ponderings, [upon] I concluded [for] the negative. For I thought first, that a great part of morality (if not all) proceeded '*ex vitio hominum*,' as that of kingdoms, commonwealths, or what the most part of men think convenient for such and such ends and purposes, which doth only conclude for such ends, and these ends are always terminal upon being '*naturæ*' congruous. Now we see, that according to men's fancy, things are congruous or incongruous to their natures, if not to the body, yet to the thinking faculty. Wee also do not know what is good, or what is evil in itself, if not thus. Whatsoever can be attributed to God, that is good, and what not is evil. And wee know not what can be attributed to God, but [by affirming of him] these things [that] by such a deduction [as I have mentioned,] wee call perfect, and by denying of him, these things wee call imperfect that

way; and so wee most ignorantly committ a circle. Now wee can have no other notion of things, in themselves, good or evil. And as for moral good or evil, all will confess that any thing may be morally evil, and any [thing morally] good also, and consequently any thing [may be] decent or indecent, morall or immoral. Nay, tho' ther were things evil in themselves, (if wee do not apprehend some other thing in stead of them) wee can have no inclination to them, otherwise the will could wish evil as evil, and if the fancy apprehend any other thing than the evil, it is only the '*ratio sub quâ*,' that is appetite [that is if wee desire a real evil, it is under the notion of good].

But I thought it yet more strange, that even out of the supposition of a natural law, neither by revelation, nor any other way than by the mercy of God, (as we are taught by reason and the light of nature,) would men be pardoned of God, for their immoralities. For 1st. if God did not pardon men's sins, ther would be no use of his mercies, and certainly if God have mercy (as undoubtedly he has) and if it be infinite, he it must of necessity pardon (as the least of its operations) the greatest sins that the highest dependent being can be capable of. And it must not be said, that this overthrows justice, for that is most false, seing that mercy presupposes justice, and the sentence to be given, and then it steps in and satisfies justice. But if you will have these two inconsistent, you must rather say, that God hath not mercy in all things.

But then if mercy do but little help, wee can say that God will not destroy and damn one, that from his heart loves him, prayeth to him, and praiseih him, and doth other acts of natural religion; for thus it would follow that in hell, ther were prayers, praises, and the love of God, and such like, yea and that the creature had more love to the creator, than the creator hath to the creature. All which [consequences] are most absurd. And it is impossible for any intelligent being not to love God, seing that he is with his most appetable attributes, '*ipsissimum bonum*.' So then it would follow, that men could be saved and enjoy God by the natural law, otherwise the world were almost damned, and even of those who embrace revelation, very few obey it. And [it would follow too], that ther were no need of revelation, or of any other way of salvation, especially such a way as christianism; for God would not do so great a work without necessity, neither can revelation and providence consist, for if ther be a generall providence, revelation would be but an effect of providence, (and that ordinary) seing that every act of providence, as providence, is alike divine, and so no revelation.

Ther was another great point which I was in doubt of, to witt that of the Trinity, where I thought that the common distinction of a seeming contradiction could not have place; seing that '*quicquid est in Deo, est Deus ipse*.' I thought nothing more clear than that if '*Paternitas filiatio*,' and '*Hagio-pneumatos*,' be

included in the essence of God, it would overthrow the simplicity of the same if they be really distinct among themselves, and that 'paternitas' be not 'filiatio Hagio-pneumatos,' and so the Trinity should differ nothing from the polytheism of the Gentiles, by making three distinct infinities. And many times have I pryed as far as my capacity would follow me, to try that if it were true, how far I could reach in the knowledge of such a thing, but I found always that the more I thought [on it] the further I was from it.

Now these things I have puzzled and vexed myself in, and all that I could learn therefrom, is, that I cannot have such certainty, either in natural or supernatural things as I would have. And so I desire all men, especially ingenious young men, to beware and take notice of these things upon which I have split. I declare my abhorrence and detest of, any of my failings or offences concerning the forsaid, and its my earnest and only desire and prayer to God for his mercies sake in the name of Jesus Christ, (which way I only expect pardon of my sins, and reconciliation with God) to forgive me my offences and trespasses. As also, I from my very heart and in grief and sorrow thereof, am perplexed and troubled for the base, wicked, and irreligious expressions which I have uttered, altho' that I did the same out of a blind zeal to that which I thought truth. And I profess and declare, that tho' it do not appear much by outward signes and tokens, yet I cannot express how much I detest, abhor and am troubled at the same, withall I acknowledge and confess to the glory of God, that in all he hath brought upon me, either one way or other, he hath done it most wisely and justly, and I hope in his mercy that it will be better for me that he hath afflicted and punished me in this life, and stopt the current of my sins, than that he had suffered me to go on headlong in my own evil ways, into the miseries out of which I should never have recovered. Likeas I bless God I die in the full perswasion of the true Christian Protestant Apostolick faith, according to the tenor of my petitions given into the lords of justiciary and council, which are signed by me and in their clerks hands.

And I cannot, without doing myself a manifest injury, but vindicate my innocence from those abominable aspersions in a printed satyr of Mr. Mungo Craig's, who was an evidence against me, whom I have to reckon with God and his own conscience, if he was not as deeply concerned in those hellish notions, (for which I am sentenced) as ever I was, however I bless the Lord, I forgive him and all men, and wishes the Lord may forgive him likewise.

To conclude, as the Lord in his providence hath been pleased in this exemplary manner to punish my great sins, so it is my earnest desire to him, that my blood may give a stop to that raging spirit of atheism which hath taken such footing in Brittain, both in practice and profession. And of his infinite mercy recover those who are deluded with these pernicious

principles. And for that end that his everlasting gospell may flourish in these lands, while sun and moon endureth. And now, O Lord, Father, Son, and Holy Ghost, in thy hands I recommend my spirit, begging and hoping for pardon to all my sins, and to be received to thy eternal glory, through the only righteous merits of Jesus Christ my Saviour. To whom with the Father and Blessed Spirit, my Sanctifier, be everlasting praise, honour and glory for now and evermore: Amen.

Sic Subscribitur, THOMAS AIKENHEAD.

Copy of his LETTER to his friends from Edinburgh Tolbooth, the day of his death:

January 8th, 1697.

Being now wearing near the last moment of my time of living in this vain world, I have by the enclosed under my own hand, now when I am stepping into eternity, briefly as my time could only allow, given a true relation to the world in general, for whose use I am to give some copies of the enclosed at my last end to the ministers and magistrats who shall be by me, and to my dear and worthy friends (whom I from good ground may term parents) in particular, for whose use I will order this enclosed principally to be delivered by the bearer, to be present, of the original rise, matter, and manner of my doubtings and inquisitions, for which as I am now to die, so I desired not to live further than might have contribute to the glory of God, and good of his people by my after short time (for which I was demanding a reprieve) and my own soul's eternal welfare, by my more serious and incessant application to the throne of mercy for my great sins, which I hope shall be all forgiven by the mercy of God, through the merits of my Redeemer Jesus Christ, tho' alace my time hath been short since my sentence, so I have trifled away and mispent too much thereof, however, as my time hath allowed me, the enclosed will give satisfaction to you in particular, and to the world in general, and after I am gone produce more charity than hath been my fortune to be trusted hitherto with, and remove the apprehensions, which I hear are various with many about my case, being the last words of a dying person, and proceeding from the sincerity of my heart.

There is one thing I hear I am aspersed with, which is not in the enclosed, which is, that I am suspected to have practised magick and conversed with devils, which I here declare in the presence of Almighty God, to be altogether false and without any solid ground. I desire you may call for extracts of my petitions to the council and justiciary, which I relate to in my last speech, which I recommend to your care, that I may be vindicated from any false aspersions.

Sic Subscribitur, THOMAS AIKENHEAD.

Some Animadversions upon Aikenhead's last words, occur in the book, intitled, "Natural Religion insufficient, and Revealed necessary,"

to Man's Happiness, in his present state," &c. written by Thomas Hallyburton, a man of learning and of piety, who was Professor of Divinity in the University of St. Andrews, from the year 1710, to his death in 1712.

The author, after having set forth the evil of sin, or, as he expresses it, having condescended on a few of those considerations, whereon he insists for proving sin to be exceeding sinful, proceeds thus: "The Deists, to evade the difficulties arising from this evil of sin, take different courses. Some plainly deny any such thing as evil, or that there is any thing morally good or bad. Thomas Aikenhead, who was executed at Edinburgh, Jan. 8th, 1697, for his blasphemies, in his paper he delivered from the scaffold, tells us what his thoughts were in this matter, and upon what grounds they were built. When in his rational enquiries he came to consider, whether we were capable of offending God, he tells us; 'that after much pondering and serious consideration he concluded the negative.' The famed Mr. Hobbs was not of a very different mind: for he plainly asserts, 'that there is nothing good or evil in itself, nor any common laws constituting what is naturally just and unjust: but all things are to be measured by what every man judgeth fit, where there is no civil government; and by the laws of society, where there is one.' And elsewhere; 'before men entered into a state of civil government, there was not any thing just or unjust, for as much as just and unjust are the relatives of human laws; every action being of itself indifferent.' And whether Spinoza was not of the same mind, is left to those to judge, who have time and leisure to trace his meaning, in his obscure and designedly involved way of writing. But surely this proposition in his Atheistical ethicks looks very like it, 'si homines liberi nascerentur (liber autem est juxta Spinozam, qui 'secundum ductum vel ex ducta rationis agit) 'nullum boni et mali formarent conceptum, 'quamdiu liberi essent.' Mr. Hobbs has been learnedly confuted by many, such as Dr. Cumberland, Mr. Tyroll, and almost all who write of the law of nature. Spinoza has likewise been examined by Wittichius, and many others. The first, viz. Thomas Aikenhead, his grounds I shall propose and examine.

The first in his own words runs thus, 'I 'thought,' says he, 'a great part of morality, 'if not all, proceeded 'ex arbitrio hominum,' 'as of that of a kingdom or common-wealth, 'or what most men think convenient for such 'and such ends, and these ends are always terminated upon being congruous to the nature 'of things; now we see that according to 'men's fancy things are congruous or incongruous to their natures, if not to the body, yet 'to the thinking faculty.'

The sum of this confused discourse, which probably he learned from Hobbs, amounts to this: God has fixed no law to our moral ac-

tions, by which they are to be regulated. Those, which are called moral laws, are only the determinations of government, or the concurring judgment of men, concerning what they think meet to be done for their own ends. That what some judge meet and congruous, others may find unsuitable to their nature and ends, and so are not obliged to obey. But, 1. Are not all these ungrounded assertions, wherof no proof is offered but the author's deluded fancy? 2. Has it not been irrefragably demonstrated by as many as discourse of moral good and evil, that, antecedently to any government among men, we are under a law, the law of nature, and that this is the will of God. 3. If all these had kept silence, does not the thing itself speak? What can be more evident, than that there is a law of nature, and that this is the law of God. We are certain that we are made of rational natures, capable of laws and government. We are no less sure, that God made us, and made us so. It is self-evident, that to him who made us, it belongs to govern, and dispose of us to those ends for which we were made. And we by our very beings are bound to obey, submit, and subject ourselves to his will and pleasure, who made us, and on whom we every way depend; and therefore his will, if he make it known, is a law, and the highest law to us. Again, it is clear that this reason, if we attend to it, tells us, that some things are to be done, and some things left undone; such as these, that we are to serve, love, obey and honour him that made us, upholds us, and on whom we every way depend; that we are to carry forward our fellow creatures, as it becomes those, who have the same original with us, who are subject to the same rule, are obliged to pursue the same ends; and that we are to dispose of ourselves, as the author of our nature allows us. These are all, if not self evident, yet next to it, and easily deducible from principles that are so. Further, the reason that is implanted in us by God, tells us so; we are to take what it leads us to, while duly used, as the will of God, and so a law to us. 'For whatever judgement God makes a man with, 'concerning either himself, or other things, 'it is God's judgement; and whatever is his 'judgement, is a law to man; nor can he neglect or oppose it, without sin, being in his 'existence made with a necessary subjection 'to God. Such and such dictates being the 'natural operations of our minds, the being 'and essential constitution of which, in right 'reasoning, we owe to God, we cannot but esteem them the voice of God within us, and 'consequently his law to us.' [Sir Charles Wolseley's Scripture Belief, pp. 32, 33.]

What he tells us, of men's different apprehensions about what is right or wrong, makes nothing to the purpose. That only shews, that in many instances we are in the dark as to what is good and evil, which is granted; but will not infer, that there is no fixed measure of good and evil. In many general truths, all, who apply themselves to think, understand the

terms, and have the truths proposed, do agree. And perhaps, all that is knowable of our duty by the light of nature, is deducible from such principles of morality, as all rational men who have them fairly proposed to them, must assent to. And deductions from laws when duly made, are of equal authority with the principles from which they are inferred. And finally, when men, in pursuance of their perverse natures, follow what is cross to those dictates of reason, they are condemned by their own consciences; which shews them under the obligation of a law, and that acting in a congruity to their natures as corrupt is not the standard they are obliged to walk by, since their own reason checks them for doing it. They who would desire to have this matter fully discoursed, may read others who have done it designedly, of whom there is great plenty.

His second reason runs thus; 'Also we do not know, what is good or evil in itself, if not thus, whatsoever can be attributed to God that is good, and what cannot, is evil. And we know not what can be attributed to God, but such things as by a deduction we ascribe to him, we call perfect, and such as we deny to be in him, we call imperfect; and so we most ignorantly commit a circle. There is no other notion of things in themselves good or evil.'

It is much harder to find the sense of these words, if they have any, than to answer the argument. The design of it is to prove, that there is no standard whereby we may judge what is good and what is evil. The force of the argument amounts to this; that there is no way how we come to know any thing to be good, but by this, that it may be ascribed to God. But we cannot know whether it is to be ascribed to God, unless we know that it is perfect or good.

This is thin sophistry, which I might easily expose, were it to any purpose to discover the weakness of that, which it's author was ashamed of and disowned.

As to the first proposition, that there is no other way to know whether any thing be good or evil, but this, that it can or cannot be ascribed to God. 1. The complex proposition is false; for there are other ways whereby we may know things to be good or evil. And this holds, whether we take it in a physical or a moral sense. We know that to be morally good, which God enjoins us to do. We know the will of God in some instances, from the natures God has given us; and from these instances, our reason can infer others. As to physical good, we know things to be good or perfect, by acquaintance with the nature of the things, and by the self-evident notions of perfection: for there are some things, such as dependence, subjection, and the like, which, without any reasoning about the matter, we understand to be imperfect, or perfect; as soon as we understand the terms, and know that a perfection is that, which it is better for

any being to have than to want; and then what these particular words dependence, subjection, &c. signify. This alone overthrows his whole argument. 2. The maxim which he fixes as a standard; that is good, which may be ascribed to God, and that is not, which may not be ascribed to him, if it is taken in its full extent, it is false as to moral good; of which the only question is: for it is certain, that it is good for man to be a dependent, a subject, &c. which cannot be ascribed to God. If it is taken in a physical sense, it is not to the purpose: and besides, it would, even in this sense, need some caution.

As to his other proposition, that we cannot otherwise know what is to be ascribed to God, than by knowing that it is good or perfect, it can scarce be supposed to speak of good in a moral sense; and in any other sense it is impertinent. If it is understood in a moral sense, it is likewise false; for we may know that things which are not in their own nature moral perfections, belong to God: such as power, omni-presence, &c. if it be understood in any other sense, we have nothing to do with it.

The next head that he adds is, "That all men will confess that any thing may be morally evil and good also, and consequently any thing decent or indecent, moral or immoral. Neither though there were things in themselves evil (if we do not apprehend other things instead of them) can we have any inclination thereunto: otherwise the will could wish evil."

But, 1. Who will grant him (in any other sense, that will be subservient to his purpose) that all actions are indifferent? I know none but men of his own principles. 2. As for what he pretends, that we cannot incline to that which is in its own nature evil, unless it be under the notion of good, I see not what this says for him: it is enough that we can do that action, which is evil and prohibited, yea, and which we know is prohibited, to constitute sin, and make the sinner deeply guilty.

But, not to insist any further on this inconsiderable trifler, (whose undigested notions scarce deserve the consideration we have given them, and much less did they become the awful gravity of the place where they were delivered :) there are others, &c.

Aikenhead's dying Speech appears to have been printed, as Halyburton not only refers to the passage cited above, but also mentions it in his Index of Authors and books quoted in his Treatise.

Wodrow (vol. 2, p. 221,) relates the following case of a convert to Judaism:

"Another lamentable effect of the bearing down of the gospel, and the neglect of instructing of people at this time, was the apostacy of too many from the very profession of religion; and indeed profaneness was now at a terrible

height. In the justiciary registers, I find a process against the underwritten person for Judaism, which being the only instance, as far as I know, of this since the Reformation, the curious reader will be content to have a view of it. I give it as it stands in the criminal books, and it is what may be a caution to parents to found their children well in our holy religion, before they suffer them to go abroad.

“ ‘Edinburgh, June 15, 1681. Francis Borthwick, second son to James Borthwick of Harelaw, being often called to have compeared before the justiciary, this day and place, in the hour of cause, to have underlien the law, for the crime of blasphemy committed by him, in so far as being born of Christian parents, and baptized and educated in the Christian faith, and continuing in the open profession thereof, and communion of the Christian and Catholic church, until the age of 14 years, he went abroad to foreign places, to follow the trade of merchandize, where he was seduced to make a shameful apostacy from the most holy faith, and to

‘ profess and openly declare himself to be a Jew, and was circumcised: and having returned to Scotland, at Edinburgh, Wrights-houses, Brandsfield, and Hall-heriot, he did rail against our Lord and Saviour Jesus Christ, denying him to be God, and affirming him to be mere man, and a false prophet, and outrageously reviling him by such other horrid blasphemies as are not fit to be uttered, renouncing and cursing the holy sacrament and rite of his baptism. And he did with great and horrid execrations wish all manner of judgment to befall him, if ever he should return to the Christian religion, in manner at length mentioned in the criminal letters, raised at the instance of his majesty’s advocate, and James Cockburn in Duddingstoun informer against him thereanent. And being lawfully cited, and not compearing, the lords adjudged the said Francis Borthwick to be outlaw and fugitive, and all his goods and gear to be brought in for his majesty’s use, for his contempt and disobedience; which was pronounced for doom.’

402. The Trial of EDWARD Earl of WARWICK and HOLLAND, before the House of Lords, for the Murder of Richard Coote, esq.: 11 WILLIAM III. A. D. 1699.

March 28, 1699.

ABOUT 11 of the clock the Lords came from their own House into the court erected in Westminster-hall, for the Trials of Edward earl of Warwick and Holland, and Charles lord Mohun, in the manner following: The lord high steward’s gentlemen attendants, two and two. The clerks of the House of Lords, with two clerks of the crown in the courts of Chancery and King’s-bench. The masters in Chancery, two and two. Then the judges. The peers eldest sons, and peers minors, two and two. Four serjeants at arms with their maces, two and two. The yeoman usher of the House. Then the peers two and two, beginning with the youngest barons. Then four serjeants at arms, with their maces. Then one of the heralds, attending in the room of Garter, who by reason of his infirmity could not be present. And the gentleman usher of the Black Rod, carrying the white-staff before the lord high steward. Then the lord chancellor, lord high steward of England, alone.

When the lords were seated on their proper benches, and the lord high steward upon the wool-pack; the two clerks of the crown in the courts of Chancery and King’s-bench, standing before the clerk’s table with their faces towards the state;

The clerk of the crown in Chancery having his majesty’s commission to the lord high steward in his hands, made three reverences towards the lord high steward, and the clerk of

the crown in Chancery on his knees presented the commission to the lord high steward, who delivered it to the clerk of the crown in the King’s-bench, (then likewise kneeling before his grace) in order to be opened and read; and then the two clerks of the crown making three reverences, went down to the table; and the clerk of the crown in the court of King’s-bench commanded the serjeant at arms to make proclamation of silence; which he did in this manner:

Serj. at Arms. O yes, O yes, O yes, My lord high steward his grace does straitly charge and command all manner of persons here present, to keep silence, and hear the king’s majesty’s commission to his grace my lord high steward of England directed, openly read, upon pain of imprisonment.

Then the Lord High Steward stood up, and spoke to the Peers.

Lord High Steward. (Lord Somers.) Your lordships will be pleased to stand up, and be uncovered, while the king’s commission is reading.

All the Peers stood up, and were uncovered, while the Commission was read.

Clerk of the Crown. ‘Gulielmus Tertius Dei Gratia Angl. Scot. Franc. et Hibern. Rex, Fidei Defensor, &c. Prædilecto et fidei Consiliar. nostro Johanni Domino Somers, Cancellar. nostro Angl. Sciatis quod cum Edrus Comes Warwic, et Holland, nuper de paroch-

' Sti. Martini in Campis in Com. Middlesex. et
 ' Carolus Dnus. Mohun, nuper de paroch.
 ' prædict. in Com. prædict. coram dilectis fide-
 ' lib. nostris Carolo Lee, Mil. Samuel. Buck,
 ' Willielmo Withers et Francisco Tysson, Ar-
 ' migeris, et aliis sociis suis Justiciar. nostris ad
 ' inquirend. per Sacramentum, probor. et lega-
 ' lium hominum de Com. nostro Middlesex.
 ' prædict. ac aliis viis modis et mediis quibus
 ' melius sciverint aut poterint, tam infra libertat.
 ' quam extra, per quos rei veritas melius sciri
 ' poterit et inquiri de quibuscunque Proditioni-
 ' bus Misprisionibus Prodition. Insurrectionib.
 ' Rebellionib. Controfact. tonsur. lotur. falsis
 ' fabricationib. et aliis falsitat. Monet. hujus
 ' Regni nostri Angl. et alior. Regnor. sive Do-
 ' minior. quorumcunque ac de quibuscunque
 ' Murdris Feloniis Homicid. Interfectionibus
 ' Burglar. Raptib. Mulier. Congregationib. et
 ' Conventicul. illicit. verbor. prolationib. Coadu-
 ' nationib. Misprisionib. Confederationibus falsis
 ' Alleganciis Transgressionibus, Riotis, Routis,
 ' Retentionib. Escapiis Contempt. Falsitat.
 ' Negligentiis, Concelament. Manutenent. Op-
 ' pressionibus, Cambiparciis, Deceptionib. et
 ' aliis Malefactis Offenc. et Injur. quibuscun-
 ' que; necnon Accessar. eorundem infra Com.
 ' prædict. tam infra libertat. quam extra, per
 ' quoscunque et qualitercunque habit. fact. per-
 ' petrat. sive commis. et per quos vel per quem
 ' cui vel quibus quando qualiter et quomodo et
 ' de aliis Articulis et Circumstanc. præmiss.
 ' seu eor. alicujus vel aliquor. qualitercunque
 ' concernen. plenius veritat. et ad easdem pro-
 ' ditiones et al. præmiss. audiend. et terminand.
 ' secundum legem et consuetud. Regni nostri
 ' Angl. nuper assignat. de Felonia et Murdro
 ' per ipsos Edrum. Comitem Warwick. et Hol-
 ' land, et Carolum Dominum Mohun, Commiss.
 ' et Perpetrat. per sacrament. probor. et legal.
 ' hominum Com. nostri Middlesex. prædict.
 ' Indictat. existunt. Nos considerantes quod
 ' Justitia est virtus excellens et altissimo com-
 ' placens, volentesque quod prædict. Edrus.
 ' Comes Warwic. et Holland, et Carolus Do-
 ' minus Mohun, de et pro Felonia et Murdro
 ' unde ipsi ut præfertur Indictat. existunt. co-
 ' ram nob. in presenti Parliament. nostro se-
 ' cundum leg. et consuetud. Regni nostri
 ' Angl. Audiantur, Examinentur, Sententi-
 ' entur et Adjudicentur, cæteraque omnia
 ' quæ in hac parte pertinent debo. modo ex-
 'erceantur et exequantur; ac pro eo quod
 ' officium Seneschalli, Angl. (cujus præsentia
 ' in hac parte requiritur ut accepimus) jam
 ' vacat, Nos de Fidelitate Prudentia provida
 ' Circumspectione et Industria vestris pluri-
 ' mum confidentes Ordinavimus et Constitui-
 ' mus vos ex hac causa Seneschallum, Angl.
 ' ad Officium illud cum omnibus eidem Officio
 ' in hac parte debit, et pertinen. (hac vice) ge-
 ' rend. occupand. et exercend. Et ideo vob.
 ' Mandamus quod circa præmiss. diligenter in-
 ' tendatis et ea omnia quæ in hac parte ad Offi-
 ' cium Seneschal. Angl. pertinent et requi-
 ' runtur (hac vice) faciatis exerceatis et exequa-
 ' mini cum effectu. In cujus rei Testimonium

' has Literas nostras fieri fecimus Patentes,
 ' Teste meipso apud Westmonasterium vicesi-
 ' mo quinto die Martii, Anno Regni nostri Un-
 ' decimo.

' Per ipsum Regem propria Manu Signat.'

Serj. at Arms. God save the king.

Then the herald and the gentleman-usher of the Black Rod, after three reverences, kneeling, presented the White staff to his grace, and his grace removed from the Wool-pack to the Chair, which was placed upon an ascent just before the uppermost step of the Throne, and seated himself in the Chair.

Cl. of the Cr. Serjeant at Arms, make Proclamation.

Serj. at Arms. O yes, O yes, O yes, my lord high steward of England, his grace, does straitly charge and command all manner of persons here present to be uncovered, upon pain of imprisonment.

Then the Judges and Masters in Chancery sat down in their places upon the wool-pack, uncovered.

Then the Clerk of the Crown read the Return of Certiorari, *in hæc verba*:

' Gulielmus Tertius, Dei gratia, Angl. Scot.
 ' Franc. et Hibern. Rex, Fidei Defens. &c.
 ' Justic. nostris per Literas nostras Paten. con-
 ' fect. ad inquirend. per Sacrm. probor. et legal.
 ' hom. Com. nostri Midd. ac aliis viis mod. et
 ' med. quibus melius sciverint aut poterint de
 ' quibuscunque prodic. mispris. prodic. insur-
 ' rection. rebellion. controfact. tonsur. lotur.
 ' falsis fabricat. et aliis falsitat. monet. hujus
 ' Regni Angl. et alior. regnorum sive domini-
 ' orum quorumcunque ac de quibuscunq;
 ' murdris, felon. homicid. interfection. burglar.
 ' raptibus mulierum, congregacon. et conven-
 ' ticul. illicit. verborum prolationibus, coadunat.
 ' misprision. confederat. falsis alleganc. trans-
 ' gres. riot. rout. retention. escapiis contempt.
 ' negligenc. concelament. manutenen. oppres-
 ' sion. deception. et aliis malefactis offens. et
 ' injur. quibuscunq; necnon accessariis eorun-
 ' dem infra Com. prædict. tam infra libertates
 ' quam extra per quoscunq; et qualitercunq;
 ' habit. fac. perpetrat. sive commiss. ac de aliis
 ' articulis et circumstanciis præmiss. et eorum
 ' quodlibet seu eorum aliquod vel aliqua quali-
 ' tercunq; concernen. plenius veritat. et ad
 ' easdem prodicion. et al. præmiss. audiend. et
 ' terminand. assign. Necnon Justic. nostris ad
 ' Gaol. nostram de Newgate de Prisonar. in ea
 ' ex existen. deliberand. assign. et eorum cuili-
 ' bet Saltm. volen. certis de causis omnia et sin-
 ' gula Indictamen. et Inquisition. de quibus-
 ' cunq; felon. et murdris, unde Edrus. Comes
 ' Warwic. et Holland, et Carolus Dominus
 ' Mohun, et al. coram vobis Indictat. sunt;
 ' necnon record. conviction. Rici. French,
 ' Rogeri James et Georgii Dockwra, pro felon.
 ' et homicid. unde indictat. sunt. Et super
 ' inde per quandam. Jur. Prie. inde inter nos
 ' et præfat. Richardum French, Rogerum
 ' James et Georgium Dockwra, capt. convict.

* exist. ut dicitur coram nobis et non alibi termi-
 * nari vobis et cuilibet vestrum mandamus quod
 * omnia et singula in Indictament. et Record.
 * convict. prædict. cum omnibus ea tangen.
 * quibuscunq; nominibus iidem Edrus. Comes
 * Warwic. et Holland, Carolus Dominus
 * Mohun, Richardus, Rogerus et Georgius
 * nuncupentur in eisdem coram nobis sub
 * sigillis vestris aut unius vestrum in octab.
 * Sti. Hiliarii ubicunq; tunc fuerimus in Angl.
 * mittat. seu unus vestrum mittat. una cum hoc
 * brevi ut ulterius inde fieri fac. quod de jure ac
 * secundum legem et cons. regni nostri Angl.
 * fore viderimus faciend. Teste J. Holt, Mil.
 * apud Westm. xxviii die Novembris, Anno
 * Regni nostri decimo.

‘ per Cur. ASTRY.

‘ Ad Instanc. prosecutor. quoad duos Def.
 ‘ et ad instanc. cæterorum Def.

‘ J. HOLT.’

‘ Virtute cujus brevis mihi et aliis direct. In-
 ‘ dictament. et Inquisition. infra mentionat.
 ‘ necnon record. conviction. infra nominat.
 ‘ Ricci. French, Rogeri James et Georgii
 ‘ Dockwra, pro felon. et homicid. unde indictat.
 ‘ et superinde per quandam Jur. prie. convict.
 ‘ exist. cum omnibus ea tangen. coram Dom.
 ‘ Rege in quibusdam Sched. huic brevi annex.
 ‘ mitto prout interius præcipitur.

‘ Respons. Fra. Child. Mil. Major. Civit.
 ‘ Lond. un. Justic. infra script.’

‘ Midd. ss. Memorandum quod ad delibera-
 ‘ tion. gaol. Domini Regis de Newgate tent.
 ‘ pro com. Middlesex. apud Justice-hall in le
 ‘ Old-Bailey in Suburbis Civit. London. die
 ‘ Veneris (scilt.) decimo tertio die Januarii
 ‘ Anno Regni Dom. nostri Gulielmi tertii Dei
 ‘ gra. nunc Regis Angl. &c. decimo, coram
 ‘ Fran. Child, Mil. Majore Civit. London.
 ‘ Edro. Ward, Mil. Capital. Baron. Scii. dict.
 ‘ Dom. Regis, Henrico Hatsel, Milit. un Baron.
 ‘ Scii. dicti Domini Regis, Thoma Stamp,
 ‘ Mil. Edro Clarke, Mil. Aldris dict. Civit. Lon-
 ‘ don. Salathiel. Lovell, Mil. servien. dict. Dom.
 ‘ Regis ad legem ac Recordator. dict. Civit.
 ‘ London. et aliis sociis prædict. de prisonar. in
 ‘ eadem existen. deliberand. assign. ven. hic in
 ‘ Cur. Carolus Lee, Com. Mil. Samuel Buck,
 ‘ Will. Withers, Fran. Tysson, Ar. Justic. dict.
 ‘ Dom. Regis per Literas patent. ipsius Dom.
 ‘ Regis eisdem Justic. prænominat. et aliis ac
 ‘ quibuscunq; quatuor vel plur. eorum sub
 ‘ magno Sigillo dict. Dom. Regis Angl. con-
 ‘ fect. ad inquirend. per Sacrament. probor. et
 ‘ legal. hom. de Com. Midd. præd. ac aliis viis
 ‘ modis et mediis quibus melius sciverint aut
 ‘ poterint tam infra libertat. quam extra, per
 ‘ quos rei veritas sciri poterit de quibuscunq;
 ‘ prodicion. misprision. prodicion. insurrection.
 ‘ rebellion. controfaktur. tonsur. lotur. falsis fa-
 ‘ brication. et al. falsitat. monetæ hujus Regni
 ‘ dict. Dom. Regis Angl. et al. Regnorum sive
 ‘ Domin. quorumcunq; ac de quibuscunq; mur-
 ‘ dris, felon. homicid. interfecon. burglar. rapt.
 ‘ mulier. congregac. et conventicul. illicit. ver-
 ‘ borum prolation. coadunac. misprision. con-
 ‘ federac. falsis alleganc, transg. riot. rout, re-

‘ tention. escapiis contemp. negligenc. conce-
 ‘ lamen. manutenen. oppression. cambiparciis
 ‘ deception. et aliis malefact. et offenc. quibus-
 ‘ cunq; nec non accessar. eorund. infra Com.
 ‘ præd. tam infra Libertat. prædict. quam extra,
 ‘ per quoscunq; et qualitercunq; habit. fact. per-
 ‘ petrat. sive commiss. ac de aliis articul. et cir-
 ‘ cumstan. præmissa et eorum quodlibet seu
 ‘ eorum aliquod vel aliqua qualitercunq; con-
 ‘ cernen. plenius veritat. et ad easdem prodi-
 ‘ tion. et al. præmissa audiend. et terminand.
 ‘ secundum legem et consuetud. hujus Regni
 ‘ dict. Dom. Regis Angl. assign. et per manus
 ‘ suas propr. deliberaver. hic in Cur. dict. Dom.
 ‘ Regis quoddam record. indictament. coram
 ‘ eis et aliis sociis suis nuper præantea præsent.
 ‘ et capt. versus Edrum. Comit. Warwic. et
 ‘ Holland, Carolum Dominum Mohun, de
 ‘ Oakehampton in Com. Devon. Ricum. French,
 ‘ Rogerum James et Georgium Dockwra, pro
 ‘ murdro cujusdam Ricci. Coote, Ar. in forma
 ‘ juris terminand. &c. (eisdem Rico. French,
 ‘ Rogero James et Georgio Dockwra, prisonar.
 ‘ in dict. Gaol. dict. Dom. Regis de Newgate,
 ‘ causa in eodem indictament. content. ad tunc
 ‘ existen.) Record. cujus quidem indictament.
 ‘ patet in quibusdam schedul. huic annex.

‘ Midd. ss. Memorandum quod ad Sessionem
 ‘ de Oyer et Terminer Domini Regis tent. pro
 ‘ Com. Middlesex. apud Hicks-Hall in St.
 ‘ John-street, in Com. præd. die Mercurii scil.
 ‘ septimo die Decembris, Anno Regni Domini
 ‘ nostri Gulielmi tertii, Dei gratia, nunc Regis
 ‘ Angliæ, &c. decimo, coram Carolo Lee, Mil.
 ‘ Samuele Buck, Willielmo Withers, Francisco
 ‘ Tysson, Armigeris, et aliis sociis suis Justic.
 ‘ dict. Dom. Regis per Literas Paten. ipsius
 ‘ Dom. Regis, eisdem Justic. prænominat. et
 ‘ al. ac quibuscunque quatuor vel pluribus
 ‘ eorum sub magno Sigillo dict. Domini Regis
 ‘ Angliæ confect. ad inquirend. per sacrament.
 ‘ probor. et legalium hom. Com. Middlesex.
 ‘ præd. ac aliis viis mod. et med. quibus melius
 ‘ sciverint aut poterint tam infra libertat. quam
 ‘ extra per quos rei veritas melius sciri poterit
 ‘ de quibuscunque prodicion. misprision. prodi-
 ‘ tion. insurrection. rebellion. controfaktur. ton-
 ‘ sur. lotur. falsis fabrication. et aliis falsitat.
 ‘ monet. hujus Regni dict. Dom. Regis Angl.
 ‘ et al. Regnor. sive Dominior. quorumcunque
 ‘ ac de quibuscunq; murdris, felon. homicid. in-
 ‘ terfection. burglar. rapt. mulier. congregat.
 ‘ et conventicul. illicit. verborum prolation.
 ‘ coadunat. misprision. confederat. falsis alle-
 ‘ gan. transgr. riot. rout. retention. escapiis con-
 ‘ tempt. negligenc. concealamen. manutenen. op-
 ‘ pression. cambiparciis deception. et aliis ma-
 ‘ lefactis et offensis quibuscunq; necnon acces-
 ‘ sar. eorundem infra Com. præd. tam infra li-
 ‘ bertat. quam extra, per quoscunque et quali-
 ‘ tercunque habit. fact. perpetrat. sive commiss.
 ‘ ac de aliis articulis et circumstantiis præmissa
 ‘ et eor. quodlibet vel aliqua qualitercunque
 ‘ concernen. plenius veritat. et ad easdem pro-
 ‘ dicion. et al. præmiss. audiend. et terminand.
 ‘ secund. legem et cons. hujus Regni dicti
 ‘ Dom. Regis Angl. assign. per sacrm. Egidii

Riddle, Richardi Read, Roberti Leg, Josephi Partherich, Johannis Marriott, Jonathan Hall, Nicolai Baker, Roberti Teague, Thomæ Briggs, Willielmi Brace, Thomæ Williams, Georgii Bishop, Thomæ Hodges, Johannis Lynn, Samuelis Lee, Richardi Rogers, Josephi Rogers, Johannis Cheney, Johannis Fowler, et Roberti Nicholson, probor. et legalium hominum Com. præd. adtunc et ibidem jurat. et onerat. ad inquirend. pro dicto Dom. Rege et corpore Com. præd. præsentat. existit. qd. Billa Indictament. huic Schedul. annex. est vera.

Midd. ss. Jurator. pro Domino Rege super sacrum. suum præsentant quod Edwardus Comes Warwic. et Holland, nuper de paroch. S. Martini in Campis in Com. Middlesex. Carolus Dominus Mohun, Baro Mohun de Okehampton, in Com. Devon. nuper de paroch. præd. in Com. Middlesex. præd. Richardus French, nuper de paroch. præd. in Com. Middlesex. præd. Gen. Rogerus James, nuper de paroch. præd. in Com. Middlesex. præd. Gen. et Georgius Dockwra, nuper de paroch. præd. in Com. Middlesex. præd. Gen. Deum præ oculis suis non habentes, sed instigatione diabolica moti et seducti, tricesimo die Octobris, Anno Regni Domini Gulielmi tertii, Dei gra. Angl. Scoc. Franc. et Hibern. Regis, Fidei Defens. &c. decimo, vi et armis, &c. apud paroch. præd. in Com. Middlesex. præd. in et super quendam Richardum Coote, Ar. in pace Dei et dicti Domini Regis, nunc adtunc et ibidem existen. felonice voluntarie et ex malitiis suis præcogitat. insult. fecer. et qd. præd. Edwardus Comes Warwic. et Holland, cum quodm. gladio (Anglice a sword) de ferro et chalibe confect. valor quinque solidor. quem ipse idem Edwardus Comes Warwic. et Holland, in manu sua dextra ad tunc et ibidem extract. habuit et tenuit, præfat. Ricardum Coote in et super sinistram part. pectoris ipsius Ricardi Coote prope Os Collar (Anglice the Collar Bone), ipsius Ricardi Coote adtunc et ibidem felonice voluntarie et ex malitia sua præcogitat. percussit pupugit et inforavit (Anglice did strike, stab, and thrust in) dans eidem Richardo Coote, adtunc et ibidem cum gladio extract. præd. in et super dict. sinistram partem pectoris ipsius Ricci. Coote, prope Os Collar (Anglice the collar bone) ipsius Ricci. Coote unum vulnus mortal. (Anglice one mortal wound) latitud. dimidii unius pollicis et profund. quinq; pollicium; de quo quidem vulnere mortal. præd. Ricus. Coote adtunc et ibm. instanter obiit. Et qd. præd. Carolus Dnus. Mohun, Ricus. French, Rogerus James et Georgius Dockwra, adtunc et ibm. felonice voluntarie et ex malitiis suis præcogitat. fuer. presen. auxilian. abettan. confortan. assisten. et manutenn. præfat. Edrum. Comit. Warwic. et Holland, ad præfat. Ricum. Coote, modo et forma præd. felonice voluntarie et ex malitia sua præcog. interficiend. et murdrand. Et sic Jur. præd. super sacrum. suum præd. dic. qd. Edrus. Comes Warwici et Holland, Carolus

Dnus. Mohun, Ricus. French, Rogerus James et Georgius Dockwra, præfat. Ricum. Coote, modo et forma præd. felonice voluntarie et ex malitiis suis præcogitat. interfecer et murdraver. contra pacem dei. Domini Regis nunc Coron. et Dignitat. suas, &c.

Ricus. French, 13 Januar. 98. pon. se Cul. de Felon. et Homicid. tant. Non cul. de Murdro. catalla nulla. Pet. Librum. Legit ut Clericus. Crematio respectuatur quousq; &c.

Rogerus James, 13 Januar. 98. pon se cul. de Felon. et Homicid. tant. Non cul. de Murdro. catalla nulla. Pet. Librum. Legit ut Clericus. Crematio respectuatur quousq; &c.

Billa vera. Samuel Cowthorne de paroch. Sti. Martini in Campis in Com. Midd. Yoman.—Willus. Cripps de paroch. præd. in Com. præd. Yoman,—Henricus Pomfret de paroch. præd. in Com. præd. Yoman,—Willus. Salmon de paroch. præd. in Com. præd. Chirurgus.—Robtus. Applegate de paroch. præd. in Com. præd. Yoman. Jur. in Cur.

Midd. ss. Memorand. qd. ad Deliberation. Gaolæ Dni. Regis de Newgate tent. pro Com. Midd. apud Justice Hall in le Old Bailey in Suburbis Civitat. London. die Mercurii scilt. septimo die Septembris, Anno Regni Dni. nri. Gulielmi tertii Dei grat. Angl. Scot. Franc. et Hiberniæ Regis, Fidei Defens. &c. decimo, coram Franco Child, Mil. Majore Civitat. London. Georgio Treby, Mil. Capital. Justic. dei. Dni. Regis de Banco, Littleton Powis, Mil. uno Baron. Scii. dict. Dni Regis, Thoma Stamp, Mil. Edro. Clarke, Mil. Aldris. dict. Civitat. London. Salathiel. Lovell, Mil. Servien. dei. Dni. Regis ad Legem ac Recordatore dict. Civitat. London. et aliis Sociis suis Justic. dei. Dni. Regis ad Gaolam ipsius Dni. Regis de Newgate præd. de prisonar. in eadem existen. deliberand. assign. ven. Robertus White, gen. Coronator dei. Dni. Regis infra Libertat. Decani et Capituli Ecclesiæ Collegiat. bti. Petri Westm. Civitat. Burgi et Villæ Westm. in Com. Midd. præd. Et per manus suas proprias deliberavit hic in Cur. quandam inquisition. de morte Ricci. Coote, Ar. coram eo nuper capt. in Cur. hic de Recordo in forma juris terminand. Quæ quidem Inquisitio huic Schemulæ annex. est, pon. se.

Civitas, Burgus et Villa. Westm. in Com. Midd. ss. Inquisitio indentat. capt. pro Dno. Rege apud paroch. Sti Martini in Campis infra Libertat. Decani et Capitli. Ecclesiæ Collegiat. bti. Petri Westm. Civitat. Burgi et Villæ Westm. in Com. Midd. tricesimo die Octobris, Anno Regni Dni. nri. Gulielmi tertii Dei gra. Angl. Scoc. Franc. et Hiberniæ Regis, Fidei Defensoris, &c. decimo, coram Roberto White, gen. Coronatore dei. Dni. Regis Libertat. præd. super visum Corporis ejusdam Ricci. Coote, Ar. ibm. jacen. mort. per sacrum. Johis Harris, Petri Solomon, Ricci. Newgent, Willi. Fryer, Samuelis Thomson, Jacobi Timberlick, sen. Jacobi Timberlick, jun. Ricci. Jackson, Johis Finch, Samuelis Powell, Samuelis

' Dimont, Robti. Giltrick, Johis Paulin, Jo-
 ' sephi Vernon, Thomæ Smithson, Andreæ
 ' Rogers et David. Jones, proborum et lega-
 ' lium homin. Libertat. præd. jurat. et onerat.
 ' ad inquirend. pro dno. Rege quando
 ' qualiter et quomodo præfat. Ricus. Coote ad
 ' mortem suam devenit dicunt super sacrm.
 ' suum præd. qd. Edrus Comes Warwic. et
 ' Holland, nuper de paroch. Sti. Martini in
 ' Campis infra Libertat. præd. in Com. præd.
 ' Carolus Dnus. Mohun, nuper de paroch.
 ' præd. infra Libertat. præd. in Com. præd.
 ' Ricus. French, nuper de paroch. præd. infra
 ' Libertat. præd. in Com. præd. gen. Rogerus
 ' James, nuper de paroch. præd. infra Libertat.
 ' præd. in Com. præd. gen. et Georgius Dock-
 ' wra, nuper de paroch. præd. infra Libertat.
 ' præd. in Com. præd. gen. Deum præ oculis
 ' suis non habentes, sed Instigatione diabolica
 ' moti et seducti dco. tricesimo die Octobris
 ' Anno decimo supradicto, vi et armis, &c.
 ' apud paroch. præd. infra Libertat. præd. in
 ' Com. præd. in et super præfat. Ricum. Coote,
 ' in pace Dei et dci. Dni. Regis, nunc adtunc
 ' et ibm. existen. felonice voluntarie et ex ma-
 ' liciis suis precogit. insult. fecer. et qd. præd.
 ' Ricus. French, cum quodam Gladio (Anglice
 ' a rapier) de ferro et chalibe confect. valoris
 ' quinq; solid. quem ipse idem Ricus. French,
 ' in manu sua dextra adtunc et ibm. extract.
 ' huit. et tenuit præfat. Ricum Coote, in et
 ' super sinistram partem pectoris ipsius Ricci.
 ' Coote, prope Os Collar (Anglice the collar
 ' bone) ipsius Ricci. Coote, adtunc et ibm. felo-
 ' nice voluntarie et ex malicia sua precogitat.
 ' percussit et pupugit dans eidem Rico. Coote,
 ' adtunc et ibm. cum gladio præd. extract. in
 ' et super præd. sinistram partem pectoris ipsius
 ' Ricci. Coote, prope dict. Os Collar ipsius Ricci.
 ' Coote, unum vulnus mortale longitudinis di-
 ' mid. unius pollicis et profunditatis quinq; pol-
 ' licium, de quo quidem vulnere mortali præd.
 ' Ricus. Coote, apud paroch. præd. infra Li-
 ' bertat. præd. in Com. præd. instanter obiit.
 ' Et qd. prædicti Edrus. Comes Warwic. et
 ' Holland, Carolus Dnus. Mohun, Rogerus
 ' James, et Georgius Dockwra, adtunc et ibm.
 ' felonice voluntarie et ex maliciis suis præ-
 ' cogitat. fuer. presentes auxiliantes abettantes
 ' confortantes assistentes et manutenentes præ-
 ' fat. Ricum. French, ad predictum Ricum.
 ' Coote, in forma præd. felonice voluntarie et ex
 ' malicia sua præcogitat. interficiend. et mur-
 ' drand. Et sic Jur. præd. dicunt super sacrm.
 ' suum præd. quod præd. Edrus. Comes War-
 ' wici et Holland, Carolus Dnus. Mohun, Ri-
 ' cus. French, Rogerus James et Georgius
 ' Dockwra, præfat. Ricum. Coote, modo et
 ' forma prædict. felonice voluntarie et ex ma-
 ' liciis suis præcogitat. interfecer. et mur-
 ' draver. contra pacem dci. Dni. Regis nunc
 ' Coron. et Dignitat. suas, &c. Et ulterius Jur.
 ' præd. dicunt super sacrm. suum præd. qd.
 ' immediate post Feloniam et Murdrum præd.
 ' per ipsos modo et forma præd. fact. et per-
 ' petrat. apud paroch. præd. infra Libertat.
 ' præd. in Com. præd. fugam fecer. Quæ

' bona et catalla terras sive tenementa præd.
 ' Edrus. Comes Warwici et Holland, Carolus
 ' Dnus Mohun, Ricus French, Rogerus James
 ' et Georgius Dockwra, tempore Feloniæ et
 ' murdri prædict. per ipsos modo et forma præd.
 ' fact. et perpetrat. sive aliquo tempore postea
 ' usque diem Captionis hujus inquisitionis ha-
 ' buerunt Jur. præd. penitus ignorant. In
 ' cujus Rei Testimonium tam præfat. Coro-
 ' nator quam Jur. præd. huic. Inquisitioni si-
 ' gilla sua alternatim apposuerunt die anno et
 ' loco, primo supra dcis.

' Ricus. French, 13 Jan. 98. pon. se cul. de
 ' felon. et homicidio tant. Non cul. pro murdro.
 ' Catal. nulla. Judicium super indictamentum.

' Rogerus James, 13 Jan. 98. pon. se cul.
 ' de felon. et homicid. tant. Non. cul. pro
 ' murdro. Catalla nulla. Judicium super In-
 ' dictamentum.

' Georgius Dockwra, 13 Jan. 98. pon. se cul.
 ' de felon. et homicid. tantum. Non cul. pro
 ' murdro. Catalla nulla. Judicium super In-
 ' dictamentum.

' Midd. ss. Memorandum qd. ad sessionem
 ' de Oyer et Terminer Domini Regis tent. pro
 ' Com. Middlesex. apud Hicks-hall in S. John-
 ' street in Com. præd. die Mercurii scilt. sep-
 ' timo die Decembris Anno Regni Domini
 ' nostri Gulielmi Tertii Dei gratia nunc Regis
 ' Angliæ, &c. decimo, coram Carolo Lee, Mil.
 ' Samuele Buck, Willielmo Withers, Francisco
 ' Tysson, Armigeris, et aliis Sociis suis Justic.
 ' dict. Dom. Regis per Literas Patent. ipsius
 ' Dom. Regis eisdem Justic. prænominat. et
 ' al. ac quibuscunque quatuor vel pluribus
 ' eorum sub magno Sigillo dict. Dni. Regis
 ' Angliæ confect. ad inquirend. per sacrm.
 ' probor. et legalium hom. de Com. Middlesex
 ' præd. ac aliis viis mod. et med. quibus me-
 ' lius sciverint aut poterint. tam infra Libertates
 ' quam extra, per quos rei veritas melius sciri
 ' poterit, et inquiri de quibuscunque Prodition.
 ' Misprision. prodicion. Insurrection. Rebellion.
 ' Controfactur. Tonsur. Lotur. et falsis Fabri-
 ' cation. et aliis falsitat. Monet. hujus Regni
 ' dict. Dom. Regis Angliæ et aliorum Reg-
 ' norum sive Dominior. quorumcumque ac de
 ' quibuscunque Murdris Feloniis Homicidiis
 ' Interfection. Burglar. Rapt. Mulier. Congre-
 ' gat. et Conventicul. illicit. Verborum prola-
 ' tion. coadunat. Misprision. Confederat. falsis
 ' Alleganc. Transgr. Riot. Rout. Retention.
 ' Escapiis Contempt. Negligen. Concelamen.
 ' Manutenen. Oppressionibus Cambiparciis De-
 ' ception. et aliis Malefactis et Offensis quibus-
 ' cunque, necnon Accessar. eorundem infra
 ' Com. præd. tam infra Libertat. quam extra,
 ' per quoscunque et qualitercunque habit. fact.
 ' perpetrat. sive commiss. Ac. de aliis Articulis
 ' et circumstantiis præmissa et eorum quod-
 ' libet seu eorum aliquod vel aliqua qualiter-
 ' cunque concernen. plenius veritat. Et ad
 ' easdem Proditiones et alia Præmissa audiend.
 ' et terminand. sedm. Legem et Cons. hujus
 ' Regni dci. Dni. Regis Angliæ assign. per

sacrm. *Ægidii Riddle, Rici. Read, Roberti
 Legg, Josephi Partherich, Johis. Marriot,
 Jonathan Hall, Nicholai Barker, Roberti
 Teague, Thomæ Briggs, Willi. Brace,
 Thomæ Williams, Georgii Bishop, Thomæ
 Hodges, Johis. Lynn, Samuelis Lee, Rici.
 Rogers, Johis. Cheney, Johis. Fowler et Ro-
 berti Nicholson, proborum et legalium Ho-
 minum Com. præd. et tunc et ibm. jurat. et
 operat. ad inquirend. pro dco. Dno. Rege et
 corpore Com. præd. præsentat. existit qd.
 Edrus. Comes Warwici et Holland, nuper
 de paroch. S. Martini in campis in Com.
 præd. Carolus Dnus. Mohun, Baro Mohun de
 Oakehampton, in Com. Devon. nuper de Pa-
 roch. præd. in Com. Midd. præd. Ricus.
 French, nuper de paroch. præd. in Com.
 Midd. præd. gen. Rogerus James, nuper de
 paroch. præd. in Com. Midd. præd. gen. et
 Georgius Dockwra, nuper de paroch. præd.
 in Com. Midd. præd. gen. Deum præ oculis
 suis non halentes, sed instigatione diabolica
 mot. et seduct. 30 die Octobris Anno Regni
 Gulielmi tertii Dei Gratia Angl. Scoc.
 Franc. et Hiberniæ Regis Fidei defen-
 soris, &c. decimo, vi et armis, &c. apud
 paroch. præd. in Com. Midd. præd. in et su-
 per quendam Ricum. Coote. Ar. in pace Dei
 et dci. Dni. Regis nunc adtunc et ibidem
 existen. felonice voluntarie et ex maliciis suis
 præcogitat. insult. fecer. Et qd. præd. Comes
 Warwici et Holland, cum quodam Gladio
 (Anglice, a Sword) de ferro et Chalibe con-
 fect. valoris quinq; solid. quem ipse idem
 Edrus. Comes Warwici et Holland, in
 manu sua dextra adtunc et ibd. extract. huit
 et tenuit, præfat. Ricum. Coote, in et super
 sinistram partem pectoris ipsius Rici. Coote,
 prope Os Collar (Anglice, the collar bone) ip-
 sius Rici. Coote, adtunc et ibm. felonice vo-
 luntarie et ex malicia sua præcogitat. per-
 cussit pupugit et inforavit (Anglice, did strike,
 stab, and thrust in,) dans eidem Rico. Coote,
 adtunc et ibm. cum gladio extract. præd. in
 et super dict. sinistram partem pectoris ipsius
 Rici. Coote. prope Os Collar (Anglice, the col-
 lar bone) ipsius Rici Coote, unum Vulnus
 mortale (Anglice, one mortal wound) latitudi-
 nis dimidii pollicis et profunditatis quinq;
 pollicium, de quo quidem Vulneri mortali
 præd. Ricus. Coote, adtunc et ibm. instanter
 obiit. Et qd. præd. Carolus Dnus. Mohun,
 Ricus. French, Rogerus James et Georgius
 Dockwra, adtunc et ibm. felonice voluntarie
 et ex maliciis suis præcogitat. fuer. præsentēs
 auxiliantes abettantes confortantes assistentes
 et manutenentes præfat. Edrum. Comitem
 Warwici et Holland, ad præfat. Ricum.
 Coote modo et forma præd. felonice volunta-
 rie et ex malicia sua præcogitata interficiend.
 et murdrand. Et sic Jur. præd. super sacrm.
 suum præd. dicunt. qd. prædict. Edrus. Comes
 Warwici et Holland, Carolus Dnus. Mohun,
 Ricus. French, Rogerus James, et Georgius
 Dockwra, præfat. Ricum. Coote, modo et
 forma præd. felonice voluntarie et ex maliciis
 suis præcogitatis interfecer. et. murdraverunt*

contra pacem dci. Dni. Regis nunc. Coron.
 et Dignitat. suas, &c. Per quod Præceptum
 est vic. Midd. qd. non omitteret, &c. quin ca-
 peret predictos Edrum. Comitem Warwici et
 Holland, Carolum Dnum. Mohun, Ricum.
 French, Rogerum James et Georgium Dock-
 wra, ad respondend. &c. Quod quidem In-
 dictamentum præfat. Justic. dci Dni. Regis
 (per dcas. Literas paten. ipsius Dni. Regis
 eisdem Justic. prænominat. et aliis ac quibus-
 cunq; quatuor vel pluribus eorum sub magno
 Sigillo dci Domini Regis Angliæ ut præfertur
 confect.) postea scilt. ad Deliberationem
 Gaolæ dci. Dni. Regis de Newgate tent. pro
 Com. Midd. præd. apud Justice Hall in le
 Old-Bailey in Suburbis Civitat. Lond. dco.
 die Mercurii scilt. septimo die ejusdem Men-
 sis Decembris Anno Regni dci. Dni. Regis
 nunc decimo supradicto coram Francisco
 Child, Mil. Majore Civitat. London. Georgio
 Treby, Mil. Capital. Justic. dci. Dni. Regis
 de Banco, Littleton Powis, Mil. uno Baronum
 Scii. dci. Dni. Regis, Thomas Stampe, Mil.
 Edro. Clarke, Mil. Aldris. dcæ. Civitat. Lon-
 don. Salathiel Lovell, Mil. Servien. dci. Dni.
 Regis ad Legem et Recordatore dcæ. Civi-
 tatis London. et aliis Sociis suis Justic. dci.
 Dni. Regis ad Gaolam dci. Dni. Regis de
 Newgate, præd. de Prisonar. in eadem ex-
 isten. deliberand. assign. per manus suas pro-
 prias deliberaverunt hic in Cur. de Recordo in
 forma juris. terminand. &c. Super quo postea
 scilt. ad deliberationem Gaolæ dci. Dni. Re-
 gis de Newgate præd. die Veneris scilt. 13 die
 Jan. Anno Regni dci Dni. Regis nunc decimo
 supradicto coram Francisco Child, Mil. Ma-
 jore Civitat. London. Edro. Ward. Mil. Ca-
 pital. Baron. Scii. dci. Dni. Regis Henrico
 Hatsall, Mil. uno Baron. Scii. dci. Dni. Re-
 gis Thoma Stamp. Mil. Edr. Clarke, Mil. Al-
 dris. dcæ. Civitat. London. Salathiel Lovell,
 Mil. Servien. dci. Dni. Regis ad Legem ac
 Recordatore dict. Civitat. Lond. et aliis sociis
 suis Justic. dci Dni. Regis ad Gaolam ipsius
 Dni Regis de Newgate prædict. de Prisonar.
 in eadem existen. deliberand. assign. vener.
 prædict. Ricus. French, Rogerus James et
 Georgius Dockwra, sub custod. Willi. Goare,
 Militis, et Josephi Smart, Militis, vic. Com.
 præd. (in custod. cujus ex causa præd. in
 Gaolam de Newgate præd. præantea commissi
 fuer.) Ad Barram hic duct. in propriis perso-
 nis suis et statim de præmissis in Indicta-
 mento præd. superius specificat. eis superius
 separatim imposit. separatim allocut. qualiter
 se velint inde acquietari iidem Ricus. French,
 Rogerus James et Georgius Dockwra, sepa-
 ratim dicunt qd. ipsi non sunt inde culpabiles
 nec aliquis eorum est inde culpabilis et inde
 de bono et malo separatim. pon. se super
 priam, &c. Jo. immediate ven. inde Jura.
 coram præfat. Justic. dci. dci. Regis ult.
 noiat. hic, &c. Et qui nec, &c. Ad recogn.
 &c. Et Jur. Jure. ill. per præfat. Vic. ad hoc
 impanellat. (scilt.) Chrus. Rednap, Thomas
 Moody, Thomas Dunck, Simo. Smith, Johes.
 Smith, Michael Miles, Thomas Rowell, Na-

thaniel Lee, Josephus Devenish, Henricus Bradbury, Willus. Giles, et Johes. Burgoyne, exacti vener. qui ad veritat. de et super præmissis præd. dicend. electi triati et jurati dicunt super sacrm. suum qd. præd. Ricus. French, Rogerus James et Georgius Dockwra, sunt culpabiles, et quilibet eorum est culpabilis de Homicidio et Felonica Interfectione præfat. Ricci. Coote, in Indictamento præd. superius nominat. Et qd. iidem Ricus. French, Rogerus James et Georgius Dockwra, tempore Feloniæ et Homicidii præd. per ipsos Ricum. French, Rogerum James et Georgium Dockwra, in forma præd. commiss. seu unquam postea non huer. nec aliquis eorum huit. nec hent. nec aliquis eorum het. aliqua bona seu catalla terras sive tenementa ad noticiam Jur. præd. sed iidem Jur. ulterius dicunt super sacrum. suum præd. qd. præd. Ricus. French, Rogerus James et Georgius Dockwra, non sunt culpabiles nec eorum aliquis est culpabilis de Murdro præd. in Indictamento præd. superius specificat, eis superius separatim imposit. prout iidem Ricus. French, Rogerus James et Georgius Dockwra, pro seipsis superius plitando. allegaver. nec seipsos ea occone. unquam retraxer. nec eorum aliquis se ea occone. unquam retraxit. Super quo visis et per cur. hic intellectis omnibus et singulis præmissis Cons. est per cur. hic qd. præd. Ricus. French, Rogerus James et Georgius Dockwra, quoad Murdrum præd. in Indictamento præd. superius spec. eis superius separatim imposit. sint quiet. Et eant et quilibet eorum sit quiet. et eat inde sine die, &c. Et superinde statim separatim per cur. hic quæsit. est de præfat. Rico. French, Rogero James et Georgio Dockwra, si quid pro se habeant vel discere sciant, vel aliquis eorum aliquid pro se habeat vel discere sciat quare cur. hic ad Judicium et Executionem de eis et eorum quolibet super Veredicto præd. quoad Homicidium et Felonicam Interfectionem præfat. Ricci. Coote, procedere non debet, qui separatim dicunt qd. ipsi sunt Clerici et quilibet eorum est Clericus et separatim petunt Beneficium Clericale eis et quilibet eorum in hac parte allocari et super hoc (tradito eisdem Rico. French, Rogero James et Georgio Dockwra separatim per cur. hic Libro) iidem Ricus. French, Rogerus James et Georgius Dockwra, separatim legunt ut Clerici et quilibet eorum legit ut Clericus; sed qui cur. dei. Dni. Regis hic et præfat. Justic. dei. Dni. Regis ult. noiat, de Judicio suo de et super Præmissis præd. quod Homicidium præd. et Felonicam Interfectionem præfat. Ricci. Coote reddend. nondum advisantur, Ideo dies inde dat. est præfat. Rico. French, Rogero James et Georgio Dockwra, in statu quo nunc. &c. usq; prox. Gaolæ deliberatio. nem dei. Dni. Regis de Newgate, præd. pro Com. Midd. præd. tenend. de Judicio suo de et super præmissis illis aud. &c. Eo. qd. præfat. Judic. dei. Dni. Regis ult. noiat. et cur. hic inde nondum, &c.'

L. H. S. Is it your lordships pleasure that the Judges may be covered?—*Lords.* Ay, ay.

[Then the Judges put on their caps.]

Cl. of the Cr. Serjeant at Arms, make proclamation.

Serj. at Arms. O yes, O yes, O yes! chief governor of the Tower of London, bring forth the body of Edward earl of Warwick and Holland, your prisoner, forthwith, on pain and peril will fall thereon.

[Then the earl of Warwick was brought to the bar by the deputy-governor of the Tower of London, having the ax carried before him by the gentleman gaoler, who stood with it at the bar, on the right hand of the prisoner, turning the edge from him; the prisoner at his approach to the bar making three bows, one to his grace the Lord High Steward, the other to the peers on each hand; and his grace and the peers returned the salute.]

L. H. S. My lord of Warwick, your lordship is brought before this great judicature, in order to your trial. You stand indicted by the grand inquest for the county of Middlesex, as guilty of the murder of one of the king's subjects, for whose blood justice requires a strict inquisition should be made.

Your lordship is called to answer this charge before the whole body of the house of peers assembled in parliament. It is a great misfortune to be accused of so heinous an offence, and it is an addition to that misfortune, to be brought to answer as a criminal before such an assembly, in defence of your estate, your life, and honour. But it ought to be a support to your mind, sufficient to keep you from sinking under the weight of such an accusation, that you are to be tried before so noble, discerning, and equal judges, that nothing but your own guilt can hurt you. No evidence will be received, but what is warranted by law; no weight will be laid upon the evidence, but what is agreeable to justice; no advantage will be taken of your lordship's little experience in proceedings of this nature; nor will it turn to your prejudice, that you have not the assistance of counsel in your defence, as to the fact, (which cannot be allowed by law) and their lordships have already assigned you counsel, if any matters of law should arise.

Your lordship, throughout your whole trial, may assuredly promise yourself, to find all the candour and compassion which is consistent with impartial justice; beyond that nothing is to be expected: their lordships can never so far forget themselves, as to depart from what is right, and to draw the guilt of blood upon their own heads; but if your lordship is innocent you are safe.

My lord, it will be requisite for you to recollect yourself upon this occasion, in the best manner you can. You ought to hear with temper what the king's counsel have to say, without interrupting them; and to hearken carefully to the witnesses produced against you,

that you may be ready to cross-examine them if you find cause, and to make your observations upon the evidence when the proper time comes for your lordship to make your defence: of which I will not fail to give you notice; and when that time does come, your lordship may be assured, yourself and your witnesses will be heard with great patience and attention; and when my lords have heard and considered the whole matter, the judgment will unquestionably be according to the rules of justice, and such as will become the honour of this high court.

[Read the Indictment to my lord.]

E. of Warwick. My lord, I beg I may have the use of pen, ink, and paper.

L. H. S. Will your lordships please to allow my lord Warwick, pen, ink, and paper?

Lords. Ay, ay.

L. H. S. Carry pen, ink, and paper to my lord. (Which was done by the Clerk.)

L. H. S. My lord, your lordship will do well to give attention while the Indictment is read to you. Read it to my lord in English.

Cl. of the Cr. Your lordship stands indicted by the name of Edward earl of Warwick and Holland, late of the parish of St. Martin-in-the-Fields in the county of Middlesex; for that your lordship, together with Charles lord Mohun, baron Mohun of Oakehampton in the county of Devon, late of the parish aforesaid, in the county of Middlesex aforesaid, Richard French, late of the parish aforesaid in the county of Middlesex aforesaid, gent. Roger James, of the parish aforesaid in the county of Middlesex aforesaid, gent. and George Dockwra, late of the parish aforesaid in the county of Middlesex aforesaid, gent. not having the fear of God before your eyes, but being moved and seduced by the instigation of the devil, the 30th day of October, in the tenth year of the reign of our sovereign lord William the Third, by the grace of God king of England, Scotland, France, and Ireland, defender of the faith, &c. with force and arms, &c. at the parish aforesaid, in the county of Middlesex aforesaid, in and upon one Richard Coote, esq. in the peace of God, and of our said sovereign lord the king, then and there being, feloniously, voluntarily, and of your malice aforethought, did make an assault; and that your lordship, the said Edward earl of Warwick and Holland, with a certain sword made of iron and steel of the value of five shillings, which you the said Edward earl of Warwick and Holland, in your right hand then and there had and held drawn, the aforesaid Richard Coote, in and upon the left part of the breast of him the said Richard Coote, near the collar bone of him the said Richard Coote, then and there feloniously, voluntarily, and of your malice aforethought, did strike, stab, and thrust in, giving to the said Richard Coote, then and there with the sword drawn aforesaid, in and upon the left part of the breast of

him the said Richard Coote, near the collar bone of him the said Richard Coote, one mortal wound of the breadth of half an inch, and of the depth of five inches, of which said mortal wound the aforesaid Richard Coote then and there instantly died: and that the aforesaid Charles lord Mohun, Richard French, Roger James, and George Dockwra, then and there feloniously, voluntarily, and of their malice aforethought, were present, aiding, abetting, comforting, assisting, and maintaining you the said Edward earl of Warwick and Holland, the said Richard Coote, in manner and form aforesaid, feloniously, wilfully, and of your malice aforethought, to kill and murder; and so you the said Edward earl of Warwick and Holland, and the said Charles lord Mohun, Richard French, Roger James and George Dockwra, the aforesaid Richard Coote, in manner and form aforesaid, feloniously, voluntarily, and of your malice aforethought, did kill and murder, against the peace of our sovereign lord the king, that now is, his crown and dignity, &c. How say you, Edward earl of Warwick and Holland, are you guilty of this felony and murder whereof you stand indicted, or not guilty?

E. of Warwick. Not guilty.

Cl. of the Cr. Culprit, How will your lordship be tried?

E. of Warwick. By God, and my peers.

Cl. of the Cr. God send your lordship a good deliverance.

Then at the motion of some lords who sate towards the upper end of the house, and by reason of the distance could not distinctly hear the Clerk, the Indictment was read again, the Clerk standing near the upper end of the house.

Cl. of the Cr. Serjeant at Arms, make an O Yes.

Serj. at Arms. O Yes, O Yes, O Yes, If any one will give evidence on behalf of our sovereign lord the king, against Edward earl of Warwick and Holland, of the felony and murder whereof he stands indicted, let them come forth, and they shall be heard; for now he stands at the bar upon his deliverance.

L. H. S. Will your lordships give me leave to go down to the Woolpack, that I may hear the better?—*Lords.* Ay, ay.

Then his grace removed to the Woolpack, and delivered the white staff to be held by the gentleman usher of the black rod, who during the whole trial always received and delivered back the white staff upon his knees.

L. H. S. Mr. Attorney, are you ready to proceed?

Att. Gen. (Sir Tho. Trevor.) Yes, my lord.

L. H. S. Then begin, Sir.

Serj. Wright. May it please your lordships.

L. H. S. Pray, Mr. Serjeant, raise your voice as much as possible you can, that my lords towards the upper end of the House may hear.

Serj. Wright. May it please your lordships, this noble lord Edward earl of Warwick and Holland, the prisoner at the bar, stands in-

dicted for the felonious killing and murder of one Richard Coote, esq. ; and the indictment sets forth, that upon the 30th day of October, in the 10th year of his majesty's reign, at the parish of St. Martin-in-the-Fields, in the county of Middlesex, the prisoner at the bar, the earl of Warwick, together with Charles lord Mohun, baron of Oakehampton, Richard French, Roger James, and George Dockwra, gent. feloniously, voluntarily, and of their malice afore-thought, did make an assault upon the said Richard Coote, in the indictment named ; and the indictment chargeth, that the earl of Warwick, at the same time and place, with a sword feloniously, voluntarily, and of his malice afore-thought, did give unto the said Richard Coote, in or upon the left part of the breast of him the said Richard Coote, near his collar-bone, one mortal wound of the breadth of half an inch, and of the depth of five inches, of which said wound the said Richard Coote then and there instantly died ; and the indictment further charges, that the said Charles lord Mohun, Richard French, Roger James and George Dockwra, the earl of Warwick, to commit the felony and murder aforesaid, were then and there aiding, assisting, comforting, and abetting ; and so the jurors charge, that he the said Edward earl of Warwick and Holland, Charles lord Mohun, Richard French, Roger James, and George Dockwra, the said Richard Coote, feloniously, voluntarily, and of their malice afore-thought, at the parish aforesaid, in the county aforesaid, did kill and murder, against the peace of our sovereign lord the king, his crown and dignity. To this indictment this noble lord the prisoner at the bar, Edward earl of Warwick and Holland, has pleaded not guilty, and for his trial hath put himself upon my noble lords his peers here present : we shall call our evidence, and if we prove this fact for the king, we do not doubt but your lordships will give such judgment for the same as shall be just.

Att. Gen. May it please your lordships, I am of counsel in this cause for the king against this noble lord Edward earl of Warwick and Holland, the prisoner at the bar, who stands indicted by the grand jury of the county of Middlesex, has been arraigned, and is now to be tried before your lordships for the felonious killing and murdering of Mr. Coote, in the indictment named ; the evidence to make good this charge against this noble lord, it comes to my turn to open to your lordships.

My lords, the case, as to the fact, according to my instructions, is this : Upon Saturday, the 29th of October last, at night, my lord of Warwick, my lord Mohun, Mr. French, Mr. Dockwra, and Mr. Coote, the unfortunate gentleman who was killed, met together at one Locket's who kept the Greyhound-tavern in the Strand, and there they staid till it was very late ; about twelve of the clock at night, or thereabouts, a messenger was sent by the company to fetch another gentleman, Mr. James ; and Mr. James coming to them, in what condition your lord-

ships will be told by the witnesses ; about one of the clock in the morning, on Sunday, the 30th of October, they all came down out of the room where they had been so late, to the bar of the house, and there, as the witnesses will tell your lordships, swords were drawn, and chairs were called for, and two chairs which were nearest at hand came, and two of the company went into those chairs ; who they were, and what past at that time, the witnesses will tell your lordships ; those that got into those chairs came out again, and more chairs were called for. But I must acquaint your lordships, that my lord Mohun, when the two gentlemen that went into the chairs ordered the chairmen to take them up, and carry them away, spoke to them to stop and go no further, for there should be no quarreling that night, and that he would send for the guards and secure them ; and after this they came out of the chairs again ; it will appear there were swords drawn amongst all of them, and some wounds given : more chairs being called for, and brought, this noble lord that is here at the bar, my lord of Warwick, my lord Mohun, and the other four gentlemen, went all into the chairs, and gave the chairmen directions whither they should carry them, at leastwise the foremost had directions given them, and the rest were to follow them ; it was a very dark night, but at last they came all to Leicester-square ; and they were set down a little on this side the rails of the square, and when the chairmen had set them down they went away ; but immediately some of them heard my lord of Warwick calling for a chair again, who came towards the rails, and there they found two of the gentlemen that had been carried in some of the other chairs, holding up Mr. Coote between them, and would have had the chairmen carried him away to a surgeon's, but they found he was dying, and so would not meddle with him ; afterwards my lord of Warwick and Mr. French were carried by two of the chairs to Mr. Amy's, the surgeon at the Bagno in Long-acre, where Mr. French being wounded, was taken care of particularly by the recommendation of my lord of Warwick, and the master of the house was called up, it being very late ; Mr. Coote's sword was brought to that place, but by whom it was brought we cannot exactly say. While my lord of Warwick and captain French were there, and my lord of Warwick had given orders for the denying of himself, and forbid the opening of the door ; there came the other two gentlemen, Mr. James and Mr. Dockwra, and upon their knocking at the door they were let in by my lord's order, after he had discovered who they were, looking through the wicket. Mr. James had his sword drawn, but it was broken. My lord of Warwick's hand was slightly wounded, and his sword bloody up to the hilt when he came in, as will be proved by the testimony of the servants in the House. There was a discourse between my lord, Mr. James and Mr. Dockwra, about going into the country ; but before they went, the swords were all called for to be

brought to them, and upon enquiry, there was no blood found upon Mr. French's sword; but a great deal upon my lord of Warwick's, of which great notice was taken at that time. Mr. Coote, who was killed, had received one wound in the left side of his breast, half an inch wide, and five deep, near the collar bone; he had likewise another wound upon the left side of his body; both which your lordships will hear, in the judgment of the surgeon, were mortal wounds, and the evidence will declare the nature of them.

My lords, the evidence does chiefly consist of, and depend on circumstances, the fact being done in the night, and none but the parties concerned being present at it; we shall lay the evidence before your lordships, as it is, for your judgment, and call what witnesses we have on behalf of the king, against this noble peer the prisoner at the bar, and take up your lordships time no further in opening; and we shall begin with Samuel Cawthorne; he is a drawer at the tavern where those lords and gentlemen were together, and he will give you an account of the time they came there, how long they staid, what happened in the house during their being there, and what time they went away.

L. H. S. Give him his oath. (Which the clerk did.)

Att. Gen. My lords, I doubt the witness is so far off, that it will be difficult for him to hear the questions that we are to ask him, unless we could have him nearer to us.

L. H. S. Mr. Attorney, my lords seem to be of opinion, that it will be more for your advantage and theirs, that the witnesses stand at the distance they do; which will oblige you to raise your voice so loud, that they may hear the witnesses and you too.

Att. Gen. Is your name Samuel Cawthorne?

Cawthorne. Yes, my lord.

Att. Gen. Where do you live?

Cawth. With Mr. Locket at Charing-cross.

Att. Gen. Did you live with him at the Greyhound tavern in the Strand the latter end of October last?—*Cawth.* Yes, I did.

Att. Gen. Well, pray will you acquaint my lords with the time when my lord of Warwick, my lord Mohun, and Mr. Coote were at that house, how long they stayed, what happened while they were there, and when they went away?

Cawth. It was Saturday night, the 29th of October last.

Att. Gen. Pray tell my lords the whole of your knowledge in the matter.

Cawth. There came my lord of Warwick, my lord Mohun, captain Coote, capt. French, and captain Dockwra, the 29th of October last, in the evening, to my master's house at the Greyhound tavern in the Strand.

Att. Gen. How long were they there, and what time of night came they in?

Cawth. About 8 o'clock at night, my lord Warwick, my lord Mohun, capt. French, and capt. Coote, came in.

Att. Gen. What day do you say it was?

Cawth. Saturday, the 29th of October last.

Att. Gen. How long did they continue there?

Cawth. It was between one and two the next morning before they went away.

Att. Gen. Was any body sent for to come to them there?—*Cawth.* Yes, Mr. James.

Att. Gen. What time was that?

Cawth. About twelve of the clock.

Att. Gen. Did he stay with them till they went away?—*Cawth.* Yes.

Att. Gen. What did you observe past in the company while they were there?

Cawth. I did not observe any thing of quarrel, not so much as an angry word amongst them, till they came down to the bar and were going away; when they came down to the bar they ordered me to call them chairs, or coaches; and there were no coaches to be had, and so I went for chairs, and two chairs came; for the porter that went to call the coaches was a great while before he came back; and, as I said, I going for chairs, there came two; but that they said was not enough; so more chairs were called for, and at length there were more chairs gotten; in the first three chairs, my lord of Warwick, my lord Mohun, and captain Coote went away in; and my lord Warwick and my lord Mohun bid the chairmen carry them home.

Att. Gen. Were there then any other chairs at the door?

Cawth. There were two more chairs at the door, and another was called for.

Att. Gen. Did you hear any directions given where they should carry them?

Cawth. My lord Warwick and my lord Mohun bid them carry them home.

Att. Gen. Did you hear my lord Warwick or my lord Mohun particularly, and which, say whither they would be carried?

Cawth. I did hear my lord Mohun say, captain Coote should go and lie with him, or he would go and lie with capt. Coote that night, for there should be no quarrelling.

Att. Gen. Did they upon that go away?

Cawth. Mr. French and Mr. Coote were in chairs before my lord Mohun or my lord Warwick, or any of the rest.

Att. Gen. What then happened upon their going into the chairs?

Cawth. My lord Mohun came out to them and swore, there should be no quarrel that night, but he would send for the guards and secure them.

Att. Gen. What happened then?

Cawth. Upon that, both of them came out of their chairs and came into the house, and there they came to the bar, three of them in the passage by the bar, and three of them behind that passage.

Att. Gen. Pray, will you tell what did really pass throughout the whole transaction? What was done after they came in again into the house?

Cawth. After that, I was bid to call for six chairs, if I could get no coaches, and so I did; and when I had brought what chairs I could get, and returned to the bar, I heard the swords

clash; when the swords were drawn I cannot say, nor by whom, it might be by all the six, for aught I know, because I was in the street to call the chairs, and when I came back to the house, I was in hopes all had been quieted, for their swords were putting up: and when they went away in the chairs, I did hope they went away friendly.

Att. Gen. Pray, how did they go away? who went together?

Cawth. My lord of Warwick, my lord Mohun, and captain Coote went in the first three chairs, them three together, and bid the chairmen go home; the sixth chair was not then come.

Att. Gen. When that chair came, pray what directions were given to it?

Cawth. I did not hear them give the chairmen any directions at all.

Att. Gen. Do you know any thing more that was done after this time?

Cawth. No, my lord, not after they went away; after I returned with the chairs, it was in two minutes time that they went away.

Att. Gen. My lords, I suppose he knows no more of the matter.

L. H. S. Will you then ask him no more questions, Mr. Attorney?

Att. Gen. No, my lords, unless this noble lord shall ask him any questions, upon which we shall have occasion to examine him.

L. H. S. My lord, has your lordship any questions to ask this witness? For now is your time, the king's counsel having done examining him.

E. of War. I desire to ask him, whether I did not bid the chairmen go home?

L. H. S. If your lordship please to propose your question to me, I will require an answer to it from the witness, and it will be the better heard by my lords.

E. of War. My lord, I desire to know of this man, whether, when I went away in the chair from his master's house, I did not bid the chairmen go home?

L. H. S. Witness, you hear my lord's question, what say you to it?

Cawth. Yes; my lord of Warwick did bid the chairmen go home.

E. of War. My lord; I have another question to ask him, Whether he knows of any quarrel there was between me and Mr. Coote at that time, or any other time; because we both used to frequent that house?

Cawth. No, my lords, I never heard any angry words between my lord Warwick and Mr. Coote in my life.

[Then the lords towards the upper end of the House complaining that they did not hear his Grace, the Lord High Steward was pleased to repeat the question thus:]

L. H. S. When my lord of Warwick bid the chairmen go home, or at any other time, did you observe that there had been any quarrel between his lordship and Mr. Coote?

E. of War. My lord, I desire he may be

asked, since we both used that house, Whether that night, when I went away, or before or after, I had any quarrel with Mr. Coote?

L. H. S. The question my lord desires you, that are the witness, to answer, is, Whether you did hear any quarrelling or angry words to pass between my lord Warwick and Mr. Coote that night before or after they came down, or when they went away, or at any other time?

Cawth. No, my lord, I never heard any angry words pass between them then, nor ever at any time before in all my life, but I always looked upon them to be very good friends.

E. of War. I desire he may be asked, Whether Mr. Coote did not come to that house in my company, and whether he did not frequently come to that house?

Cawth. Yes; they used to be there every day almost, and they came that night together in company.

E. of War. I desire he may be asked, whether I have not been frequently in his company there?

Cawth. Yes; I say very frequently, every day almost, sometimes twice a-day.

L. H. S. Would your lordship ask him any other question?

E. of War. My lord, I desire he may be asked this question, whether he knows of any particular kindness between Mr. Coote and me?

L. H. S. Do you know of any particular kindness between my lord Warwick and Mr. Coote, the gentleman that was killed?

Cawth. Yes, my lord, there was always a great kindness between them, as I observed; it ever was so, and I never heard angry words pass between them, but they were very good friends constantly; I waited upon them generally when they were at my master's house, which was every day almost.

E. of War. I desire to know of this witness, whether he does not remember, or can name, some particular kindnesses that passed between Mr. Coote and me?

L. H. S. Can you specify any particular instances of kindness that passed between my lord Warwick and Mr. Coote?

Cawth. Yes; my lord of Warwick used generally to pay the reckoning for Mr. Coote, and he did so at this time.

E. of War. My lord, I desire he may be asked, between whom he apprehended the quarrel to be at this time?

L. H. S. You say, friend, there were swords drawn, and a quarrelling at the bar; can you tell between whom the quarrel was?

Cawth. My lord Warwick, my lord Mohun, and capt. Coote, were all on one side, and the other three were on the other side.

E. of War. Who were the two persons that it was apprehended the quarrel was between? I desire he may be asked.

L. H. S. You say, there were three on the one side, and three on the other; pray, between whom did you apprehend the quarrel to be?

Cawth. I believe the quarrel was between Mr. Coote and Mr. French.

E. of War. My lord, I desire to know of this witness, what words he heard Mr. Coote say after he and Mr. French returned into the house and came out of the chairs.

L. H. S. What do you say to the question my lord proposes?

Cawth. I heard Mr. Coote say, he would laugh when he pleased, and he would frown when he pleased, God damn him.

E. of War. My lord, I desire to know, who he thinks those words were addressed to?

L. H. S. To whom did Mr. Coote speak these words?

Cawth. Whether he spoke them particularly to Mr. French or to the other two gentlemen who were on the other side of the bar, I cannot directly tell.

E. of War. I desire to know of him, whether Mr. Coote was not one of the three that was on the outside of the bar?

Cawth. Yes, my lord of Warwick, my lord Mohun, and capt. Coote, were of the outside of the bar.

E. of War. Was capt. Coote with me in the beginning of the night at that house?

Cawth. Yes, he came at the beginning of the night with my lord of Warwick.

E. of Peterb. My lords, I desire to ask this witness one question.

L. H. S. I think it is proper, my lords, in point of method, to let both sides have done before any questions be asked by any of my noble lords.

E. of Peterb. I did apprehend my lord of Warwick had done.

L. H. S. No, my lord, not as yet: pray my lord Warwick, what other questions has your lordship to ask of this witness?

E. of War. My lord, I desire he may be asked particularly this question, whether he perceived any quarrel particularly between me and capt. Coote when we went out of the house?

L. H. S. You hear the question, did you perceive any quarrel between my lord Warwick and Mr. Coote before they went out of the house?

Cawth. No, I did not; nor ever saw any quarrel between them in my life.

E. of War. I desire to know who paid the reckoning that night?

Cawth. The reckoning was called for before I came in to take it; and though I think my lord of Warwick paid for Mr. Coote, yet I cannot so directly tell, because it was collected before I came into the room to receive it.

L. H. S. My lord, have you any thing more to ask this witness?

E. of War. No, my lord, at present, that I think of.

L. H. S. My lord Peterborough, your lordship desired to ask a question, will you please to propose it now?

E. of Peterb. My lord, this witness seems to take notice of two sides, who were on the one

side, and who were on the other, and that Mr. Coote and my lord of Warwick were on one side; I desire to know one thing of him, what reason he had to apprehend that they two were of a side?

L. H. S. Friend, you hear that noble lord's question; you seem to say, there were three and three of a side. What reason had you to apprehend, that my lord Warwick and Mr. Coote were of one side? You must explain to my lords how you come to make that judgment, what reason you had to think so?

Cawth. They three, my lord Mohun, my lord Warwick, and Mr. Coote, were on the one side of the bar; and capt. James, capt. French, and capt. Dockwra, were on the other side of the bar.

L. H. S. So you said before; but the question which my noble lord desires to be satisfied in, is this, how you come to speak as if there was a quarrel between three and three? what reason had you to think, that three were on one side, and three on the other?

Cawth. Their swords were all drawn, and they stood three on one side of the bar, and three on the other.

E. of Rochester. My lords, I desire to ask this witness one question; I think he told your lordships at first, that he did not perceive any angry words among them; afterwards he comes to talk of swords drawn amongst them all, three on the outside, and three on the inside of the bar; I desire to know what was the occasion of those swords being drawn on the one side or the other?

Cawth. Whatsoever quarrel there was, was amongst themselves above stairs, and I know no angry words that passed between them when they came down to the bar.

L. H. S. See what you say; how consistent one part of it is with another! You said at first, you did not hear of any angry words that passed between them, and yet you say, all their swords were drawn, and three were on the one side, and three on the other: and when you were examined upon the motion of that noble lord, what you meant by three on the one side and three on the other, you said, my lord Mohun, my lord Warwick, and Mr. Coote, were on the one side; Mr. James, Mr. French, and Mr. Dockwra, were on the other side: how could there be two sides, unless there was a quarrel?

Cawth. I said, I did not hear any angry words pass between them before they came to the bar, or while they were above stairs; but they were three on the one side of the bar, and three on the other.

L. H. S. But you have not given a satisfactory answer to that question which the noble lord, my lord Peterborough, asked you, What reason you had to apprehend that the noble lord the prisoner at the bar, and capt. Coote were of a side?

Cawth. My lord Mohun came to the chair-side, when capt. Coote and capt. French were got into the two first chairs, and told capt.

Coote, that there should be no quarrel that night, but that they three, my lord Warwick, my lord Mohun, and he, should go home together; and I took them three to be of a side, because they were on the outside of the bar together; and when they all went away, their three chairs went away first, all three together.

L. H. S. Is that all the reason you can give why you say, they were three and three of a side?

Cawth. Yes, my lord, I did apprehend it so.

Att. Gen. If my noble lords have done with their questions, I desire to ask this witness another question; my lords, I think this person says, that there was a quarrel at the bar of the house, and swords drawn, and as he apprehended, three were on the one side, and three on the other; but if I take him right, I do not see that he has given your lordships any manner of satisfaction, what reason he had to apprehend there were three and three of a side; or, which will be very material in this case, if your lordships can get to the knowledge of it, which three were on the one side, and which three were on the other; or indeed, whether there were three and three of a side, as your lordships will have reason by-and-bye to enquire a little further into that matter. My lords, I desire he may be asked this plain question, What words or other passages he did perceive, that made him apprehend there was a quarrel between them, and they were three and three of a side?

Cawth. I apprehended it from the words that Mr. Coote said, That he would laugh when he pleased, and frown when he pleased.

Att. Gen. Pray, my lord, I desire he may be asked, who those words were spoke to, and who they were applied to?

Cawth. They were spoke to Mr. James, Mr. French, and Mr. Dockwra, who were within side of the bar.

Att. Gen. Did he apply those words to all those particular persons?

Cawth. Yes, as I thought, for they three were within the bar; my lord Warwick, my lord Mohun, and Mr. Coote, were without the bar.

Att. Gen. Pray, my lord, I desire he may be asked this question, Was that before the swords were drawn, or afterwards?

Cawth. It was before.

Att. Gen. Then I desire he may be asked, whether the swords were drawn upon those words?

Cawth. No, my lord; the time of drawing the swords was when I went out to call chairs and coaches; and I know not who drew the swords first, or when they were drawn; but when I came back I found them all drawn, and I heard them clashing.

Att. Gen. Upon the oath you have taken, was those words that you speak of Mr. Coote's, that he would laugh when he pleased, and frown when he pleased, before the swords were drawn, or after the swords were drawn?

Cawth. Before the swords were drawn; for

I did not see the swords drawn till I came back.

L. H. S. Does either side desire to ask this witness any questions; if not, then you may withdraw, and you may proceed, Mr. Attorney, to examine some other witness.

Lord Wharton. My lord, there was a question asked at the bar about the hindering of the quarrel, and my lord Mohun's desire to part them, and make them friends; I desire the witness, before he goes away, may be asked what he knows of that matter.

L. H. S. It has been observed by my lords that you said, when they came down to the bar, and the quarrel happened, somebody would have prevented it; pray repeat that matter again, Did you observe any of the company were disposed to take up the quarrel, and make them friends, and who they were?

Caw. My lord Mohun and my lord Warwick said they would send for a file of musqueteers; and my lord Mohun did all he could to quiet and pacify them till the quarrel was over; and my lord Mohun particularly had his finger pricked with endeavouring to cross their swords, and keeping them from fighting; which was all he got by it.

L. H. S. Do you know that of your own knowledge?

Caw. His hand was bloody, and he said so at the bar; but I was just coming in again when I heard him say so; but I cannot say that I saw him hurt, for I was without the house at the time when that was done.

Lord Godolphin. My lords, I desire to ask this witness one question; I observe he has told my lords, there was not an angry word passed between them before they came down to the bar: I would fain ask him this question, whether he was in the room all the time till they did come down to the bar?

Caw. I received the reckoning just before they came down to the bar.

Lord Godolphin. And I desire he may be asked, How long he staid in the room when he received the reckoning?

Caw. It was about two or three minutes that I staid in the room, and not longer.

E. of Warwick. My lord, this witness that has been examined, told you, that when we first came down to the bar there were two chairs called for; and when they came, Mr. Coote and the other gentleman, Mr. French, went into the chairs, and afterwards they came out again, and Mr. Coote said some words; I desire the witness may be asked again, when it was Mr. Coote spoke those words; whether it was before or after the time that he came out of the chair; for I take it to be very material.

Caw. It was after Mr. Coote came out of the chair, for the chairmen heard the words as I verily believe.

Att. Gen. My lord, I desire he may be asked, was there any reply made to those words by any of those persons he says he apprehends were on the other side?

Caw. No, not one word that I know of.

E. of Warwick. My lord, I must beg the favour to have the question asked again of him, whether I did not at that time endeavour to prevent any quarrelling, and did not say I would call for the guard if they did?

Caw. Yes; my lord of Warwick did say so, and so did my lord Mohun, and so I think did Mr. James.

L. H. S. How came you not to say so when you were asked that question particularly before? Then you said my lord Mohun endeavoured to prevent the quarrelling, and make them friends.

Caw. Yes, my lord Warwick did so, and so did Mr. James.

L. H. S. I cannot tell whether any body else desires to ask him any questions.

Att. Gen. My lord, he speaks of what this noble lord, my lord of Warwick, said; but he does not tell you the particular expressions, nor the time when my lord said them.

L. H. S. You say, my lord, the prisoner at the bar, endeavoured to pacify the quarrel between them; but you do not tell my lords who the quarrel was between; nor when the endeavour was made by my lord Warwick to pacify it.

Caw. My lord of Warwick did say he would have the guards sent for.

L. H. S. What time was that, before or after my lord Mohun said so?

Caw. Truly, my lord, I do not know but that it was at the same time.

L. H. S. Was it when the swords were drawn, or before?

Caw. They spoke it both before and after the swords were drawn, as I remember; for the swords were not drawn while I was in the house, till I came back.

L. H. S. Were the swords drawn when my lord Warwick spoke of sending for the guards?

Caw. Surely, my lord, it was before the swords were drawn, when I was sent for the chairs.

L. H. S. You said there was no angry words or quarrel between them?

Caw. Not above stairs, my lord: but I apprehended when they came down to the bar, there were three on one side, and three on the other.

Att. Gen. Pray, my lord, let him be asked this question, Was it after they were three on the one side, and three on the other, that my lord Mohun and my lord Warwick spoke those words?

Caw. I apprehend the words were spoke by Mr. Coote, That he would laugh when he pleased, and frown when he pleased, before the swords were drawn.

L. H. S. But that which my lords desire to know is, What the time was when my lord Warwick and my lord Mohun declared their desire to part them and make them friends; whether before or after the swords drawn?

Caw. Before and after; for I was absent when the swords were drawn.

Earl Rivers. He says, that after my lord Mohun and my lord Warwick threatened to

send for the musqueteers, they promised to be quiet. I desire to know who he means by they?

Caw. Mr. James called to me, and said, I need not go and call for the guards, for the quarrel was over. There is one thing more that I forgot, my lord: After my lord Mohun and my lord Warwick were gone away in their chairs, and Mr. Coote, I heard Mr. Dockwra say to capt. James and capt. French, they did not care a farthing for them, they would fight them at any time.

L. H. S. Who were together then?

Caw. Capt. James, Mr. French, and Mr. Dockwra, after my lord Mohun and my lord Warwick were gone with capt. Coote.

L. H. S. Then Mr. French was with them? Mr. Dockwra said so?—*Caw.* Yes, my lord.

Lord Wharton. If I apprehend him aright, as to what he says now, my lord of Warwick, my lord Mohun, and capt Coote, were gone away at that time.

Caw. Yes, they were gone away in the three first chairs, which my lord Mohun bid go home.

Lord Wharton. Who does he say spoke those words?

L. H. S. You hear my noble lord's question, who spoke those words? Repeat them again.

Caw. When my lord Warwick, my lord Mohun, and capt. Coote were gone, I heard Mr. Dockwra say to Mr. French and Mr. James, we don't care a farthing for them, we will fight them at any time.

Att. Gen. I desire to know, whether this witness testified any thing of this matter when he was examined before the coroner?

Caw. No; I forgot those words when I was examined before the coroner.

Att. Gen. How soon after your examination did you recollect yourself as to what you now speak?—*Caw.* The next day after.

Att. Gen. I pray, my lords, that he may be asked, whether he did in general give the same evidence before the coroner that he now does?

Caw. Yes, as to all but only those words, of Mr. Dockwra's declaring he did not care a farthing for them, they would fight them at any time.

Att. Gen. My lord, I beg he may be asked, how long it was after the fact was done that he was examined before the coroner?

Caw. It was the next day, in the afternoon.

Att. Gen. Then I have this question further to ask, if your lordships please, was he at the trial of Mr. Dockwra, Mr. James, and Mr. French?—*Caw.* Yes, I was.

Att. Gen. Did he then give any evidence of those words of Mr. Dockwra's, after when my lord Warwick, my lord Mohun, and capt. Coote were gone?—*Caw.* No, I did not.

Att. Gen. My lord, I have one question to ask him then more, how he came not to swear this matter at that trial?

Caw. It was out of my mind at that time, and I had like to have forgot it now.

Att. Gen. My lord, we have done with this witness: Is it your lordships' pleasure that we go on to call our other witnesses?

Lords. Ay, Ay.

Att. Gen. Then our next witnesses, my lords, will be the chairmen that carried my lord Mohun, my lord of Warwick, and captain Coote: We shall begin with Thomas Browne and John Gibson; one of them carried Mr. Coote, the other my lord of Warwick.

[Thomas Browne was sworn.]

L. H. S. What question do you ask this witness, Mr. Attorney?

Att. Gen. That he would acquaint your lordships, whether he carried Mr. Richard Coote, the person that was slain, upon the 29th or 30th of October, from the Greyhound tavern in the Strand, and to what place he carried him?

L. H. S. You hear the question; pray speak so loud that my lords may all hear what you say.

Browne. My lords, I was between the hours of one and two in the morning, on Sunday the 30th of October last, with my fellow and our chair, at the Buffler's Head tavern at Charing-cross, and I heard some people at Locket's, at the Greyhound in the Strand, calling coach, coach, a pretty while; but there were no coaches in the street, nor that came to them; when they could not get coaches, then they called out for chairs; and we coming to the door with our chair, there were four other chairs there, and six gentlemen stood in the passage; and then it was said, there was not chairs enough, and there wanted one more, and they stood discoursing; and the first man came into my chair, who was capt. Coote; and my lord of Warwick he got into another: When the door of the chair was shut up, we asked whither we should go; but my lord Mohun came and bid open the chair again; and we did so, and he returned into the house, and there was some discourse between them standing at the bar in the entry. Mr. Coote came out again and came into my chair, and my lord Mohun and my lord of Warwick went into two others; Mr. Coote bid me carry him into Leicester fields, and to make all the haste I could; my lord of Warwick and my lord Mohun being in the next chairs, asked him, Whither are you a-going, and called out twice, and he said, To Leicester fields; pray do not, says my lord of Warwick, but come along with us, and let it alone till to-morrow; but he bid us go on; and as we were turning up St. Martin's Lane, by the Cross Keys tavern, my lord Mohun, and my lord Warwick called out to us to stop, and their chairs came up to the back door of the Cross Keys tavern, and there all the three chairs were set on a-breast in St. Martin's lane, and while they were talking together, there came by three chairs of the other side of the way; and Mr. Coote bid us take up and make all the haste we could before them into Leicester fields, so taking up the chair

again, Mr. Coote bid us make haste, and if we could go no faster, he swore, damn him, he would run his sword in one of our bodies: There were two chairs before me, and my lord Mohun and my lord Warwick followed in two chairs after me; and when we came to the corner of Leicester fields, at Green street end, all the three chairs were set down a-breast again, and Mr. Coote put his hand in his pocket, and took out half a guinea to pay, and said he had no silver; and my lord of Warwick spoke to my lord Mohun, who took out three shillings out of his pocket, who said, there was for my lord Warwick, capt. Coote, and himself; and when they were gone out, I took my box and my pipe, and filled my pipe, and took the lanthorn and lighted it, and by that time I had lighted my pipe, I heard a calling out, Chair, chair, again, towards the upper end of the square; so I took my chair, and there was one of the chairs that was not gone; and so we came up to the upper end of the fields, and they called to us to bring the chairs over the rails; we told them we did not know how to do that, for we should not be able to get them back again; at last we did get over the rails, and made up close to the place where we heard the noise, for we could see nothing, it being a very dark night; and when we came up close to them, by our lanthorn there were two gentlemen holding up Mr. Coote under their arms, and crying out, My dear Coote, My dear Coote!

Att. Gen. Pray, who were those two gentlemen?

Browne. I did not know them, one was in red cloaths, and the other had gold lace, and they would have had me have taken Mr. Coote into my chair; but seeing him bloody, and not able to help himself, I said I would not spoil my chair, and so would not meddle with him; but they said they would make me any satisfaction for my chair, and desired me to take him in; but he gave himself a spring from them, and we found he was too heavy for us to lift over the rails, and all we could do could not make him sit in the chair, but the chair was broken with endeavouring to place him there; and they said, if we would carry him to a surgeon's, they would give us 100*l.* security; but we finding it impossible, the watch was called for, but nobody would come near, for they said it was out of their ward, and so they would not come anigh me; and I staid about half an hour with my chair broken, and afterwards I was laid hold upon, both I and my partner, and we were kept till next night eleven a-clock; and that is all the satisfaction that I have had for my chair and every thing.

Att. Gen. Pray, my lord, I desire he may recollect himself; for we do apprehend it is very material, who it was that desired to take Mr. Coote into the chair?

Browne. I cannot tell who they were, it was so very dark I could only see their cloaths.

Att. Gen. Did you see the earl of Warwick there?

Browne. No, Sir, he was not there; one of them, I tell you, had officers cloaths on, red lined with blue, and the other had gold lace on; there was nobody there that held him up but them two.

M. of Norm. He says he saw two persons holding up Mr. Coote; it would be very well to have that matter very well settled, who those two persons were; I desire to know how he is sure my lord of Warwick was not one of them two?

Browne. I know my lord of Warwick very well, and I am sure he was neither of the two.

D. of Leeds. I would know what light he had to discern it so well by, that he can be sure my lord of Warwick was not there; for he says, it was a very dark night, and yet he describes the particular persons that held Mr. Coote up.

Browne. Yes, my lord, I am sure my lord of Warwick was none of them.

D. of Leeds. How could you distinguish in so dark a night, the colours of people's cloaths?

Browne. With the candle that I had lighted in my lanthorn.

D. of Leeds. He could not know any of the persons unless he held a lanthorn to their faces, or knew them very well before.

L. H. S. My lord Warwick, will your lordship ask this witness any questions?

E. of War. My lord, I desire he may be asked, Whether I did not bid him stop at St. Martin's-lane end, and do all that I could to hinder Mr. Coote from going any further, but to go home?

Browne. The earl of Warwick, and my lord Mohun, as they turned up the lane, asked Mr. Coote, whither he was going? And when he said to Leicester-fields, they desired him to let it alone till to-morrow; and my lord Mohun said he should go home with him; but the other bid us go on, and said he would not go to his lodgings, but that they would make an end of it that night; still they called to him again, dear Coote, let us speak a word with you; and as the chairs came to the back-door of the Cross-keys tavern, there they stood all of a breast, and they both of them spoke to him, and stood a pretty while there, and in the mean time three chairs passed by on the other side; he commanded us to take up, and carry him away to Leicester-fields immediately, and overtake the other chairs, or he would run one of us into the body.

L. H. S. Would your lordship ask him any more questions?

E. of War. No, my lord.

Att. Gen. My lord, I observe, he says they discoursed some time together while they stopped in St. Martin's-lane; I desire that he may be asked, Whether he can tell what that discourse was?

Browne. I could not well hear, they whispered together, but I could hear my lord Mohun, and my lord of Warwick, desire capt. Coote to go home, and let the business alone till another time.

Att. Gen. I desire he may explain himself,

what that business was that they would have put off till to-morrow.

Browne. I know not what it was; I heard of no anger betwixt them, but they were as good friends, for any thing I know to the contrary, as ever they were in their lives, or as ever I see any men.

L. Jefferys. He says there were two went into chairs at the door of the house, and afterwards went out again, and went into the house, and there was discourse at the bar of the house, I would desire to know what that was?

Browne. I did not hear the discourse that was in the house, I was at the door of the house.

Att. Gen. Our next witness is William Crippes. [Who was sworn.]

L. H. S. What do you ask this man, Mr. Attorney?

Att. Gen. Pray, will you give my lords here an account who you carried to Leicester-fields the 29th or 30th of October, and what happened in your knowledge at that time?

Crippes. Captain Coote was the first man that went into the chair when we came to the Greyhound tavern; afterwards he came out again, and when we took him up the second time, he was the first man that set out; and he bid us carry him to Leicester-fields; and when we came to the corner of St. Martin's-lane, we turned up that way; and my lord of Warwick, and my lord Mohun, called to us, being in chairs behind, to know whither we were going, and desired to speak with captain Coote; and he said he was going to Leicester-fields; and when they asked, what to do? He said, to end the business: they desired him to put it off till to-morrow; and while they were discoursing about it in St. Martin's-lane, there passed by other three chairs, which, when captain Coote saw, he bid us take up and overtake them, and go faster, or he would run one of us into the body: so we went on, and at the lower end of Leicester-fields we set him down; and the other two gentlemen, my lord Warwick and my lord Mohun, were there set down, and went lovingly together, for any thing that I saw, up the pavement of the square, towards the upper end; and in a little time we heard a noise of calling for chairs towards the upper end, and when we came there with the chair, we were bid to lift over the chair within the rails; and when we said it was hard to be done, they insisted upon it, and we did come in; and when we came there we saw two gentlemen holding up captain Coote, and would have had us taken him into the chair; we saw there was a great deal of blood, but I never heard how it came, and they would have had us carried him to a French surgeon's, and proffered any money.

Att. Gen. My lord, I desire to know, who they were that desired him to be carried to the surgeon?

L. H. S. You hear the question, what say you?

Crippes. I cannot tell, my lord; one of them

had something of lace upon him, but it was so dark that I could hardly see my hand, and therefore I cannot tell who they were; and when there was an objection made, that the chairs would be spoiled, they said, we need not question our chair, they would give us 100*l.* security to answer any damages, if we would but carry him; so we endeavoured to put him into the chair, but could not; and so we called out to the watch, to have had some help; but they said it was none of their ward, and so they would not come to us; so the gentlemen went away, and we left them, and went and called a surgeon, who, when he came, said, he was a dead man, and we were secured till the next day.

Att. Gen. Pray, my lord, I desire he may be asked, Were there not other chairs in that place at that time?

Crippes. There was one in the Field besides, and no more that I could see; they all went away but us two.

Att. Gen. What distance of time was there between their setting down in Leicester-fields, and their calling the chairs again?

Crippes. Not a quarter of an hour.

Att. Gen. What became of the three chairs that passed by you in St. Martin's-lane?

Crippes. They got before us; but what became of them afterwards I cannot tell.

Att. Gen. Did they come from the same place, the tavern in the Strand that you were at?

Crippes. Yes, I believe they did, my lord; for capt. Coote bid us follow them, and threatened us if we did not make greater haste.

Att. Gen. Do you know my lord of Warwick?

Crippes. Yes, he had whitish cloaths on; and none but he had such clothes on as those were.

L. H. S. Will your lordship ask this witness any questions?

E. of Warwick. My lord, I desire he may be asked, Whether I did not bid him stop? and, whether I did not say, they should not go to quarrel that night?

Crippes. Yes; both he and my lord Mohun would not have had captain Coote gone any where, but home to his lodgings.

Att. Gen. My lord, I desire to know of him, directly and downright, Whether my lord of Warwick was not one of them that held him when he was within the rails in the fields?

Crippes. No, he was not; he was neither of them; for the one of them was too big for him, and the other was too little for my lord Mohun.

Att. Gen. Now we call the chairman that carried the earl of Warwick into Leicester-fields, James Crattle. (He was sworn.)

Att. Gen. Will you tell my lords what you know of any person that you carried the 29th or 30th of October last, from the Greyhound tavern in the Strand, and who it was, and whither you carried him?

Crattle. I was going along Charing-cross,

between one and two in the morning, the 30th of October last, and I heard a chair called for at Locket's at the Dog tavern; and thither I and my partner went, and we took up the gentleman, and carried him to Leicester-fields.

Att. Gen. Who was that gentleman?

Crattle. It was my lord of Warwick.

Att. Gen. What time of night do you say it was?

Crattle. It was about one or two in the morning.

Att. Gen. What day of the week was it?

Crattle. It was Saturday night and Sunday morning.

Att. Gen. Whither did you carry him?

Crattle. Into Green-street, towards the lower end of Leicester-square.

Att. Gen. What chairs were there more there?

Crattle. There was one that captain Coote was in, and another that my lord Mohun was in, and we went away all together.

Att. Gen. Were there no other chairs?

Crattle. I did not know who went in the other chairs, but there were three other chairs that passed by us at St. Martin's-lane, and we followed after them to Leicester-fields.

Att. Gen. Pray what became of you after you had set down your fare?

Crattle. We were discharged and paid; the other three went up towards my lord of Leicester's; but we were coming away, and in a little time we heard the noise of calling chairs! chairs! again, and there were two chairs did come up, Thomas Browne's and our's; my lord of Warwick called our chair, and we took him into it, and he bid us carry him to the Bagnio in Long-acre; and when we came there we knocked at the door, and his hand was bloody, and he asked us if we had any handkerchief to bind up his hand.

Att. Gen. Was there any other chairs at the door of the Bagnio, at the same time when you came there?

Crattle. Yes, there was another chair there at the door at the same time, and we set down both together.

Att. Gen. Pray whence came that chair?

Crattle. Indeed, I do not know.

Att. Gen. Who were the chairmen that carried that chair?

Crattle. Indeed, my lord Mohun and my lord Warwick were the only persons that I knew of all the company.

Att. Gen. What sort of gentleman was the other, that went out of the other chair into the house.

Crattle. He was a pretty tall man; when he was in we went away; I only can say, I saw my lord of Warwick go into the house.

Att. Gen. Did you take any notice of any sword that my lord of Warwick had in his hand at that time?

Crattle. No; I cannot say I did take any notice of any sword, only that there was a handkerchief desired.

Att. Gen. Pray, did you hear no noise at

all in the field, till you heard chairs called for again?

Crattle. No; I cannot say I heard any noise in the field.

Att. Gen. Did you apprehend there was any fighting?

Crattle. No, I knew nothing at all of it; but upon the calling of chairs again, and my lord Warwick coming along, we took him in, and he bid us go to the Bagnio, and thither we went.

Att. Gen. My lord, we have done with this witness.

L. H. S. My lord Warwick, will you ask this witness any questions?

Earl of Warwick. No, my lord.

Att. Gen. Then, my lord, our next witness is John Gibson; he was another of those chairmen that carried my lord of Warwick to the Bagnio afterwards. Pray, will you give my lords an account what you know; who you carried the 29th and 30th of October last, and whither you carried them? (Who was sworn.)

Gibson. My lord, I was at Charing-Cross with my partner the 29th of October last, at night, and about one or two o'clock in the morning chairs were called for to the Grey-hound-tavern in the Strand; and when we came there, my lord of Warwick, my lord Mohun, and Mr. Coote got into the three first chairs, and we got my lord Warwick into our chair, and when we had him there, we were bid to go towards Leicester-fields, as I apprehended, for thither the chairs that went first was to go; and indeed my lord Mohun and my lord Warwick did call to stop at the end of St. Martin's-lane, and asked Mr. Coote whither he was going? and he said, he was going to make an end of the business; and they said it should not be to-night; but presently after three other chairs coming along, and passing before us, the chair that captain Coote was in was bid to go on, and we were ordered to follow, which was done accordingly; just at the turning of Green-street we set down our three chairs; and, I think, just about the turning of Green-street end we staid till there came another chair again; and we and the other chair, upon my lord Warwick's coming into us, went away from thence, and carried him to the Bagnio in Long Acre.

Att. Gen. You talk of another chair; pray, whose chair was that?

Gibson. There was another chair that was got there just before us; but indeed I do not know whose it was, nor indeed can I say who it was that was in it; but this I am sure, we went to the same place; and we met and lit just at the same time; and my lord of Warwick asked for a handkerchief to bind up his hand, which was bloody; which was given him.

Att. Gen. Did you not know who was in the other chair at that time?

Gibson. No, indeed, I did not know, I will assure you.

Att. Gen. Pray did you not know where that other chair took the other gentleman up?

Gibson. No, indeed, sir, I did not.

Att. Gen. Pray, what time of the night was it?

Gibson. It was between one and two in the morning.

Att. Gen. You talk of his hand being hurt, and that he called for a handkerchief: Did you see his hand bleed; and pray, in what nature was his wound?

Gibson. My lord, all I can say is, there was blood, and he wanted a handkerchief, and had one, for he said his hand was hurt; but in truth I did not take any notice what that hurt was, I did not see it; if my partner took notice of it, so; but else I can say nothing to it; but the handkerchief was afterwards asked again, and could not be had.

L. H. S. Would my lord of Warwick ask this witness any questions?

Earl of Warwick. No, my lord.

Att. Gen. Then, my lord, our next witnesses are Robert Applegate and Peter Catro, who will give your lordship an account who they carried at this time.

L. H. S. Whom do you call first?

Att. Gen. Robert Applegate. (Who was sworn.)

L. H. S. What questions do you ask him, Mr. Attorney?

Att. Gen. I desire that he would acquaint your lordship, what he knows of what passed at the Greyhound-tavern in the Strand, the 29th of October last, whom he carried, and whither he carried them?

Applegate. My lord, about one or two in the morning, a Sunday, the 29th or 30th of October last, I was going home with my partner and my chair, and I heard them calling at the Greyhound tavern in the Strand, Mr. Locket's, for coaches and chairs; there was no coach to be had that could be heard of; but coming up to the door, they said they wanted six chairs; and when we were there at the door, there came out first my lord Warwick, capt. Coote, and my lord Mohun; capt. Coote got into the first chair, and what directions he gave them I cannot tell; my lord of Warwick got into the next; and into ours, which was the third, my lord Mohun came in, and bid us take him up and carry him towards Westminster, and he ordered us to follow the chairs before: just as they turned at St. Martin's-lane, my lord Mohun called out and desired to stop, and at the Cross Keys tavern back-door all the three chairs came up together; and then my lord of Warwick and capt. Coote and my lord Mohun talked together; and I could hear my lord Mohun and my lord of Warwick desire capt. Coote to defer it, and put it by till another day; what it was, indeed I cannot tell: but while they were talking there, three chairs more came up on the other side of the way; and capt. Coote would needs go forward, and my lord Mohun and my lord of Warwick went with him; and so they were all set down at the lower end of Leicester-fields, at Green-street end. But in truth I did not see where the other three chairs set down those they carried.

Att. Gen. What then happened afterwards, can you tell?

Applegate. I cannot tell whether I had lighted my pipe, or just lighting it, when I heard chairs called again; upon which we run up with our chair towards the upper end of the fields, and there I did see my lord of Warwick within the rails, who bid us put over our chair into the fields; but we told him, if we did, we could not get it over again; and so we went with our chair to the corner of the fields; and when we came there, there came out captain French, who bid us open our chair, and let him in, for he did believe he was a dead man; and upon that we did take him in, and he bid us carry him with all the speed we could to the Bagnio in Long-Acre, and my lord of Warwick got into another chair behind; so we went to Long-Acre; and when we came to the door of the Bagnio, and captain French came out of the chair, he was so weak that he fell down upon his knees; and when he came out, I asked who should pay me, and desired to be discharged; and the earl of Warwick said, Damn ye, call for your money to-morrow; so they both went in at the Bagnio door together.

Att. Gen. Pray, who called for the chair first, captain French, or my lord of Warwick, in the fields?

Applegate. I cannot tell; but when I brought up my chair, I first saw my lord of Warwick, and he would have had me lifted the chair over the rails, and I told him we could not get it over again, and so went up to the upper end of the fields.

Att. Gen. If you first spoke with my lord of Warwick, why did you not carry my lord of Warwick?

Applegate. Indeed I cannot tell; but I suppose it was because he did not come so soon out of the fields as captain French, or did not come the same way.

Att. Gen. Pray, do you remember any thing that happened just at their carrying capt. French away?

Applegate. Before he went into the chair, he stopped, and would have pulled off his cloaths, but we would not let him.

Att. Gen. Did you see any sword capt. French had?

Applegate. I did see no sword that I can say directly was a sword; but capt. French had something in his hand, but what it was I cannot tell.

Att. Gen. What was it that he said to you, when he first went into the chair?

Applegate. He desired to be carried to the Bagnio; for he said he believed he was a dead man.

Att. Gen. Pray friend, recollect yourself, if you heard him say any thing at all when he first went into the chair at the Greyhound tavern?

Applegate. I did not hear him mention any thing at all.

Att. Gen. Pray what did you hear my lord of Warwick say at that time?

Applegate. Truly, I cannot say I heard him mention any thing at all neither; but I did hear my lord Mohun say, when he could not prevail, in St. Martin's-lane, with captain Coote to go home, that if they did go he would go and see it.

Att. Gen. If they did go; who did he mean by they?

Applegate. My lord Warwick and captain Coote that were in the other chairs; there was nobody else to speak to.

Att. Gen. Was there any talk of fighting or quarrelling?

Applegate. No, indeed, I do not know of any difference there was between them.

L. H. S. My lord Warwick, will your lordship ask this witness any questions?

Earl of Warwick. My lord, I desire he may be asked, Whether I did not endeavour to put off the going into Leicester-fields, and to have all things let alone till to-morrow.

Applegate. My lord, I cannot say any thing of that; but I did hear my lord Mohun beg heartily of captain Coote to go home, and let the business alone till another time; and indeed I think, I never heard a man beg more heartily for an alms at a door, than he did, that they might not go into the fields then; but I cannot say that I heard any thing that my lord of Warwick said about it.

L. H. S. Will your lordship ask him any other questions?

Earl of Warwick. No, my lord.

L. H. S. Did my lord of Warwick express any inclination to go on?

Applegate. Indeed I know not any thing one way or other.

L. Jeffreys. My lords, if I am not mistaken, he did say, that he did not see any thing of inclination in my lord of Warwick to go on: but I desire, if your lordships please, that he may be asked this question, Whether he did see any thing in my lord of Warwick that shewed any inclination to the contrary?

Applegate. All that I can say is, I heard my lord Mohun say, Pray let's go home and lie all together, and let us put off this business to another time; but indeed I do not remember that my lord of Warwick said one word of going any way backward or forward.

Att. Gen. Pray, who did my lord Mohun speak these words to?

Applegate. My lord Mohun spoke to my lord of Warwick and captain Coote, both.

L. H. S. Mr. Attorney, who is your next witness?

Att. Gen. Peter Catro. [Who was sworn.]

L. H. S. What do you ask him, Sir?

Att. Gen. He was the other chair-man that carried my lord Mohun; Pray, will you give my lords an account what you know passed at the time when you carried my lord Mohun to Leicester-fields?

Catro. I and my fellow carried my lord Mohun from the Greyhound-tavern in the Strand, till we came to the turning up of St. Martin's-lane, where my lord Mohun desired

that our three chairs might stop, and that they might go down to Westminster, and that my lord Warwick and capt. Coote would go thither, and he would wait upon them to their lodging; capt. Coote made answer again something, but what I cannot tell, and his chair went on; and my lord Mohun did say, if they went forward, he would follow them, and see what would come of it.

Att. Gen. What did you see happen while you were in St. Martin's-lane?

Catro. There were other three chairs that went by while we stood at the Cross-Keys tavern-door, and captain Coote's chair going forward, we followed and went to the end of Leicester-fields, at Green-street end; and there all three went out of their chairs and walked up the paved stones of the square; my lord of Warwick asked my lord Mohun if he had any silver, and three shillings were given for the three chairs, and they went from us, and bid us go about our business; and in a little while after we heard a noise from the upper end of the fields, calling chairs, again.

Att. Gen. Did you observe any thing of quarrel or difference between them, or any clashing of swords?

Catro. Indeed I heard nothing of any quarrel, for we were at the lower end of the square, at Green-street end; and when we heard them call for chairs again, we went up towards the upper end of the fields; and when we came there, we heard one bid us bring up the chair over the rails.

Att. Gen. Who was that?

Catro. Indeed, my lord, I cannot tell, for I was behind the chair, and could not see who it was; but we saying that we could not get it over again if we did, we went up to the upper end of the fields, and there was capt. French, I think it was, for I did not perfectly see him, being at the hind-part of the chair; and we went on to the bagnio in Long-Acre; and I did see my lord Warwick come out of his chair at the bagnio door, for there they were set down.

Att. Gen. You say you saw my lord of Warwick at the bagnio door; did you see any sword (as my lord of Warwick had, or capt. French?

Catro. No, I did not see any sword at all of either of them.

Att. Gen. What do you know of capt. French his declaring he was wounded?

Catro. I think it was either when he went into the chair, or in Newport-street end, he called out to have the chair opened; for, says he, I think I am a dead man, and would have pulled off his cloaths; and when we were at the bagnio door, we tarried a pretty while till they got them up to let them in; and asking if we should wait, my lord of Warwick bid us come to that house to-morrow morning for our money; and they went in together into the house, but I never heard any one word of quarrel or dissatisfaction passed between them.

Att. Gen. This witness speaks to the same

purpose as the other did; and I think we need not trouble your lordship any further as to that.

L. H. S. Would my lord of Warwick ask him any questions?

Earl of Warwick. No, my lord.

Att. Gen. Then our next witness is one John Palmer. (Who was sworn.)

Att. Gen. Pray, will you give my lords an account, who it was you did carry in your chair the 29th or 30th of October last, and whither you carried him?

Palmer. About one o'clock in the morning, the 30th of October, we were called to the Greyhound Tavern in the Strand, to Mr. Locket's, and there we took up a gentleman, one captain French.

Att. Gen. Whither did you carry him?

Palmer. He bid us go to Leicester-fields.

Att. Gen. What did he particularly say to you?

Palmer. There were three other chairs that were just gone before from the same door, and he bid us get before all those chairs; and just as we come to St. Martin's-lane end, we saw there were three other chairs set down before us over against the Cross Keys tavern back door.

Att. Gen. Well, what did you do then?

Palmer. So we went before, according as we were bid, unto Leicester-fields, and at the upper end of the fields, by Leicester-house, we opened the door, and captain French came out, and he gave us a shilling, and we went away about our business.

Att. Gen. Were there any more chairs there that went with you?

Palmer. There were two more chairs that set down two other gentlemen by Leicester-house, and we came away when we were paid; that is all I know.

Att. Gen. Did you see any other chairs besides your three when you came down again, or any other gentlemen?

Palmer. We did see some gentlemen walking up about the middle of the square when we came down, but we made what haste we could away home, it being late on Sunday morning.

Att. Gen. Did you observe any fighting when you were in the field?

Palmer. I did not hear or discern any fighting while I was there.

Att. Gen. Did you hear of any quarrel, or any thing between any of them, and whom, before?

Palmer. No, I did not know of any quarrel, or hear of any thing at all, I do assure you.

Att. Gen. All that he says then, my lord, is, That he carried capt. French to the upper end of Leicester-fields, and there he left him.

L. H. S. Would my lord Warwick ask this witness any questions?

E. of War. I desire he may be asked, whether he knows who were in the chairs that were in St. Martin's-lane, when they passed by?

L. H. S. You hear the question, What say you to it?

Palmer. There were three chairs, but who

they were that were in them I cannot tell directly ; but as they said, when they set them down at Leicester-fields, they were my lord Warwick, my lord Mohun, and Mr. Coote.

Att. Gen. Who was it that said so ?

Palmer. Some of the other chairmen when I came by.

L. H. S. Mr. Attorney, who is your next witness ?

Att. Gen. We shall call next the chairmen that carried Mr. Dockwra and Mr. James : Call Jackson the chairman. (Who was sworn.)

Att. Gen. This man carried capt. James : Pray acquaint my lords, who you did take up at Locket's in the Strand on the 29th or 30th of October last, and whither you carried him ?

Jackson. I carried capt. James from Locket's in the Strand into Leicester-fields.

Att. Gen. How many chairs were you that went ?

Jackson. There were two more that went when I went ; there were six in all that took up gentlemen there, and we were the last but one.

Att. Gen. Can you tell who were in the other three first chairs ?

Jackson. I do not know who were in the other chairs, but I heard my lord Mohun at the door of the house desire, that the business might be deferred till to morrow morning : there were six gentlemen at the door, but truly who they all were I cannot tell.

Att. Gen. Who did my lord Mohun speak that to ?

Jackson. Indeed I do not know who he spoke it to.

Att. Gen. What answer was made to my lord Mohun ?

Jackson. Truly, there was no answer that I heard, but we all went away soon after that, and we were bid to go to Leicester-fields to follow the other chairs ; and when we came to the other end of Leicester-fields, we set down captain James by the Standard tavern, and he gave us a shilling, and bid us go our ways ; so we went our way, and I heard nothing afterwards, but came away down the fields, and there were three chairs that stood at the bottom of the fields ; and we asked them, what they stayed there for ? And they said, to fill a pipe of tobacco : And presently after, we heard call chairs again ; but it was late, and it was Sunday morning, and my partner said let us go away home ; and we did so, we went directly home.

Att. Gen. Did you carry nobody back ?

Jackson. No, we carried nobody back.

Att. Gen. My lord, we have done with this witness ; our next witness is one Richard Edwards, and he was one of the chairmen that carried Mr. Dockwra. (He was sworn.)

Att. Gen. Pray will you acquaint my lords, Whether you carried any body from Locket's the 29th of October, and who it was, and whither you carried him ?

Edwards. I do not know who I carried, but they were calling coaches at the Greyhound tavern in the Strand, and no coaches coming,

they called for chairs, and so our chair was brought up.

Att. Gen. When you came there, who did you see there ?

Edwards. Indeed I did not know my lord of Warwick, nor my lord Mohun, nor any of them.

Att. Gen. Well, what do you know ? tell my lords what happened.

Edwards. When we were there, there went two into two chairs ; and my lord Mohun said, or another gentleman, I cannot tell which, that the chairs should not go away, that they would kill any man that should go away ; and they went out of the chairs, and went into the house again.

Att. Gen. And what happened after they went into the house again ?

Edwards. After they went out of the chairs into the house again, as I was told, my lord of Warwick, my lord Mohun, and Mr. Coote, went into three chairs, and went away from the door ; and there were three chairs of us that went last.

Att. Gen. Whither did you go with your chair ?

Edwards. We went to the Standard tavern at the end of Leicester-fields, and when we came to the tavern door, we asked him if we should knock at the door ; he said no ; but he gave us a shilling, and bid us go about our business, and so we did, for we went sheer away to Charing-Cross.

Att. Gen. Pray can you tell who were in the other chairs ?

Edwards. Truly I cannot tell any man that was in our three chairs, for I was the hind-chairman, and did not know any of them.

Att. Gen. My lord, I desire to know what he means by hind-chairman ?

Edwards. My lord, ours was the last chair that went to Leicester-fields, and I was behind the chair, and never could see any of them, it being so very dark after they took the chairs, till we came to Charing-Cross, at St. Martin's-lane ; and then I could not see who the particular persons were that were in the chairs ; nor indeed, whose the chairs were that carried them.

Att. Gen. What hour was it ?

Edwards. It was very late, between one and two in the morning ; it was past one before we were called out.

Att. Gen. You say you went to the upper end of Leicester-fields with two other chairs ; pray did you see any other chairs afterwards, and where ?

Edwards. We saw three chairs at the lower end of the square, as we came down by Green-street end, and we asked them, what they stayed there for ; and they said, to light a pipe of tobacco.

Att. Gen. Pray, who had been carried in those chairs, can you tell ?

Edwards. I did not see them set down any body, and I cannot tell who they carried ; and as for the person that we carried, I did not so

much as see him to know him, nor know who he was; but we went away as soon as ever we were paid.

Att. Gen. I have one question more to ask you; you say, that my lord of Warwick at the tavern door bid you stay, and that none should go away, and swore he would run any man through that should go away?

Edwards. It was my lord Mohun; and then two that had gone into the chairs, went into the house again.

Att. Gen. Did not you say that there was some talk of going to Westminster?

Edwards. My lord Mohun did talk of going to Westminster, when they went into the chairs the second time; and I think I heard Mr. Coote say, he would make an end of it then, and he would kill any man that would not go forwards to Leicester-fields.

L. H. S. My lord Warwick, will you ask this witness any more questions?

Earl of Warwick. No, my lord.

L. H. S. Mr. Attorney, have you any more evidence to call?

Att. Gen. My lord, the next piece of evidence that we should apply ourselves to, will be to what happened at the Bagnio in Long-acre, after my lord Warwick and capt. French came there: and the witness that we shall call is Pomfret, and he is a servant at the Bagnio in Long-acre, and he will acquaint your lordships who came thither the 30th of October last, and what happened there.

L. H. S. What is his name?

Att. Gen. Henry Pomfret.

L. H. S. Is he sworn?

Att. Gen. Yes, my lord.

L. H. S. What is it that you examine him about? What questions do you ask him, Mr. Attorney?

Att. Gen. Who came to his master's house, and at what time they came?

Pomfret. My lord, on Sunday the 30th of October last, between two and three in the morning, there came to my master's door the earl of Warwick, and knocked at the door, and there was capt. French with him; and when they were let in, my lord of Warwick told me that capt. French was wounded, and he himself had a wound, and he desired that my master might be called up for to dress the wounds; especially, because capt. French was very much wounded; which accordingly was done in about a quarter of an hour after they were brought in.

Att. Gen. Did he desire to be concealed when he was come in?

L. H. S. Of whom do you speak, Mr. Attorney?

Att. Gen. My lord of Warwick.

Pomfret. He did desire, that if any body asked for him, it should be said he was not there.

Att. Gen. Pray in what condition did my lord of Warwick seem to be in at that time?

Pomfret. He seemed to be very much concerned at that time, and his right hand, in

which he had his sword, and which was drawn, was very much bloody.

Att. Gen. Was the sword bloody that he had in his hand?

Pomfret. The blade was bloody; but whether it was all over bloody, I cannot tell; there was besides some blood upon the shell; it was very near all over bloody, as I remember.

Att. Gen. Pray, friend, consider what you swore at the Coroner's Inquest about the blood upon the sword.

Pomfret. Indeed I cannot say it was bloody all along the blade; but there was blood upon the shell, and there was blood upon the inside; it was so, to the best of my remembrance.

Att. Gen. What condition was Mr. French's sword in?

Pomfret. He had a drawn sword in his hand, but I did not perceive it had any blood upon it: it was a large blade.

Att. Gen. How do you know what sort of sword Mr. French's was, and in what condition it was?

Pomfret. He desired me to take notice of it next morning, and I did so; and there was no blood upon it.

Att. Gen. How came you to be desired to take notice of what passed there about the swords?

Pomfret. My lord, there was three of them the next day, and one, it was said, was Mr. Coote's, and another of them was my lord of Warwick's, which I do believe was bloody from the point upwards, very near; but I cannot directly say but that was afterwards.

Att. Gen. Who brought in that sword that you say was Mr. Coote's?

Pomfret. To the best of my remembrance, capt. Dockwra brought it in; it was almost half an hour after my lord Warwick and capt. French came into the house, when they came thither.

Att. Gen. They, who do you mean?

Pomfret. Captain James and he.

Att. Gen. Were they let in presently?

Pomfret. No, My lord of Warwick had desired that they might be private there; but when they knocked at the door, my lord of Warwick desired to know who they were; and when it was understood that they were Mr. James and Mr. Dockwra, they were let in by my lord's order.

Att. Gen. Pray, which of all the four brought in any sword in a scabbard?

Pomfret. It was captain Dockwra.

Att. Gen. Pray, did they appear to be all of a party?

Pomfret. They were glad to see one another; and they talked a pretty while together; but indeed I cannot say I heard what they talked.

Att. Gen. Pray, do you remember my lord of Warwick's sword, and what there was upon it?

Pomfret. It was a steel sword, water-gilt, and as near as I can remember, there was blood upon it for the most part from the point upward.

Att. Gen. And what did appear upon Mr. French's sword?

Pomfret. There was water and dirt, but there was no blood at all.

Att. Gen. How long did they stay there?

Pomfret. They all continued about half an hour; and then went away, all but Mr. French, who staid there.

Att. Gen. What then became of the others?

Pomfret. Mr. James, Mr. Dockwra, and my lord of Warwick went away; and my lord of Warwick desired particularly, that we would all take care of Mr. French, for he was his particular friend; and Mr. French continued there till Sunday about one of the clock.

Att. Gen. Was there any discourse at that time about Mr. Coote?

Pomfret. Not that I heard of, one word.

Att. Gen. Was there any notice taken of any quarrel that happened between any body, and who?

Pomfret. No, indeed, I did not hear them take notice of any quarrel at all between any body.

Att. Gen. You say Mr. French, when he came into your house, was wounded, and there was care particularly taken of him because he was wounded.

Pomfret. Yes; my lord of Warwick desired to take care of him.

Att. Gen. Then pray, was there no discourse how he came to be wounded?

Pomfret. Indeed I do not know how he came to be wounded; nor did I hear one word of discourse about it; indeed I cannot say any thing who wounded him.

Att. Gen. Pray will you recollect yourself, and tell my lords what sort of handle had my lord of Warwick's sword when you saw it.

Pomfret. It had a steel handle.

Att. Gen. Pray, can you tell whether the shell was open or close?

Pomfret. I cannot tell justly; I saw it, and that was all.

Att. Gen. If I apprehend you, you say my lord had a wound in his hand.

Pomfret. Yes, my lord, he had so.

Att. Gen. Pray, in what hand was it that he was wounded?

Pomfret. To the best of my remembrance, it was in his right hand.

Att. Gen. Pray, did there appear much blood there?

Pomfret. Yes, my lord, indeed there did.

Serj. Wright. You talk of Mr. James and Mr. Dockwra's swords; pray in what condition were they?

Pomfret. Mr. Dockwra's sword was by his side, and not drawn.

Serj. Wright. What did you observe of captain James's sword?

Pomfret. His sword was naked, and he had lost his scabbard; but how that came I cannot tell; and there was dirt on one side of the sword; and he said he had left his scabbard behind him.

Att. Gen. Was there any blood upon his sword?

Pomfret. No, there was no blood that I did see upon it.

Att. Gen. Pray did you see any blood upon Mr. Dockwra's sword?

Pomfret. No, indeed, I did not see Mr. Dockwra's sword, it was in the scabbard by his side.

D. of Leeds. My lords, there has been notice here taken of several swords that this witness saw; and he takes so far notice of my lord of Warwick's sword, that he tells you what sort of hilt it had, and how it was bloody from the point to the hilt; I desire he would give you an account of the length and breadth of the other men's swords, Mr. French, Mr. James, and Mr. Dockwra's.

L. H. S. You said just now, that you took notice of my lord of Warwick's sword, that it was bloody from the point to the hilt; what sort of sword was it?

Pomfret. It was a pretty broad sword.

L. H. S. Did you take notice of the other swords, what breadth or length they were of?

Pomfret. No, my lord, I did not.

Att. Gen. Which was that sword that was dirty, as you say?

Pomfret. That was captain French's.

Att. Gen. Was that a broad sword or not?

Pomfret. No, it was not.

Att. Gen. Pray, was it over night or next morning that you saw the swords?

Pomfret. It was in the morning about three a'clock.

Att. Gen. What time did my lord of Warwick, and Mr. James, and Mr. Dockwra go away?

Pomfret. My lord of Warwick and they were gone several hours before Mr. French; and to the best of my remembrance, Mr. James broke his sword upon the floor after he came in.

Att. Gen. Pray, what swords were there in all that you saw there?

Pomfret. There was capt. French's, capt. James's, my lord of Warwick's, and one Mr. Coote's, as Mr. French said when it was brought in.

L. H. S. Have you done with this witness, Mr. Attorney?

Att. Gen. Yes, my lord, we have.

L. H. S. My lord Warwick, will you ask him any questions?

E. of Warwick. No, my lord.

L. H. S. Then, Mr. Attorney, call your next witness.

Att. Gen. Our next witness is Thomas Goodall, who is a servant at the Bagnio in Long Acre, as well as this man that was last. (He was sworn.)

L. H. S. What questions do you ask him, Mr. Attorney?

Att. Gen. My lord, I desire he would acquaint your lordships, what time it was my lord of Warwick and capt. French came to his master's house?

Goodall. It was between one and two o'clock in the morning.

Att. Gen. My lord, I desire he would acquaint your lordships what he saw and knows, that passed at that time?

Goodall. All that I can say is, that I did see my lord of Warwick's sword bloody, and it was naked in his hand, and I did see a wound on his hand: indeed I did not see him when he first came in, for he had been there a pretty while before I saw him.

Att. Gen. Pray, in what condition was my lord when you saw him?

Goodall. He had his sword in one hand, and it was bloody at the blade and at the hilt; but whether it was bloody all over, indeed I did not take notice of it, and so cannot give an account.

Att. Gen. Pray, what sort of sword was it?

Goodall. Indeed I cannot give an account what sort of sword it was, but it was either steel or silver gilt, as I remember; but I did take notice that there was blood upon the hilt, that is, upon the shell.

Att. Gen. Was it an open shell, or a close one?

Goodall. I think it was a close one.

Att. Gen. Pray, did my lord of Warwick give any order to be denied in the house, or for any concealment there?

Goodall. Indeed I did not hear of any orders given for concealing of any body there; but my lord walked up and down very much concerned.

Att. Gen. Did not Mr. French come in with him?

Goodall. I do believe he might: but I cannot say I saw him when he came in.

Att. Gen. Can you tell when Mr. James and Mr. Dockwra came in? How long was that after my lord of Warwick was there, and Mr. French?

Goodall. To the best of my remembrance and knowledge, it was half an hour after my lord of Warwick and Mr. French came, that Mr. James and Mr. Dockwra came: I am sure it was so before I saw them in the house; but indeed I cannot say directly when they came in, or when they went out.

Att. Gen. Pray, which hand of my lord of Warwick was it that was hurt, the right or the left?

Goodall. Indeed, I cannot positively say; but I think it was the right hand.

Att. Gen. You talk of my lord of Warwick's sword; did you take any notice of Mr. French's sword?

Goodall. No, indeed; I was busy about the affairs of the house; I did see my lord of Warwick's sword, but that was by chance, and it was bloody at the hilt, and upon the blade; but whether it were all over bloody, indeed I cannot tell.

Att. Gen. I desire to ask him, Whether he can tell who brought in Mr. Coote's sword thither?—*Goodall.* Indeed I cannot.

L. H. S. Mr. Attorney-General, have you any more questions to ask him?

Att. Gen. No, my lord, not I.

L. H. S. My lord of Warwick, will you ask him any questions?

E. of Warwick. No, my lord.

L. H. S. Mr. Attorney, who is your next witness?

Att. Gen. My lord, our next witness is Mrs. A. Goodall, this man's wife. [Who was sworn.]

L. H. S. What questions do you ask this gentlewoman?

Att. Gen. I desire that she would acquaint your lordships, whether she was at the Bagnio in Long-acre when my lord of Warwick and capt. French came in?

A. Goodall. I was there when my lord of Warwick came in.

Att. Gen. Was capt. French with him?

A. Goodall. Yes, captain French was with him.

Att. Gen. About what o'clock was it that they came there?

A. Goodall. It was about two o'clock, as near as I can remember.

Att. Gen. In what condition were they when they came in, pray?

A. Goodall. Mr. French was very much wounded.

Att. Gen. Pray, how was my lord of Warwick?

A. Goodall. My lord had his sword in his hand, and it was very bloody, both at the hilt, and upon the blade.

Att. Gen. Did you observe any wound that my lord had?

A. Goodall. I think, to the best of my remembrance, my lord had his hand wrapped up in a handkerchief, which was bloody; but I was busy up and down in the house, and I cannot so well tell what hand it was; I was indeed up and down there while they were there.

Att. Gen. Do you know of any orders that were given by my lord of Warwick to be concealed while he was there?

A. Goodall. He did desire the door might not be opened to any body that asked for him, and that it might not be said that he was there; and when the other two gentlemen came to the door, he went to the door himself, and when he saw who they were, he ordered them to be let in.

Att. Gen. What was the occasion of his going to the door himself?

A. Goodall. There was a knocking at the door, and he had a mind to know who it was; and when it did appear it was Mr. James and Mr. Dockwra, he himself ordered them to be let in.

Att. Gen. How came the door to be open to them?

A. Goodall. Indeed I think he opened it himself.

Att. Gen. How long was that after he and capt. French came in?

A. Goodall. It was about half an hour.

Att. Gen. When they first came in, what posture were they in? Had they any swords in their hands?

A. Goodall. I did not positively take notice, whether they had any swords in their hands, nor what they had when they came in.

Att. Gen. What became of them afterwards?

A. Goodall. My lord of Warwick, Mr. James, and Mr. Dockwra, went away within a little while, and my lord of Warwick ordered particular care to be taken of Mr. French, as his friend, and he was put to bed after his wounds were dressed; but I cannot tell what afterwards became of my lord Warwick, and the other gentlemen.

Att. Gen. I think you were saying, that my lord of Warwick was wounded in the hand; which hand was it?

A. Goodall. I cannot positively say, whether it was the right or the left.

L. H. S. Will you who are of the king's counsel, ask this witness any further questions?

Att. Gen. No, my lord, we shall ask her no other questions.

E. of Warwick. No, my lord, nor I.

Att. Gen. Then our next witness is Henry Amy, who is a surgeon, and lives at the Bagnio in Long-acre; and he will give your lordship an account what passed within his knowledge at this time within his house, and who came thither wounded, and what particular care was ordered to be taken of Mr. French, and by whom.

(Mr. Amy was sworn.)

Att. Gen. I desire you will give an account to my lords what happened at your house early in the morning, the 30th of October last?

Amy. The 30th of October last, about two of the clock, I was knocked up out of my bed to attend two gentlemen, my lord Warwick and captain French, who came then into my house.

Att. Gen. In what condition were they?

Amy. They were both wounded; Mr. French very much, and my lord of Warwick in his hand.

Att. Gen. Did you see any swords?

Amy. Yes; they had both swords in their hands, and my lord of Warwick's sword was very bloody.

Att. Gen. Well, Sir, when they came into your house, what directions was given by my lord Warwick?

Amy. He gave directions, if any body should ask for him, they should say he was not there.

Att. Gen. Did any body come and ask for him?

Amy. While we were taking care of Mr. French, and dressing his wound, there were some persons came and knocked at the door, and my lord of Warwick did order, that nobody should be let in; but he himself went to the door, and when he found that it was Mr. Dockwra and Mr. James, my lord Warwick ordered that they should be let in.

Att. Gen. Pray tell my lords what followed after that?

Amy. After we had dressed Mr. French—

Att. Gen. By the way, was there any par-

ticular directions, and by whom, to take care of Mr. French?

Amy. Yes, my lord Warwick desired me to take care of him as his particular friend.

Att. Gen. Well then, after you had dressed Mr. French's wound, what happened?

Amy. I dressed my lord Warwick's wound.

Att. Gen. Pray, whereabouts was my lord of Warwick's wound?

Amy. It was near the first joint of his forefinger.

Att. Gen. Pray, how long did they stay there?

Amy. After Mr. Dockwra and Mr. James came in, and my lord's hand was dressed, they stayed a little while, and they three went away.

Att. Gen. What was said when they went away?

Amy. My lord of Warwick desired to have great care taken of Mr. French; and they said, Now let us go away; and they went away.

Att. Gen. Pray, what time did they stay in your house?

Amy. When they went away, I think it was about half an hour after they first came in.

Att. Gen. Did you take notice of no sword but my lord of Warwick's?

Amy. No, not then.

Att. Gen. Did you afterwards?

Amy. Afterwards in the morning, Mr. French called for his sword, and I looked upon it.

Att. Gen. Pray, in what condition was his sword? Was it bloody?

Amy. It was without blood, only a little dirty.

Att. Gen. Pray, did you observe that they talked of any quarrel that had been between capt. French and my lord, when they came in?

Amy. No.

Att. Gen. Did you ask them any questions about it, the one or the other of them?

Amy. No, I did not.

Att. Gen. Did you hear them say, how they came by their wounds?—*Amy.* No, I did not.

Att. Gen. Did you hear them talk of any body being killed, particularly Mr. Coote?

Amy. I did not know of any body being killed till next day.

Att. Gen. Did you take any notice of James's and Dockwra's swords?

Amy. Truly, I took no notice of any swords but my lord Warwick's, while my lord Warwick was there in the house; but the next morning Mr. French gave me his sword, and there was another sword there, which Mr. French told me was capt. Coote's sword.

Att. Gen. When was that? How long after my lord of Warwick, and James, and Dockwra, were gone away?

Amy. It was some hours after.

Att. Gen. When did you hear of Mr. Coote's being killed?

Amy. About nine o'clock next morning I heard of Mr. Coote's being killed.

Att. Gen. Whom did you hear it from?

Amy. From Pomfret, my servant.

Att. Gen. Did you hear no discourse be-

tween my lord of Warwick, capt. French, Mr. James, and Mr. Dockwra about it?

Amy. No, I did not.

Att. Gen. Did they not talk how those wounds came they had; nor did not you ask who gave them?

Amy. No, I did ask no question of either of them: and in half an hour after they came in, my lord of Warwick and the other two gentlemen went away.

Att. Gen. When they left French there, what orders were left about him?

Amy. Only to take care of him, my lord of Warwick desired that.

Att. Gen. What reason did my lord give for that?

Amy. I heard nothing of reason, only that he was his particular friend.

Att. Gen. Did you hear them talk any thing, whither they would go, when they went away?

Amy. I did hear some talk about going into the country.

Att. Gen. Do you know whither they went, when they went away from your house?

Amy. No, indeed I did not.

Att. Gen. My lord, we have done with him.

L. H. S. My lord Warwick, will your lordship ask this witness any questions?

E. of War. I desire to have him asked, whether I was not wounded in the hand.

Amy. His hand was very bloody, the handkerchief that was about it was wet with the blood.

E. of War. I desire to ask him, when it was that he saw capt. French's sword?

Amy. It was not before the morning; it was about nine o'clock, as I remember.

M. of Norm. Before this witness goes away, I desire he may be asked one question, whether he can tell the size of Mr. French's sword?

L. H. S. Here is a noble lord that desires to know, if you can tell about capt. French's sword, what sort of sword it was?

Amy. As to the blade, it was a middle-sized sword.

M. of Norm. Was it a broad blade or no?

Amy. No, my lord, it was not a broad blade.

L. H. S. Mr. Attorney, who is your next witness?

Att. Gen. Capt. Loftus Duckinfield. (Who was sworn.)

Att. Gen. This gentleman will acquaint your lordships what discourse past between these gentlemen the next day; pray, Sir, acquaint my lords what you heard about Mr. Coote's death, and when and where.

Capt. Duck. Early in the morning I was told of this accident.

Att. Gen. By whom?

Capt. Duck. One of the company, I cannot tell who, I think they were all together then, my lord of Warwick, capt. James, capt. Dockwra, and nobody else.

Att. Gen. What was their discourse?

Capt. Duck. They said, they believed captain Coote was killed.

Att. Gen. Did they tell you by whom?

Capt. Duck. By Mr. French, every body did say he was his adversary.

Att. Gen. What account was given of the action?

Capt. Duck. They said it was done in the dark, and capt. French was his adversary.

Att. Gen. Was there any notice taken of any duel?

Capt. Duck. Yes, there was, between those two, and the other persons on both sides; and it was said my lord of Warwick was friend to Mr. Coote, and my lord Mohun.

Att. Gen. Who were on the other side?

Capt. Duck. Mr. Dockwra and Mr. James.

Att. Gen. Was there any discourse, who actually fought?

Capt. Duck. It was said, that capt. French fought with capt. Coote, as they believed, and Mr. James with my lord of Warwick.

Att. Gen. Did you see my lord of Warwick's sword?

Capt. Duck. Some time of the day I did; but I cannot tell whether it was in the morning, or no.

Att. Gen. In what condition was it? Was it bloody or not?

Capt. Duck. It was a steel sword.

Att. Gen. How long did they stay with you?

Capt. Duck. About half an hour.

Att. Gen. Did they come publicly?

Capt. Duck. We went away in a hackney coach together.

Att. Gen. Pray, what discourse was there about consulting to go into the country together?

Capt. Duck. That might be discoursed, but by whom I cannot tell.

Att. Gen. Did my lord of Warwick talk of going into the country?

Capt. Duck. Whether the company talked of it, or my lord of Warwick in particular, and the rest assented to it, I cannot well tell.

Att. Gen. Whither did they go?

Capt. Duck. I cannot directly tell.

Att. Gen. What time of the day was it?

Capt. Duck. It was about six of the clock.

Att. Gen. Cannot you tell whither they went?

Capt. Duck. Capt. James and capt. Dockwra went to the Ship and Castle in Cornhill about five o'clock or six, as near as I can remember.

Att. Gen. Can you tell what time my lord of Warwick went away?

Capt. Duck. No, I cannot tell what time he went away, not directly.

Att. Gen. Can you tell of any agreement amongst them, whither they were to go?

Capt. Duck. No, I cannot.

Att. Gen. What discourse or concern did you observe past between them, concerning capt. Coote?

Capt. Duck. My lord of Warwick shewed a great deal of concern for his friend Mr. Coote.

Att. Gen. Had you any notice of Mr. Coote's death amongst you?

Capt. Duck. We had notice before we went away ; but I cannot tell whether it was before my lord of Warwick was gone.

Att. Gen. Was it after the discourse of going into the country, or before ?

Capt. Duck. Indeed, I cannot directly say when it was.

Att. Gen. Pray, what reason was there for their going into the country before he was dead ?

Capt. Duck. They believed he was dead.

Att. Gen. Cannot you tell the reason why they would go into the country ?

Capt. Duck. No, indeed, I cannot tell the reason.

Att. Gen. Did you observe my lord of Warwick's sword ? Was there any blood upon it ?

Capt. Duck. I cannot say his sword was bloody at the point ; the whole blade and shell was bloody, to the best of my remembrance.

Att. Gen. What sort of a sword was it ?

Capt. Duck. It was a pretty broad blade, a hollow blade, and a hollow open shell.

Att. Gen. Was there any discourse concerning capt. French ?

Capt. Duck. Yes, they thought he was very ill wounded.

Att. Gen. Was there any, and what discourse, who should give my lord of Warwick his wound ?

Capt. Duck. It was said, they believed capt. James gave my lord his wound.

Att. Gen. Pray, was there any blood upon Mr. James's sword, or was he wounded ?

Capt. Duck. I saw no wound upon capt. James, that I know of.

L. H. S. Do you believe that my lord Warwick's sword was bloodied with the hurt of his own hand, or any otherwise ?

Capt. Duck. I cannot tell ; it was a cut shell, and the outside bloody as well as the in.

L. H. S. My lord Warwick, will your lordship ask this witness any questions ?

E. of War. No, my lord.

L. H. S. Mr. Attorney, if you have any other witness, pray call them.

Another Witness was produced, that belonged to the Ship and Castle in Cornhill.

Att. Gen. This man will give you an account what passed at his house at that time, and between whom ; pray, will you tell my lords who was at your house the 30th of October last, and what past there then ?

Witness. My lord of Warwick, capt. James, and capt. Dockwra ; and when my lord of Warwick came in, I thought my lord was in a very great concern, and called for pen, ink, and paper, and I feared there was some quarrel in hand ; but they said no, the quarrel was over, and says my lord of Warwick, I am afraid poor Coote is killed.

Att. Gen. Did you observe any desire to be private ?

Witness. No, indeed, I cannot tell that.

Att. Gen. How long did they continue there ?

Witness. About six a-clock my lord of Warwick, and capt. James, and capt. Dockwra, and capt. Duckinfield went away.

Att. Gen. Can you tell who went with my lord Warwick ?

Witness. No, indeed, I cannot tell who went with my lord Warwick ; there came in a gentleman in black, whom I knew to be my lord of Warwick's steward, and he came and spoke some words to my lord of Warwick, about a quarter of an hour after they came in, and then they went away, for after that I did not hear any farther discourse.

Att. Gen. What became of the rest of the company ?

Witness. They went away ; I do not know what became of them, nor whither they went ; some of them went in and out of one room into another several times, two or three times, and came out again.

Att. Gen. My lord, we have done with this witness.

L. H. S. My lord Warwick, will you ask him any questions ?—*E. of War.* No, my lord.

L. H. S. Mr. Attorney, who is your next witness ?

Att. Gen. Mr. Salmon, the surgeon, who by the coroner's order searched the wound. (Who was sworn.)

Att. Gen. Pray, Sir, was you ordered by the coroner to view the body of Mr. Coote ?

Salm. Yes, I was ordered by the coroner to inspect the body of capt. Coote, and to give the jury an account of the nature of the wounds.

Att. Gen. Pray, upon the view of the body, what wounds had he ?

Salm. There was two wounds ; one on the breast near the collar bone, running downwards very deep.

Att. Gen. Pray, what part of the breast was it, and how deep was it ?

Salm. It was on the left part of the breast near the collar bone, and it penetrated four or five inches.

Att. Gen. Can you guess at what sort of sword it was that made the wound ?

Salm. No, indeed, Sir, I cannot.

Att. Gen. Was it a broad sword, or a little sword ?

Salm. The orifice was about the length of half an inch, and about the depth of five inches.

Att. Gen. Was that made with a broad sword, or with a narrow sword ?

Salm. Indeed, I cannot tell.

Att. Gen. You say he had another wound ; where was that ?

Salm. That was on his left side too, near unto the short ribs, under the last rib ; which was about the length of an inch, and of the depth of six inches, and it run through the diaphragma.

Att. Gen. Did you take one of these wounds, or both of them to be mortal ?

Salm. I did look upon either of them to be mortal, and to be the occasion of his death.

Att. Gen. Can you tell, whether they were both made with one and the same sword ?

Salm. Indeed I cannot tell that, whether they were made with one sword, or two.

Att. Gen. Cannot you tell how they appeared to be? I suppose you probed them.

Salm. Yes, I probed them both; one was quite through the diaphragma.

Att. Gen. What time was it that you viewed the body by the order of the coroner?

Salm. I saw the body at seven a-clock on Sunday night.

Att. Gen. If my lord of Warwick desire to ask him any questions, he may.

E. of War. My lord, I desire to ask him, whether any of the wounds were large enough to be made by a sword run up to the hilt?

Salm. No, my lord, sure they were not.

E. of War. My lord, I desire to know of him, whether both these wounds were given before or behind?

Salm. I can only tell you the length and depth by following of the probe; the one was downwards, and the other upwards.

Att. Gen. Do you suppose both those wounds were given when the person was standing, backward or forward?

Salm. It is impossible to tell how they were given, because of the variety of the postures of the body in the divers capacities thereby of receiving the wounds.

Att. Gen. Pray, can you tell whether they were given by one and the same sword, or no?

Salm. Indeed I cannot tell.

Att. Gen. Do you know any thing to the contrary?

Salm. I cannot say any thing for it or against it.

E. of Kingston. My lords, this witness, if I apprehend him right, says, the wound on his side was a large wound.

Salm. Yes, a very large wound, of the length of about three quarters of an inch at the orifice, and five or six inches deep.

E. of Kingston. I desire he may tell whether that wound could be given by any other than a broad sword?

Salm. I cannot tell that.

E. of Rochester. Indeed, my lords, I would have him asked this question again; I know not whether he can answer it or no; but I cannot but think it is proper to have some account of this matter. In all enquiries before the coroner, there is a judgment to be made of the nature of the wound, in order to form the indictments, and that the jury may know with what sort of weapon it was made; and it is his profession as a surgeon to know such matters.

L. H. S. Mr. Salmon, you hear what is required of you by my noble lords, and the observation which is made. You are the surgeon sent for by the coroner on purpose to inspect this body; and when you did so, it was incumbent upon you to consider and give information, as well with what sort of instrument the wound was given, as the length and depth of the wound, that the jury might consider upon all the circumstances of the occasion, and manner of the party's death: and my lords would

know, whether by the orifices of the wounds, when you inspected them, you can make a judgment, if they were made by several swords, or the same sword?

Salm. I cannot say that I saw any difference between the orifices, as to the nature of the instrument they were given with, nor whether they were made by one and the same sword or no; only the one orifice was bigger than the other; that of the side was bigger than that at the collar-bone.

L. H. S. Then so far we have light (if I apprehend you rightly), the orifice of the upper wound was not near so wide as that of the lower; but it seems to be much, in one of your profession, not to be able to judge whether the wounds were given with the same sort of sword when there was such a difference in the orifices.

Salm. That below was a deeper wound; and there was a considerable difference between the largeness of one and the other.

Lord Audley. My lords, I desire he may tell your lordships how far backward the wound in the side lay.

Salm. It was directly on the left side, immediately under the two last ribs, and past through the diaphragma.

M. of Normanby. Pray, my lords, let him point with his finger whereabouts it was.

L. H. S. My lords would have you shew them with your finger, whereabouts it was. (Which he did.)

E. of Warw. It is a very material question for me, that he should answer, whether he did believe that one and the same sword might not give both wounds.

Salm. I cannot say any thing of it one way or other; but one wound went much further than the other, because it was in a fleshy part; and in such a case, the further the sword goes in, it makes the wound larger.

Att. Gen. Then our next witness is Stephen Turner, who was Mr. Coote's man; and he will give you an account what sword his master had, and where he found it.

[He was sworn, a sword was shewn him.]

Turner. This was my master's sword, Mr. Coote's; and I never saw it after he went out in the morning, till I saw it in the hands of the constable, and afterwards before the coroner.

Att. Gen. What time did you hear of your master's death?

Turner. It was about nine a-clock next morning that I heard he was dead.

Att. Gen. Where was your master's body?

Turner. It was in St. Martin's-lane.

Earl of Tankerville. I would desire he might be asked, whether his master used his left hand or his right?

Turner. I do believe he was a right-handed man. I did never see him fence. It was on the Sunday morning that I went to the Round-house, where I found my master dead.

E. of Warw. I desire he may be asked, whether he has not observed a particular kindness and friendship between his master and me?

Turner. Yes, my lord; I have several times waited upon my master, when my lord and he was together, and they were always very civil and kind one to another; and I never heard one word of any unkindness between them.

E. of Warw. Whether he knows of any quarrel that was between us?

Turner. No, I never did.

E. of Warw. Whether he did not use to lie at my lodgings sometimes?

L. H. S. You hear my lord's question: what say you? Did your master use to lie at my lord of Warwick's lodgings at any time?

Turner. Yes; very often.

Att. Gen. Pray call Pomfret again, and let him see the sword.

[Then he came in, and two swords were shewn him.]

Att. Gen. I desire he may acquaint your lordships what he knows of those two swords.

Pomfret. These two swords were brought in by some of the company that came to my master's house; and when they were shewn to captain French in the morning he owned this to be his, and the other to be Mr. Coote's; and he desired that notice might be taken, that his sword was dirty but not bloody; and there was some blood upon the other.

Att. Gen. Who brought in Mr. Coote's sword?

Pomfret. Indeed I cannot tell.

Att. Gen. Then our last piece of evidence, my lord, will be that of Mr. White the coroner. (Who was sworn.)

L. H. S. What do you ask him, Mr. Attorney?

Att. Gen. From whom had he these swords?

[The swords were shewn him.]

White. May it please your grace, these swords were delivered to me by the constable.

Att. Gen. My lords, I desire he may be asked, Whether, upon his view of the body, he looked upon the wounds; and, whether he did apprehend they were given by one and the same sword.

White. May it please your grace, when I had sworn my inquest, I sent for the surgeon that was here before, and gave him order to probe the wounds, that the jury might know the nature of them, in order to the drawing up the inquisition; and I did expressly ask him, whether he found any such distinction between them, that they were given by one and the same weapon, or different weapons: he said, as he says now, that he could not tell, whether the wounds were given by two swords, or by one; but he did apprehend there was a great difference between them, and so did I; but generally the orifice of a wound does close up when the body is cold: one of the wounds were nearer the left side than the other; to the best of my remembrance, it was almost behind him.

Att. Gen. We have done with our evidence, until we hear what my lord of Warwick says to it.

L. H. S. My lord of Warwick, will you ask this witness any questions?

E. of War. No, my lord.

L. H. S. Make proclamation for silence.

Cl. of the Cr. Serjeant at arms, make proclamation.

Serj. at Arms. O yes, O yes, O yes! His grace, my lord high steward of England, does strictly charge and command all manner of persons here present to keep silence, upon pain of imprisonment.

L. H. S. My lord of Warwick, the king's counsel have made an end of giving evidence for the king; now is the proper time for you to enter upon your defence.

E. of War. May it please your grace, and you my noble lords, my peers,

I stand here before your lordships, accused of the murder of Mr. Coote, of which I am so innocent, that I came and voluntarily surrendered myself so soon as I heard your lordships might be at leisure to try me; and had sooner done it, but that the king was not then here, nor your lordships sitting, and had no mind to undergo a long confinement; and now I think I might well submit it to your lordships' judgment, even on the evidence that has been offered against me, whether there hath been any thing proved of malice prepense, or my being any actor therein, so as to adjudge me guilty. And I think I may with humble submission to your lordships say, that my innocence appeareth even from several of the witnesses who have been examined against me, which I will not trouble your lordships to repeat, but submit to your memory and observation.

But, my lords, the safety of my life does not so much concern me in this case, as the vindication of my honour and reputation from the false reflections to which the prosecutor has endeavoured to expose me; and I shall therefore beg your lordships' patience to give a fair and full account of this matter: in which the duty I owe to your lordships, and to justice in general, and the right I owe to my own cause in particular, do so oblige me, that I will not in the least prevaricate, neither will I conceal or deny any thing that is true.

My lords, I must confess I was there when this unfortunate accident happened, which must be a great misfortune in any case, but was more so to me in this, because Mr. Coote was my particular friend; and I did all I could to hinder it, as your lordships may observe by the whole proceedings.

It was on the Saturday night when my lord Mohun and I, and several other gentlemen, met at Locket's, where the same company used often to meet; and in some time after several of us had been there, Mr. Coote came unexpectedly, and for some time he and we were very friendly, and in good humour, as we used to be with each other: but then there happened some reflecting expressions from Mr. Coote to Mr. French, who thereupon called for the reckoning; and it being paid, we left

the upper room, and I proposed to send three bottles of wine to my own lodging, and to carry him thither to prevent the quarrel. But while the company stopped to call for a glass of ale at the bar below, Mr. Coote (whose unfortunate humour was sometimes to be quarrelsome) did again provoke Mr. French to such degree, that they there drew their swords; but we then prevented them of doing any mischief: then Mr. Coote still insisting to quarrel further with Mr. French, my lord Mohun and I proposed to send for the guards to prevent them: but they had got chairs to go towards Leicester-fields; and my lord Mohun and I, as friends to Mr. Coote, and intending to prevent any hurt to him, did follow him in two other chairs; and as he was going up St. Martin's-lane, stopped him, and I extremely there pressed him to return and be friends with Mr. French, or at least defer it, for that the night was very dark and wet; and while we were so persuading of him, Mr. French in one chair, and Mr. James and Mr. Dockwra in two other chairs past by us, (which we guessed to be them) on which Mr. Coote made his chairmen take him up again, and because the chairmen would not follow Mr. French faster, threatened to prick him behind; and when we were gone to Green-street, and got out of our chairs, Mr. Coote offered half a guinea to be changed to pay for all our three chairs, but they not having change, he desired lord Mohun to pay the three shillings, which he did. And in a few minutes after, Mr. Coote and Mr. French engaged in the fields, whither I went for the assistance and in defence of Mr. Coote, and received a very ill wound in my right hand; and there this fatal accident befel Mr. Coote from Mr. French, whom Mr. Coote had dangerously wounded, and I must account it a great unhappiness to us all who were there: but so far was I from encouraging of it, that I will prove to your lordships that I did my utmost endeavours to prevent it; so far from any design upon him, that I exposed my own life to save his; so far from prepense malice, that I will, by many witnesses of good quality and credit, prove to your lordships a constant, good and uninterrupted friendship, from the first of our acquaintance to the time of his death; which will appear by many instances of my frequent company and correspondence with him, often lending him money, and paying his reckonings; and about two months before his death lent him an hundred guineas towards buying him an ensign's place in the guards, and often, and even two nights before this, he lodged with me, and that very night I paid his reckoning. And when I have proved these things, and answered what has been said about the sword, and what other objections they have made, I doubt not but that I shall be acquitted to the entire satisfaction of your lordships, and all the world that hear it.

Before I go upon my evidence, I will crave leave further to observe to your lordships, that at the Old Bailey, when I was absent, Mr. French, James, and Dockwra, have been all

tried on the same indictment now before your lordships; and it was then opened and attempted, as now it is, to prove it upon me also; and by most of them the same witnesses who have now appeared; and they were thereupon convicted only of manslaughter, which could not have been, if I had been guilty of murder. And on that trial it plainly appeared that Mr. French was the person with whom he quarrelled, and who killed him. And now I will call my witnesses.

L. H. S. Will your lordship please to go on to call your witnesses, for the proof of what you have said; that is the method, and then you are to make such observations as you please.

E. of War. My first witness is capt. Keeting, who was with me at Locket's, but went away before capt. Coote or any of them came; and he will tell you I was with him a while.

[Then captain Keeting stood up.]

L. H. S. Capt. Keeting, you are not upon your oath, because the law will not allow it. In cases of this nature the witnesses for the prisoner are not to be upon oath; but you are to consider that you speak in God's presence, who does require the truth should be testified in all causes before courts of judicature; and their lordships do expect, that in what evidence you give here, you should speak with the same regard to truth as if you were upon oath; you hear to what it is my lord of Warwick desires to have you examined, what say you to it?

Capt. Keeting. My lord, I will tell your lordship all the matter I know of it. I met with my lord of Warwick that evening at Tom's Coffee-house, and we continued there till about eight at night; I went away to see for a gentleman that owed me money, and afterwards I went to Locket's; and while I was there, the drawer came up and told me, my lord of Warwick desired to speak with me; and when he came up into the room, he said he was to meet with my lord Mohun there, and capt. Coote, and he asked me if I knew where capt. French and capt. James were; I told him I dined with capt. Coote at Shuttleworth's; and in a while after, capt. Coote came in, and about an hour and an half, I think, I continued there, and capt. French came in; capt. Dockwra and we drank together for an hour and an half, and they admired, about ten o'clock, that my lord Mohun was not come; and I payed my reckoning, not being very well, and away I went home; Mr. James came in just before I went away; but there was no quarrelling, nor any thing like it before I went away.

E. of War. My lord, I desire he may be asked, Whether we did not usually meet there as friends, especially capt. Coote and I?

Capt. Keeting. Captain Coote and my lord of Warwick used to be almost every day together at that place.

E. of War. Pray, did he ever know or observe any difference or quarrel between capt. Coote and me?

Capt. Keeting. No, my lord, I never saw any thing but the greatest friendship between my lord of Warwick and captain Coote that could be; I was with them, and saw them together almost every day.

L. H. S. Have you any thing further to examine this witness to?

E. of War. No, my lord, I have no other question to ask him.

L. H. S. Who is your next witness, my lord?

E. of War. My lord, I suppose I shall not need to trouble you to examine the chairmen over again; your lordships have heard what they can say: I desire colonel Stanhope may be called.

[Who it seems stood by the Chair of State, and it was some while before he could get round to come to the place where the witnesses were to stand.]

L. H. S. While this witness gets round, if your lordship has any other witness ready to stand up, pray let him be called.

E. of War. To prove the kindness between capt. Coote and me, I desire col. Blisset may be called. [Who stood up.]

L. H. S. What is it your lordship asks this witness, or calls him to?

E. of War. To testify what he knows of any kindness or unkindness between capt. Coote and me; whether he has not been often in our company?

L. H. S. Have you been often in company with my lord of Warwick and capt. Coote?

Col. Blisset. Yes, my lord, I was very well acquainted with both of them for a twelve-month past before this accident, and I have often been in their company, and always observed that there was a great deal of friendship and kindness between them.

E. of War. My lord, I desire he may tell any particular instance that he knows or can remember.

Col. Blisset. I remember when capt. Coote had his commission in the regiment of guards, he was complaining of the streightness of his circumstances; he was to pay for his commission 400 guineas, and said he had but 300 for to pay for it; and my lord of Warwick did then say to him, do not trouble yourself about that, or let not that disturb you, for I will take care you shall have 100 guineas, and he said he would give order to his steward to pay him so much; and I was told afterwards that he did so.

E. of War. I desire he may tell, if he knows of any other particular instances of my friendship to Mr. Coote?

Col. Blisset. Once when he was arrested by his taylor for 13*l.* my lord lent him five guineas, and used very frequently to pay his reckoning for him.

E. of War. I desire he may tell, if he knows any thing else; and whether he has not lain at my lodgings, and particularly but some small time before this accident happened.

Col. Blisset. About ten days before this unhappy accident happened, I was at my lord of Warwick's lodgings, and when I came there I found capt. Coote a-dressing himself; and I asked him how that came to pass, and they told me they had been up late together, and that he had sent home for his man to dress himself there; upon which I did observe that they had been a rambling together over night; and there was a very great familiarity between them.

E. of War. Did you observe any quarrel between us?

Col. Blisset. No, none at all; I never knew of any quarrel between my lord of Warwick and capt. Coote, but I observed there was a particular kindness between them; and a great deal of friendship I know my lord of Warwick shewed to him, in paying of reckonings for him, and lending him money when he wanted.

E. of War. My lord, I desire he may be asked, whether he does not know that capt. Coote was straitened for money?

Col. Blisset. I did hear capt. Coote say, that he had not received any thing from his father for 13 months, and his father was angry with him, and would not send him any supply, because he would not consent to cut off the entail, and settle two or three hundred pounds upon a whore he had.

Att. Gen. Pray, Sir, will you consider with yourself, and though you are not upon your oath, answer the questions truly, for you are obliged to speak the truth, though you are not sworn, whenever you come to give your testimony in a court of judicature; pray, acquaint my noble lords here, whether you did never hear my lord Warwick complain of capt. Coote?

Col. Blisset. No, I never did hear him complain of him.

Att. Gen. Did you never hear the least word of any quarrel between them?

Col. Blisset. No, indeed, I did never hear of any quarrel between them.

Att. Gen. Did you never hear of any unkindness at all?

Col. Blisset. No, indeed, my lord, not I: I never so much as heard of the least unkindness whatsoever.

L. H. S. Well then, my lord, who do you call next?

E. of War. Now colonel Stanhope is here, I desire he may be asked the same question, whether he does not know the particular friendship that was between capt. Coote and me, and what instances he can give of it?

L. H. S. You are to consider, Sir, though you are not upon your oath, you are in a great court, and under no less strict obligation to testify the truth, and nothing but the truth: You hear what my noble lord asks you.

Col. Stanhope. My lord, I have known my lord of Warwick and capt. Coote for about a twelvemonth, and I did perceive that they did always profess a great kindness for one another.

E. of War. I desire to know of him, whether he observed any particular friendship be-

tween capt. Coote and me, much about the time of this business?

Col. Stanhope. About eight or ten days before this unhappy accident, I went to wait upon my lord of Warwick twice at his lodgings: Once I found capt. Coote there, one of them was in bed, and the other was dressing of himself; I thought they were very good friends that were so familiar, and I had good reason to think so, because of that familiarity: Both the times that I was there, when I found them together, was within eight days before the accident happened.

E. of War. The next witness I shall call will be Mr. Disney.

Att. Gen. But before colonel Stanhope goes, I desire to ask him this question, whether he did never hear or know of any unkindness between my lord of Warwick and capt. Coote?

Col. Stanhope. No, indeed I did not; I always thought them to be very good friends.

L. H. S. Will your lordship go on to your next witness?

E. of War. Yes, my lord, there he is, Mr. Disney; I desire he may be asked what he knows of any expressions of kindness and friendship between me and capt. Coote.

Mr. Disney. About the time that capt. Coote was to have his commission in the guards, my lord of Warwick received a letter from him, wherein he desired him to lend him the 100 guineas, according to his offer, for he had but 300 by him; and he said his father was unkind to him, and he could have no money from him, and he would be honest to him, and pay it again as soon as he could; my lord sent for his steward, and ordered him to provide 100 guineas for capt. Coote while I was there; and all the times that ever I saw them together, which was very frequently, there was the greatest kindness between them that could be; and several times I have seen my lord of Warwick pay capt. Coote's reckoning for him, and lent him money when he wanted money.

Att. Gen. I desire to ask you, Sir, this question, though you are not upon oath, yet you are obliged to speak the truth in a court of justice as much as if you were upon oath: did you not know or hear any thing of a misunderstanding or quarrel about the time that this business happened?

Mr. Disney. No, indeed: I was with them together but the day before, and frequently, and I heard nothing of any unkindness between them in my life, nor never knew of any quarrel between them, or any reason for it.

L. H. S. My lord, who is it you call next?

E. of War. Colonel Whiteman. (Who stood up.)

L. H. S. What do you call this gentleman for?

E. of War. It is to the same effect, to acquaint your lordships with what he knows of the conversation between captain Coote and me.

Col. Whiteman. My lord, I know my lord of Warwick and capt. Coote were constant com-

panions together; they dined together almost every day for half a year's time almost; and as to this time, when this business had happened, I went to my lord of Warwick, being sent for by him, and found him at a private lodging, where he expressed a great deal of concern for the death of his dear friend Mr. Coote; and he shewed me the wound he had received in his hand, and he desired he might be private, and he told me he believed people would make worse of it than it was, because he did not appear; but he did but intend to keep himself out of the way till he could be tried; and I took what care I could to get him a convenience to go to France.

Att. Gen. Pray, what reason did he give for his going away?

Col. Whiteman. The king being at that time out of England, and so the parliament not sitting, he said he did not love confinement, and had rather be in France till the parliament should meet, and he might have a fair trial, which he thought he should best have in this House.

Att. Gen. But pray, Sir, consider, you are bound to tell truth, and the whole truth, in such a case as this: are you sure there was no unkindness or quarrel between my lord Warwick and capt. Coote about this time?

Col. Whiteman. No; I never knew of any quarrel or unkindness between them in all my life.

L. H. S. My lord, have you any more witnesses?

Earl of War. I have a great many witnesses more to the same purpose, but I think I need not trouble your lordship with them; only I would call a person that has been mentioned, that is my steward.

L. H. S. What is his name?

Earl of War. Edmund Raymund. (Who stood up.)

L. H. S. What questions do you ask him?

Earl of War. I desire he may tell what he knows of any friendship between capt. Coote and me, and what particular instances he can give of it.

Raymund. My lord, I know that my lord sent for me, and said capt. Coote had occasion for 100 guineas to pay for a commission in the guards, which he had not money to make up; and I know that they were constant companions every day, did eat together, and often did lie together, and I did provide the 100 guineas for him; and I always did observe that there was a very great friendship between them.

Earl of War. My lord, the next witness I shall call will be Mr. French, who, I hope, having been tried, and had his clergy allowed him, will be a good witness; I should be sorry to interpose any thing that would be a hindrance to your lordships' giving judgment in this case presently; he is able to give your lordships an account of the whole matter; and though I hope I have no need of calling him as a witness, yet I humbly offer it to your lordships.

L. H. S. What say the counsel on the other side?

Earl of War. My lord, I do not insist upon it; I think I have no need of it.

L. H. S. Your lordship must judge for yourself, how far it is for your advantage to desire that this matter should be debated.

Earl of War. I do not desire to take up your lordships' time, though I am very well advised, that he is a good witness in law.

Earl of Rock. I apprehended it the duty of the king's counsel to make objection against any witness that should be produced by the prisoner; I am loth to give your lordships any unnecessary trouble, yet I own, that I am not satisfied that a witness should be offered and rejected, though the objection be not made and argued, by my lord the prisoner at the bar: if a witness be offered, and they think they have an objection against him, if they do insist upon it, it will occasion a debate, and then we must adjourn into the House of Lords.

L. H. S. It is not insisted upon by my lord, as I apprehend. My lord of Warwick, have you any other witness you would have called?

Earl of War. I desire to ask Mrs. Amy a question or two. (Then she stood up.)

L. H. S. What does your lordship ask her?

Earl of War. What she remembers passed at her house about my sword, or any thing.

Mrs. Amy. My lord, when I came into the room where my lord of Warwick and capt. French were, in our house, I stood by capt. French while his wounds was dressing, and I saw my lord of Warwick's sword, and looked upon it, and the hilt and all the shell was full of blood, and it ran down to the bottom of the sword blade.

Earl of War. I desire she may be asked, how soon that was after my coming in?

Mrs. Amy. It was a quarter of an hour after my lord came in.

Earl of War. I desire she may speak what sort of sword it was at the hilt, whether it were open or close?

Mrs. Amy. Indeed, I cannot say; but the hilt was full of blood, the shell of it, and it ran down to the bottom of the blade.

L. H. S. Has your lordship done?

Earl of Warwick. My lord, I will only take notice, that the three gentlemen that were on the other side were tried at the Old Bailey, and found guilty only of manslaughter; but now I being on his side, and not having any malice to him, but always a great deal of friendship, I submit it to your lordships, whether I can be thought any ways guilty of his death; and I humbly hope your lordships will hear my counsel, if you make any doubt of that.

L. H. S. What is it your lordship would have counsel heard to?

Earl of Warwick. To this case, my lord, Whether there being six persons, three of a side, one is killed, and I being engaged on the side of him that was killed, the three on the other side have been tried for the death of that man; whether I, who was of his side, be

equally guilty with them who were on the other side, especially, I engaging particularly with another of the three, that were of the other side: that question I desire my counsel may argue, whether I be equally guilty with them that were on the other side, and who, notwithstanding death happened in the case, yet were found guilty only of manslaughter?

L. Godolphin. My lords, it has been moved by my noble lord at the bar, that his counsel should be heard about Mr. French's being witness, whether he should be a witness or no; I think it would be much for the clearing of the fact one way or other, if the evidence of that witness could be heard; but whether he can be heard, or not, according to law, is a question that must be debated amongst your lordships, after your lordships have heard the counsel on both sides, and perhaps the opinion of the judges upon their arguments; and therefore I think we must adjourn, to consider whether this matter shall be argued or no.

L. H. S. What say you to this matter, Mr. Attorney?

Att. Gen. My lords, I should agree with the motion that is made, if there were any thing insisted upon by the prisoner at the bar, that would bear a question or argument; but my lord of Warwick himself has waved the objection, and so I think there is no need for any argument on our side.

L. Godolphin. I would agree with the motion that was made for adjourning, in order to debate; but I desire to be thus understood, if he thinks it for his advantage, that this witness should be heard for him, which he knows best, whether it be or be not; then I do suppose your lordships will adjourn, to consider of it in your own house amongst yourselves; it will not be proper to enter into the debate here, nor there neither, till you know what objection the counsel for the king make against this man's being an evidence; and therefore we would know, it is fit to be known, whether my lord's waving, or not insisting upon this man's testimony, be free and voluntary, and absolute; or whether it be only in respect to the trouble it may put the house to for the debate.

L. H. S. My lord Warwick, some of my noble lords observe you have desired Mr. French should be examined, and that your counsel may be heard to that point, whether he be by law a witness, or not? Several of my lords think it reasonable, counsel should be heard, whether he be a witness or not; or at least, that that question should be considered amongst themselves, if insisted upon; therefore your lordship is to declare, whether you do insist upon it, or desire to wave it.

Earl of War. I wholly submit myself to your lordships; but as I am advised by my counsel, I hope he is a good witness, and I desire my counsel may be heard to that point.

Att. Gen. My lords, in truth I acknowledge, according to the method of law, the objection ought to come of our side; for I think we have very good reason to oppose that gentleman's

being a witness in this case, even upon that objection which my lord has made himself, upon the consideration, that he has been found guilty of manslaughter for the death of this very person. It is true, upon his prayer, clergy was allowed him, but the burning of the hand was respited, and he was not burnt in the hand, and he is not pardoned; and how far can he be a witness in this case, is the objection: if a man convicted of felony, that is within clergy, prays his clergy, and it is allowed him, but he is not burned in the hand, nor pardoned, we apprehend he is no witness; and that is the objection we make against his testimony to your lordships.

L. H. S. My lord of Warwick, you hear what is said by way of objection against this man's being a witness. What say you to it?

Earl of War. For matter of law, my lords, I am not capable of speaking to it, but I desire my counsel may.

L. H. S. That which Mr. Attorney proposes by way of objection is matter of fact, and the matter of law does not arise till the fact be settled, which must fall within your lordship's own knowledge, who produce him as a witness, and therefore you must answer to that fact yourself.

Earl of War. I desire to know of your lordships, if a man be convicted of felony that is within clergy, and prays his clergy, and it is allowed him, but the burning of the hand is respited, and there is a warrant for his pardon; whether he cannot be a good witness: that his clergy was allowed, and the burning of the hand respited, I have the record here to shew.

L. H. S. My lords, my noble lord at the bar insisting upon a warrant for a pardon, I must acquaint you with something that happened during your lordships' sitting here this day; since I came hither a privy seal was delivered to me, in order to pass a pardon for the burning in the hand of Mr. French, for the manslaughter for which he was convicted at the Old-Bailey; so far I can acquaint your lordships as to matter of fact.

Earl of War. My lord, I am advised by my counsel, that he is a good witness without a pardon, or without burning in the hand.

L. H. S. What say you, Mr. Attorney, to the law? Now you understand what the fact truly is.

Att. Gen. Yes, my lord; and I do apprehend, with submission to your lordship's judgment, that a man convicted of felony, though he prays his clergy, and has it allowed him, but is not burnt in the hand, nor has any pardon, can be no witness.

L. H. S. That is the case upon which you are to form your objections: here is a man produced as a witness, who has been convicted of felony within the benefit of clergy, has craved his clergy, has had it allowed, but has not been burnt in the hand, nor pardoned.

Att. Gen. Then, my lords, with humble submission, upon the matter of fact so stated, I make this objection, That he is no witness in

point of law: he has been convicted, in one respect, for the very offence for which the noble lord, the prisoner at the bar, stands indicted: Though not in the same degree as the indictment sets it forth, yet it is for the same fact. Upon this indictment Mr. French was indicted at the sessions at the Old Bailey, and there he was found guilty of manslaughter; upon which he prayed the benefit of his clergy, which was allowed him, but he was not burnt in the hand: thus stands the case in fact. Now, my lords, the allowance of clergy of itself, does not discharge the party from the offence, so far as to set him 'rectus in curia,' and make him in all respects a person fit to have the benefit and privileges of a 'probus et legalis homo,' till he has passed through those methods of setting himself right in the eye of the law, that the law hath prescribed; and in order to set this matter in its true light before your lordships, it will be necessary for me to open to your lordships, as far as I can, the nature of this benefit of clergy, and what advantage did accrue to the party, by having that benefit allowed him, and likewise what benefit he had by the act that enacted the burning in the hand, which was the statute of the 4th of H. 7. And by that act the burning in the hand was to be of no more effect, but only to shew that he had had his clergy allowed him; and that unless he were within orders, he should have it no more than once. Before that act of parliament, a person might have had the benefit of clergy several times, but that act limits it as to time, that it shall be but once: and therefore, in order to the having of it known, whether a man once had his clergy allowed him, that did not produce his orders, that act provides there shall be a mark set upon him at the time of the allowance of this clergy, as a token that it was allowed him, and he was never to have it allowed afterwards, but even at that time he was to be delivered over to the ordinary to make his purgation; but since that act several statutes have been made about this matter. I shall mention one that relates to your lordships, and that is the statute of Edward the 6th, which indeed does enact, That in case where a peer is convicted of felony within the benefit of clergy, he shall be discharged without being burnt in the hand; but then and thus the law stood till the statute of 18 Eliz. cap. 7, by which it is enacted, That after the burning in the hand the prisoner shall be delivered to the ordinary, but he shall be discharged; by virtue of which act, after burning in the hand, the prisoner hath made full satisfaction to the law, without that sort of purgation which was before requisite to be made; but till he be burnt in the hand, or has his pardon, he is not to be discharged; it may be, he may be bailed out by the judge, in order to get a pardon; but still he remains *in statu quo*, as to his being a witness, or any thing of that nature; his credit is gone till it be restored by the king's pardon, or his undergoing the punishment that the law requires; and no man would say, that where

one lies under a conviction of felony undischarged by burning in the hand, or pardon, that he can be a witness; he remains just as he was before, the conviction remains upon him, which disabled him to be a witness; and that we submit to your lordships as the case of this person, captain French.

Sol. Gen. My lords, if your lordships please to spare me one word of the same side: sure at common law there would be no difficulty at all, that a person convicted of felony within the benefit of clergy, unpardoned and undischarged, could be no witness; and since those several statutes that have been mentioned by Mr. Attorney, unless there be an actual burning in the hand, or a pardon for that burning in the hand; sure it cannot be pretended, that one convicted of felony can be admitted as a witness. If my lord of Warwick does insist upon his evidence as matter of right, we, for the king, do insist upon it, that there is no right at all in the case; for French must be taken to be one convicted of felony, and not discharged without either burning in the hand, or pardon; and then we are sure it cannot be pretended in law, that he can be a witness.

L. H. S. My lords, the king's counsel have stated their objection, what is your pleasure to have done in it?

Earl of Rivers. I suppose, my lords, that it will be necessary to hear what answer my lord of Warwick gives to this objection.

L. H. S. Is it your lordships' pleasure, then, that the counsel assigned for my lord Warwick be heard what they have to say to this matter?

Lords. Ay, ay, ay.

[Then sir Thomas Powys came to the bar, and stood by the earl of Warwick, and spoke thus.]

Sir T. Powis. May it please your lordships, I am by the order of this honourable house assigned of counsel for this noble lord at the bar, in point of law; and, my lords, as to the present question that has been spoken to by the king's counsel, I am a little surprised to hear it should be wondered at, that my lord of Warwick should insist upon it, that this gentleman should be examined for him as a witness, because, with humble submission to your lordships, I think the authorities of law will make for the opinion on the other side. Mr. Attorney General says true, The first statute that was made for burning in the hand, was that in 4 H. 7. Before that time the benefit of clergy, even for murder, was used to be allowed upon the prayer of the party, and he was thereupon delivered over to the ordinary to make his purgation; and that not only once, but *toties quoties*, let him demand it as often as he would, and as often as he offended it was allowed: This was thought such a privilege as ought to be restrained; that statute of the 4th of Hen. 7, takes notice, that an ill use was made of it, and therefore does ordain, that it should be allowed no more than once, unless to persons within orders: And as a means to know, whether it had been before allowed, or not, the act does direct, that

the party convicted shall be burnt in the hand, that is all the act does appoint, it does no otherwise alter the case; it does not impose it upon the party as a punishment for the offence, but only as a mark of distinction, that if ever he came again before the court, and being convicted of the like offence, should pray the benefit of clergy, then upon inspection it might be known, whether before he had been allowed his clergy or not; and so stood the law without alteration as to the manner of delivery of the criminal over to the ordinary to make his purgation, with which the temporal law, in the manner of doing thereof, did not intermeddle; and therein consisted, with respect to this matter, the benefit of clergy. Afterwards, by the statute of Edward the 6th, the peers were exempted from the burning in the hand; and then comes the act that we rely upon, which is, that of the 18th of Eliz. that takes notice of the former act of the 4th of H. 7, which only ordered the burning of the hand for the purposes aforesaid, but left the party to be delivered over to the ordinary to make his purgation; which was found to be a matter attended with many abuses, and upon the reformation thought fit to be abolished, and taken away, because it was only an outward appearance and shew of purgation, and was often the occasion of very great perjuries; therefore it is taken totally away, and by this act the party shall have the benefit of clergy without making purgation, as fully as if he had actually made it. But, say they, there is still left something that the law requires, which is, that he should be first burnt in the hand; and if he be not burnt in the hand or at least pardoned, he is not in that condition that the law calls for in such a case, to set him *Rectus in Curia*: If he be burnt in the hand, or pardoned by the king, they agree on the other side, that he may be a very good witness. My lords, that act of parliament of queen Eliz. does empower the court that tries the criminal, and before whom he is convicted, not only to burn him in the hand, pursuant to the act of Hen. 7, but also to detain him in prison for a year after; but yet I think that doth not signify any thing one way or other to restore him, or not restore him to his credit; for I think the burning in the hand, which is a mark of infamy, was never intended as a means, any more than imprisonment for a year, of restoring a man to his credit; it was only to shew he had his clergy once, and should have it no more. The allowance of clergy by the statute of Eliz. operates as a pardon; only, saith the statute, he shall not be delivered out of prison before he is burnt in the hand, according to the statute of Hen. 7. Nobody can say, that the continuing in prison for a year, which the court may order, though burnt in the hand, would, as to restoring of credit, have operated one way or other: but that we insist upon is, That the allowance of clergy sets him right in court, since purgation is abolished, and is the same thing as if he had undergone the ceremonial parts of a formal purgation. It is the allowance of clergy that

makes the alteration or operation in this case, by virtue of this last act of the 18th of Eliz. for we take it, that he is to have the same benefit of his clergy, as if he had been delivered to the ordinary, and purgation had been made; and now the allowance of clergy by this act, gives the same benefit to the party, as purgation would have done before the act; and he is in the same state and condition as he would have been in case of a purgation, or of a pardon by the king. The authorities are all with us. There is a case that is very well known among the men of the law, in the fourth report of my lord Coke, Holcroft's case, who was indicted and convicted of manslaughter, and he prayed the benefit of his clergy; the judges thought fit to respite their judgment therein, but his prayer was entered upon record; and then an appeal being brought against him, it came to be a question, how far he had had his clergy: For by the statute of the 3d of Hen. 7, an appeal will lie notwithstanding a conviction, if the party have not had his clergy; and in this case it was adjudged, that the party having prayed his clergy, he should have the same benefit as if the court had ordered every thing to be actually executed, which ought thereupon to be done: And surely then it can be no question, whether a man shall be a witness or no, who has had his clergy allowed? It is so entered upon record, That the book was administered to him, and that he read as a clerk; for the party has done as much as he can, prayed the benefit of his clergy, and had it allowed, and so it is entered upon record. The respiting of the burning of the hand till the king's pardon be obtained, shall not, sure, put him in a worse condition than he would have been, if he had actually been burnt in the hand. My lords, I have in my hand a book which is of very great esteem, and that is, The Reports of my lord chief justice Hobart, wherein he declares his opinion in this point, and for whose opinion every one of our gown ever hath testified a very great veneration and respect; the case is that of Searle and Williams, wherein my lord Hobart has spoken so fully to this matter, that I think it ought to put an end to the question: He says, the statute of Eliz. appointing the burning in the hand without purgation, does operate as a statute pardon to all intents and purposes, and the party having now the benefit of his clergy allowed, is in all respects in the same condition as if he had been acquitted: that is the opinion that he holds throughout that case: I need not trouble your lordships with reading all the particular words that he uses, but only those which relate to the thing now in question, immediately before your lordships. He delivers his opinion, "That whosoever speaks words of accusation, reflecting upon a man for any offence for which he was indicted and convicted, and had had his clergy allowed, an action lies as if he had been totally acquitted from it; it is not the burning in the hand, but the allowance of clergy, that sets him right in his credit in the eye of the law, and he

is thereby in the same condition in that respect, that he would have been, if he never had had any conviction upon him.* Towards the end of the case his very words are these: "Though the statute saith, after burning in the hand according to the statute in that behalf made, he shall be discharged, and there is no burning in the hand, that makes nothing; for though it be a case where the hand ought to be burnt, yet it is not so essential but a man may have the benefit of the statute, though he be not burnt; the king may pardon the burning; for the burning, even in an appeal, is no part of the judgment, nor so much as in the nature of punishment, but rather a mark to notify that he may have his clergy but once." These are his very words in this case; so that the statute of Eliz. doth abolish purgation, but gives the party all the benefit thereof, as if he had gone through it, and instead of delivering the party to the ordinary to make his purgation, it says he shall be delivered out of prison; but lest it might seem to repeal the statute of Hen. 7, as to burning in the hand, it adds, "Being burnt in the hand, according to the statute in that behalf provided:" By the statute of Hen. 7, he was first to be burnt in the hand, and then delivered to the ordinary to make his purgation; but by the statute of Eliz. he is first pardoned his crime by being allowed the benefit of his clergy, without making his purgation, and afterwards to be burnt in the hand before he be delivered out of prison; so that the burning in the hand is only a condition precedent to his getting out of prison, not to his being restored to his credit: the king may pardon the burning in the hand undoubtedly, and he has gone a great way in this case, for he hath given a pardon as far as the privy seal, and that is sufficient to shew his gracious intention of pardoning it throughout; and if there be need, we hope it may pass yet forward. What we insist on, is not only the opinion of my lord chief justice Hobart; but he is followed therein by the opinion of a man of very great authority, one no less eminent than he in his profession, and that is my lord chief justice Hale, in a book of his that is intituled, his Pleas of the Crown, which is but an abridgment of what he intended upon that subject under the title of clergy: when he comes to treat of the consequences of the allowance of clergy, and what the several effects of clergy allowed shall be, he says, it gives him a capacity to purchase goods, and retain the profits of his lands, and restores him to his credit, according to the case I have mentioned before in Hobart, of Searle and Williams; for that case is particularly in that book mentioned and referred to: therefore I hope your lordships will make no difficulty of hearing this witness; for we think the having his clergy allowed him, is that which restores him to his credit. If they have any other objections against him, I hope we shall hear it from the

* See Hawkins's Pleas of the Crown, b. 2, c. 33, s. 132.

king's counsel: but if this be stood upon in point of law as an objection, that though clergy was allowed, he was not burnt in the hand, nor pardoned; I would have observed to your lordships, that my lord high steward has told you it is so far gone towards the pardon, that the king has shewn his intention to pardon by the privy-seal; and we hope your lordships will not let this noble lord at the bar suffer any prejudice by the not perfecting of the pardon by actual passing of the great seal.

L. H. S. Mr. Attorney General, what say you to the matters which have been urged?

Att. Gen. My lord, we have stated our objection; we think there is nothing given as an answer to it, and we submit it to your lordship's judgment.

Marq. of Halifax. My lords, I desire that the question that is to be decided before your lordships, may be settled truly, what it is.

L. H. S. If there be six in company, and one of them is killed, the other five are afterwards indicted, and three are tried, and found guilty of manslaughter, and upon their prayers have their clergy allowed, and the burning in the hand is respited, but not pardoned, Whether any of the three can be a witness upon the trial of either of the other two?

Sir T. Powys. My lords, with submission, though he were convicted of the felony, yet upon prayer of his clergy, that being allowed him, that restores him to all the capacities, we say, that he had before the conviction, and particularly to his credit; and for that we submit ourselves to your lordship's judgment.

Marq. of Halifax. I suppose your lordships will have the opinion of the judges upon this point; and that must be in the presence of the prisoner.

L. H. S. It must certainly be in the presence of the prisoner, if you ask the judges opinions.*

Marq. of Halifax. But in these cases, my lords, it is usual to hear the king's counsel to make a reply: I desire to hear what they would say to what has been offered by the counsel for the noble lord the prisoner at the bar.

Serj. Wright. My lords, I did apprehend that the very stating of the objection would have set this matter in its true light: For in the first place, it is agreed on all hands, that this Mr. French, that is desired to be a witness, does stand convicted of felony; and by the law of England, while that conviction remains upon him, till he be either purged or pardoned, he cannot be a witness: by the conviction his credit is lost; and till he be restored to his first condition, he stands not so clear in the eye of the law that he can be an evidence. The counsel for the prisoner have objected, that if he either be pardoned, or clergy allowed, he is put in the same condition as if he had been acquitted.

* See the Case of lord Cornwallis, vol. 7, p. 143, and the Note.

My lords, I must admit a pardon restores to credit; and I must likewise admit, that allowance of the benefit of clergy, and burning in the hand upon it, amounts in law to a pardon, or is equivalent to a pardon in this matter: but the fact here is not so; for here is neither actual pardon, nor any burning in the hand; the benefit of clergy was prayed, and allowed; but that alone is not sufficient; there must be an actual burning in the hand, or a pardon of that burning in the hand, otherwise it cannot be a satisfaction in law, such as should put him in the same condition as if he were acquitted. Your lordships have heard what was said by his grace my lord high steward, That as to the burning in the hand, the king has been pleased to proceed so far as to grant a privy seal for the pardon of the burning in the hand: But your lordships very well know, and it cannot be insisted on to the contrary by the counsel on the other side, That it is no pardon until it be past under the great seal of England; so that here is no actual pardon; nor is the bare allowance of clergy, without burning in the hand, equivalent to a pardon. My lords, it must be agreed, That at the common law, persons that were convicted of felony, were not restored to their credit merely by allowing the benefit of clergy to them; there was something further to be done to regain credit; the party convicted must undergo another trial before the ordinary, which was commonly called purgation; when any man was convicted of felony, he was, upon his prayer of the benefit of clergy, to have it allowed to him, and if he could read as a clerk, his life was saved. He was not discharged of the felony, and therefore was delivered over to the ordinary to be kept in prison until he had, by a sort of trial before the ordinary, made his innocence appear, and purged himself of the fact charged upon him; and if he could not make his purgation, he was to lie perpetually in prison; and notwithstanding the allowance of clergy, and delivery over to the ordinary, yet was not the credit restored, nor his former capacities; he was not a legal witness until he had purged himself of the crime: It was the clearing themselves of the guilt, that restored such persons to their reputation and credit, not the bare allowance of clergy: Some criminals were delivered to the ordinary generally; those might make their purgation: Others were specially delivered, or delivered with a special charge to the ordinary, not to admit them to purgation, 'Absque purgatione facienda:' These latter could never be restored to credit, except by the king's pardon; for the liberty of purgation, which was the means of regaining their credit, was taken from them; their guilt occasioned their loss of credit; taking away that guilt doth consequentially restore credit again; and this benefit of clergy was to be allowed as often as any man had occasion for it.

Thus the matter of benefit of clergy stood in common law in respect of purgation and restoring of credit, till the statute of 18 Eliz. c. 7, which

was cited on the other side by sir Thomas Powys; by which statute purgation is absolutely taken away and set aside: and the party being burnt in the hand, according to the statute of 4 H. 7, is appointed by this statute, 18 Eliz. to be discharged, and not to be delivered over to the ordinary, as was before that time used. The delivering over to the ordinary, was in order to purgation, and that by the last statute is quite taken away, and the party is to have the same benefit by the having the benefit of his clergy and burning in the hand, as if he had made his purgation; he shall be discharged: it is not his reading as a clerk, and that pronounced by the ordinary, that gives him the benefit of a discharge, as if he had been purged of the crime; but there must be the burning in the hand, that is the very terms of the statute upon which he is to be discharged; that must actually be done before he can be put into the same condition that he was in before the conviction, and consequently make him capable of being a witness. As for the case of Searle and Williams, that was cited by sir Thomas Powys, that case doth not oppose in this matter; there it was not needful to burn the person convicted; he was a clerk in holy orders, and by law exempt from burning in the hand: so it was not needful to burn him, the statute of 18 Eliz. not requiring any person to be burned in the hand that were not so liable before then. The most that is said in that case by the chief justice Hobart is, that in case where the hand ought to be burnt, it is not essential; but the party may have the benefit of the statute, i. e. be discharged without burning, and the king may pardon the burning; and no doubt if the king pardons the burning, it is as good and effectual as if the hand had been actually burnt. The king might pardon the whole, and consequently any part; the pardon of the punishment supplies the effect of it; no question but a pardon may supply the want of burning in the hand. Chief justice Hales in his book of Pleas of the Crown, fol. 240, which I have here, says expressly, that burning in the hand is now, since the statute 18 Eliz. the consequent upon the allowance of clergy, which hath this effect: First, It enables the judges to deliver him. Secondly, It restores him to former capacities. Thirdly, It restores him to his credit, and so it puts him in the same condition as if he were acquitted. What is it that hath this effect? The allowance of clergy, and burning in the hand: There is not to be a delivery of the criminal till all be done which is required by law: The law requires that the party be burnt in the hand, or that the king do pardon the burning in the hand, before the party be discharged; and, with humble submission, it was never yet pretended, that any person could have the full advantage of the benefit of clergy, since the statute of 4 H. 7, till he was burnt in the hand, or the burning in the hand was pardoned. Now, my lords, to apply this to the case in question; it is on all hands admitted, That Mr. French

was convicted of felony and manslaughter, and is neither burnt in the hand, nor pardoned; but he has prayed the benefit of the clergy; and has had the book given to him, to try if he can read, and he certified he can read; this is all that is done. I think it cannot be pretended he ought to be discharged until he is burned in the hand, or that burning pardoned, as the act requires; and if the reading as a clerk without burning in the hand, or pardon of it, be not sufficient in law to entitle him to be discharged, why should it be sufficient to restore his credit? The whole together works the discharge and restores the party. In the case of Burroughs and Holcroft that has been cited, there a man was convicted of manslaughter, and prayed his clergy; the court did not allow his clergy, but did advise upon it. This was held sufficient to bar an appeal; for if clergy had been allowed it had clearly been a good bar; and the act of the court in advising upon the prayer, and not allowing clergy where it ought to be, shall not prejudice the party convicted, but he shall be in the same state as if the clergy had been actually allowed; but that has no likeness to the case now before your lordships; for here it is not pretended that Mr. French ever desired to be burnt in the hand, but that was respited in favour to him, which was done with intention, it seems, to get the king's pardon for the burning of the hand, which is not yet obtained; and consequently I take it he is not entitled to that benefit which the law would give him, if he was either pardoned or burned in the hand; he is not fully discharged of the conviction, and therefore I think he ought not to be admitted as a witness.

L. H. S. What is the resolution your lordships please to take upon this matter? Is it your lordships' pleasure to have the opinion of my lords the Judges, who are here present, upon this point?

Lords. Ay, ay, by all means have the judges opinions.

L. C. J. Treby. Two things have been mentioned at the bar, which, I think, ought to be laid out of the question.

1. The consideration of a peer, with respect to burning in the hand.

I suppose it is not (I am sure it ought not to be) insinuated, that if any of your lordships' degree should have the misfortune to fall into the like condition as the gentleman now produced, viz. to be once convict of a clergyable felony, there could be any doubt of receiving such peer as a witness, without his having been burnt in the hand. Certainly there could not; for the statute of 1 E. 6, exempts the peers from such penalty, and virtually repeals the statute of 4 H. 7, as to so much. And the statute of 18 Eliz. requires burning in the hand only, according to the statute in that behalf (before) provided. And there being no statute then or now in force, to subject peers to such brand; they are, in such case, upon the allowing the benefit of the said statute of E. 6, which is as much as clergy without reading or

burning freed from discredit and other penalties of the felony, as much as Commons are by having clergy formally allowed, and being burnt.

2. Here hath been mention of a pardon of the burning this gentleman in the hand; and, it seems, the proceeding hath been so far as to pass the privy-seal. I do not question the king's pardoning of the burning's being as effectual as the party's undergoing it. But, I say, here is no pardon (though great preparation for one). For the sign manual, the signet, the privy-seal, are but warrants in such cases, and countermandable. But it is the great seal that speaks the king's last and irrevocable intent, and passeth the pardon (or other like thing) to be granted. And that hath not been obtained here.

Now the question is cleared, I take it to be this: Whether this commoner, being convicted of felony, and having his clergy allowed, but being unburnt and unpardoned, shall be received and allowed to be a witness?

I am of opinion he ought not.

For (whatever quality or credit he might personally be of) he is, by being and remaining a felon convict, rendered infamous in the eye of the law. Upon the conviction, he lost, by the intendment of law, that credit which is necessary to a witness; and is not restored to it by the bare allowing of clergy; but is in the state as a felon convict would have been, before purgation, at common law.

Clergy or (more properly called) benefit of clergy, is an ancient privilege, whereby a clerk charged with felony was dismissed from the temporal judge, and delivered in custody to his ordinary, before whom he was to purge himself, if he could, of the offence; and if he failed in his purgation, he was to remain in the ordinary's prison.

I mean generally; and I think it not proper to this occasion, to discourse of the special cases wherein the delivery to the ordinary was *absque purgatione*.

This privilege took its root originally from a constitution of the pope, exempting the persons of the clergy from the secular jurisdiction. This the canon-law is full in. But that law was not thoroughly received here in England. And this matter was moulded, ordered, and altered by our common and statute law.

For instance: The canon-law gives the privilege only to men in holy orders: our law, in favour to learning, and the desire of the English bishops, extended it to lay-clerks,* as an old statute calls them, i. e. any layman, that, by reason of his ability to read, was (other circumstances concurring) in a possibility of being made a priest. On the other side; that law would not suffer the clergy to be tried before secular judges: but ours hath, for several hundred years, subjected them to such trial.

* As to Benefit of Clergy, see in this Collection the Case of Cavenagh and others, vol. 12, p. 630; and the Cases there referred to.

But the common law was ever clear in this, That when a man was convicted of felony, though by the allowing of clergy, his life, land, and blood were saved, yet, that conviction laid him under divers penalties and forfeitures, some absolute, others limited and determinable.

He forfeited all his goods and chattels, which he had at the time of his conviction, absolutely; not to be restored by purgation or pardon.

He also forfeited and lost, 1. His liberty, being to continue a prisoner. 2. His capacity of purchasing more goods or chattels, and of taking and retaining the issues and profits of his freehold land to his own use. 3. His credit, so as not to be a witness, juror, &c. Under these three penalties he remained till his purgation: but by that they were determined. As soon as he had made his purgation, he was restored to his liberty, capacities, and credit.

Purgation was the convict's clearing himself of the crime, by his own oath, and the oaths or verdict of an inquest of twelve clerks (as compurgators). The proceeding was before the ordinary. And, for the manner of it, old books speak of their making proclamation for persons to come in against his purgation, and of their enquiring into his life, conversation, and fame, and of other formalities. In all which, several other statutes say, there were great abuses. But it is certain, that, upon his acquittal, the ordinary pronounced him innocent, and absolved from infamy. And thereupon he was discharged from the imprisonment, incapacities, and discredit incident to the felony.

The statute 4 H. 7, brings in a new thing, appointing that every person convict of felony, should be marked in the hand by the gaoler in open court, before he should be delivered to the ordinary. And this was partly that they might taste of corporal punishment; but, principally, to notify that they had had their clergy. For the same statute, taking notice that men were emboldened to commit murder, rape, robbery, and other felonies, because they had the benefit of clergy *toties quoties*, ordains that no person, who was once admitted to that benefit, should ever have it again for a following offence, unless he were within orders, and produced his letters of his orders, or a certificate of them.

For this Act, Perkin Warbeck, in his Declaration against H. 7, brands him as an 'execrable breaker of the liberties and franchises of 'holy church.'

Then comes the statute 13 Eliz. c. 7, which, for so much as concerns this question, I desire to read. It is in these words, "For the avoiding of sundry perjuries and other abuses in and about the purgation of clerks convict, delivered to the ordinaries, be it enacted, that every person which shall be admitted and allowed to have the benefit or privilege of his clergy, shall not thereupon be delivered to the ordinary, as hath been accustomed, but after such clergy allowed, and burning in the hand according to the statute in that behalf provided [meaning that of 4 Hen. 7], shall forthwith be enlarged and delivered out of prison by the

justices before whom such clergy shall be granted, that clause notwithstanding."

Then there follows a proviso to this effect: "Provided nevertheless, and be it enacted, that the justices before whom any such allowance of clergy shall be had, may for the further correction of such persons, detain and keep them in prison for such convenient time as the same justices in their discretions shall think convenient, so as the same do not exceed one year's imprisonment."

This statute refers to that of H. 7, and follows the order of it; as that appointed that the convict should be burnt before he should be delivered to the ordinary to have the benefit of purgation, so this of 18 Eliz. appoints that he should be burnt before he shall be discharged by the justices, and have the benefit thereby intended (instead of purgation).

The council for the noble lord at the bar say, that the allowance of clergy by virtue of this act, freeth this man, and makes him *rectus in curia*; as if he had made his purgation: and that by this statute he is first pardoned his crime, by being allowed the benefit of clergy, without making his purgation; and afterwards to be burnt in the hand before he be delivered out of prison; and so the burning is a condition precedent to his getting out of prison, not to his being restored to his credit.

But I am to seek for any ground for this notion in this statute. It doth not require clergy to be allowed, nor give any new virtue or operation to it, when allowed. It supposeth such a thing to be by virtue of the common law: but there it leaves it, if there be nothing more done. It is one clause consisting of two parts; 1. Negative; he that is allowed his clergy, shall not be delivered to the ordinary. 2. Affirmative; but after that, and burning in the hand, shall be delivered by the justices.

Now, if it had stopped at the first part, it had been so far from pardoning or restoring any clerk convict, that it had put all into the same condition that those were who were without purgation, viz. to be perpetually imprisoned, and infamous. Indeed, it had not been reasonable to take away such a privilege from the subjects, without some recompence; and therefore it did not stop there: but proceeds to the 2d part, and provides that those who before were delivered to, and by the ordinary, shall now be delivered by the justices. But withal, it declares when, and upon what terms, viz. After clergy allowed, and burning in the hand. And this is a satisfaction to be given to the law, before they shall have the benefit of it.

I agree, if this convict had made that satisfaction to the law, he might have been a witness; for in that case, he would have been freed from his discredit by virtue of the last words of the said clause. It is true, the words are only, 'Shall forthwith be enlarged and delivered out of prison by the justices,' which literally import nothing but restoring his liberty. But under this prime instance, are implied and intended all other particulars which

a convict might be discharged of by means of purgation. It was never the intent of the statute merely to set him at large, and leave him a felon convict: but when it is said delivered, it is meant delivered free, freed from all incident further penalties, as he might have been if delivered upon purgation. This is a reasonable construction; to a man that observes the opposition in the words, the sense will appear to be as if the law-makers had said, that instead of being discharged 'a culpa et poena' by the ordinary upon a tedious proceeding to purgation, he shall now be so discharged by the justices forthwith.

And this also is necessary to vindicate the justice of this law; for, since it takes from him the means he had of regaining his credit, it is but just it should restore to him by this way.

It is objected, that it may as well be said that he shall not be restored to credit till he have suffered imprisonment, not exceeding a year, as that he shall not be restored till burnt. But that receives an easy answer; for, if it were so, it would not avail this person. But I take it to be otherwise. A convict is discharged from imprisonment and all other penalties incident to the conviction, forthwith upon the burning in the hand: but if there be a commitment made by virtue of the proviso, it is a collateral and a new thing, and the party is not then in prison by virtue of his conviction, but by a fresh express order of the judges, made upon the heinousness of the circumstances appearing on the evidence. They may, and generally do, forbear to commit at all: and when they do, it may be for a month or two, at their discretion. The proviso calls it a further correction.

As to the manner in which this statute works this full discharge, it hath been disputed, whether it be by supply of purgation, or rather by a kind of statute-pardon. But, I think, that by force of the statute the party is purged and freed of the felony, and all penalties incident to it, in nature of a pardon.

In what manner soever the statute works it, it is manifest that it doth it not but upon a condition precedent, viz. After clergy allowed, and burning in the hand. Now, this person hath his clergy allowed, but is not burnt in the hand, (nor has any pardon for it) and therefore is not yet intitled to the benefit of this statute. My lord's counsel say he is, because he hath his clergy allowed. But that is claiming the advantage upon the performing of one part of a joint condition, which ought not to be had but upon performing both. They might as well have pretended to it before the performance of either; the statute says, after both clergy and burning. They say also, that this burning is no part of the judgment, as hath been held in the case of an appeal. Be it so: but, I say, it is a part of the condition in this statute.

There is no case in our books against this opinion. (But, on the contrary, there are authorities for it.) Holcroft's case is in no sort

applicable to this case; as was truly observed by the king's serjeant. The opinion of my lord chief justice Hobart, in Searle and Williams's case, rightly considered, confirms this. I have borrowed the book from the gentleman at the bar, and read it. He saith expressly, that where a convict is liable to be burnt in the hand, he is not discharged and restored without it; because the statute says, after burning: but from thenceforth the statute frees him from all further punishment. But, he saith, that where he is not liable to burning, he shall have the same benefit immediately upon the allowance of clergy only. So it was in the case before him; which was that of a clerk in orders: for, Searle was a clergyman, parson of Heydon German, in Essex, and convicted of manslaughter. So it is, he says, in case where the king pardons the burning. And the last words in the case clearly shew his meaning, viz. where the statute says, after burning, it imports where burning ought to be, &c.

To me the law is evident. A peer shall have this benefit, without either clergy or burning. A clerk in orders, upon clergy alone, without burning. A lay-clerk, not without both.

As I remember, there hath been but one authority more mentioned, and that is of my lord chief justice Hale, in his Summary of the Pleas of the Crown; I have got hither that book also. To my understanding, he plainly declares the same opinion, and cites the before-mentioned case of Searle for proof of it. His words (so far as they relate to this matter) are these:

What the effect of clergy allowed?

In ancient time the consequent was delivery to the ordinary, either to make purgation, or *absque purgatione*, as the case required.

But by stat. 18 Eliz. c. 7. Now only burnt in the hand, which hath these effects,

1. It enables the judge to deliver him out of prison.

2. It gives him a capacity to purchase goods, and retain the profits of his lands. Foxley's Case, 5th report.

3. It restores him to his credit. Hob. Searle's Case.

The word [which] used here (whatever else it do, or do not refer to) doth certainly refer to the next antecedent, that is, burning in the hand; and the two books which this most learned judge cites, are full authorities that it is this burning which enables the court to deliver him, and that that delivering which is then due to him is, by good construction, in lieu of a pardon, which restores him to his said capacity and credit.

To conclude: this condition precedent, upon which the restitution of this person's credit depends, is not performed (by his undergoing the said punishment,) nor discharged (by the king's pardoning it;) and therefore he is not a legal witness.

Earl of Rochester. If the rest of my lords the judges be of the same opinion, so; and I hope you will not oblige them to deliver their

opinions at large, to take up your lordships time with arguments of any length; for the matter has been, I think, sufficiently debated.

L. Chief Baron. (Sir Edward Ward.) My lords, I am of the same opinion.

Just. Nevill. And so am I.

L. H. S. My lord of Warwick, have you any thing more to say to this question?

Earl of War. No, my lord.

L. H. S. Then what is your lordships' pleasure? Is this man to be admitted a witness or not?

Lords. No, no; we think, by law, he cannot be a witness.*

L. H. S. My lord of Warwick, my lords are of opinion, That this person cannot be admitted as a witness for you.

Earl of War. My lords, I submit to your lordships' judgment in the matter.

Earl of Nottingham. My lords, I am very glad your lordships have had this matter debated by the counsel, that so it might be settled: All my lords the judges that are here, it seems, are of opinion, that this man can be no witness, and therefore his testimony must be rejected. But there is another proposal that I have to make to your lordships, of a point that I think ought to be considered of: My noble lord at the bar did suppose that he had proved before your lordships, that he went into the field to fight on the side of the party that was killed, but not on the other side; and indeed, that he went not to fight, but to prevent a quarrel; and thereupon he did start a question, whether it should not be a presumption in point of fact and law, that he, being on the side of the party that was killed, should not be reputed innocent of his death? Now, I confess, upon the starting of this objection, I doubted of it, whether, if any one were present at the killing of a man, where several people were engaged in fighting; on what side soever such a person were, either on the side of the party that was killed, or on the other side, yet whatsoever crime it was in those that killed him, it was the same crime in those that were present at the action. My lord of Warwick did desire, that his counsel might be heard upon that point; if there be any question with your lordships in that case, and my lord desires his counsel may be heard to that matter, it may occasion a matter of debate, which cannot be in this place openly, but must be between your lordships among yourselves; Indeed, I think it reasonable that counsel should be heard upon the case.

L. H. S. My lords, I think you are not arrived at that question yet; you are not to take for granted any part of the fact, but are to debate among yourselves, after the proof is over, what that proof does amount to.

* See Mr. Hargrave's notice of this Case in his learned Discourse on the effect of the King's Pardon of Perjury. See, too, Rookwood's Case, and the authorities referred to in the Note, p. 187, of this Volume.

Earl of Rochester. Indeed, my lords, I hope you will not suppose any thing, and so take it for granted, that may occasion any debate, because that is not to be done here in this place, but we must adjourn to another place for it: The bare putting of a case by a prisoner at the bar, does not make that to be the case truly in point of fact, for as far as I heard and understood the noble lord's proposal at the bar, what he desired to have his counsel heard to, was, that he being one of six that went into the field, but going with a design to part them, and not with an intention to promote the quarrel, could not be in equal degree of guilt with those that were on the other side, who killed the party; but now, my lords, I take it, it is far from being granted on the other side, that that is the state of the fact; nay, my lord himself owns that he was in the field, and that he was engaged in the combat with Mr. James; and then the question must be that is to be debated, whether a party that is concerned in a quarrel where a person is killed, is in equal degree guilty with those that were on the other side against the person that was killed? And then the question would be far different from what it would be otherwise, and as his lordship did propose it; and if there be a doubt in matter of fact, that ought to be settled here in this place, that afterwards it may be considered in another.

Earl of Nottingham. My lords, I cannot but agree with that noble lord, that the matter of fact ought to be settled, and then if any debate arises thereupon, your lordships are to return to your own house, and there to debate what is your judgment upon that matter of fact: But whatsoever motion is made by the noble lord at the bar, wherein he desires to have his counsel heard, that I suppose may be considered here; and this point having been started by my noble lord at the bar, as a point of law, and not of fact, I desire to remind him of it, to know whether he does insist upon it; if he does not move to have the matter argued, then there is an end.

L. H. S. My lords, I do not think you will hear counsel upon a matter of fact, and therefore it is not ripe (till the fact be settled) for you to hear counsel.

Earl of War. My lords, I humbly pray, that you will hear my counsel as to that point.

L. H. S. My lord, this is a matter of fact undetermined, and not a matter of law: what opinion their lordships will be of, when they have considered the proofs as to the fact, is one step; when that is over, it will be the proper time, if any doubt be remaining with their lordships, in point of law to hear counsel; but upon bare matter of fact counsel is not to be allowed.

Earl of Rochester. My lords, if there be any debate among the lords, whether it be a matter of fact, or a matter of law, we must go up to our own house; but upon any point of law, where counsel is to be heard, it must be in this place, in the presence of the prisoner, and afterwards your lordships will debate it among yourselves.

Earl of Nottingham. I hope, my lords, the counsel would not state the case otherwise than as it is really in point of fact; nor can this noble lord hope, that any thing will make an impression upon my lords, but what from the fact rightly stated, is supported from the evidence; and that which my lord proposes, is to have his counsel heard to a matter of law, which your lordships will be judges of after you have heard it, whether there be any weight in that which he supposes to be his case, that a person assisting in a combat on the side of him that is killed, is in equal degree of guilt with them that are on the other side; that possibly, if the fact be agreed, may be a point fit to hear counsel to, before your lordships go to debate it among yourselves.

Duke of Devonshire. If I am not mistaken, my lord of Warwick owns his being one of them that fought, for he has offered witnesses to prove, that he received a wound in his hand by fighting: if my lord of Warwick thinks, that there is a difference between his being on Mr. Coote's side, and theirs that were on the other side, and would have his counsel heard, how far it will difference his guilt, and the nature of the crime, from what it was with them on the other side, I cannot think that can be to any great purpose to have that argued; but if your lordships' please, you may hear his counsel what they have to say to that matter; but otherwise, I cannot think, but that his lordship will acknowledge the matter of fact, that he was engaged in the quarrel.

Earl of Peterborough. My lords, I desire, if this be a point that my lord's counsel should be heard to, that it should be stated as a point of law, and then your lordships will consider of it.

L. H. S. As well as I could apprehend it, as it was offered by my lord of Warwick, this was what he desired to have his counsel heard to: though the persons engaged in the quarrel on the opposite party to Mr. Coote have been tried and found guilty of manslaughter, yet he is not in equal degree of guilt with them, he being engaged on Mr. Coote's side, and therefore his lordship's case differs from theirs who fought against Mr. Coote. This point he would have argued by his counsel before your lordships as a matter of law founded upon the fact; now the fact of the case must arise from the evidence as it has been given, which has not yet been debated or settled by your lordships; and till that be agreed to be the case, no question of law does properly arise.

Duke of Leeds. My lords, if possible, I would put this matter into its true method; for indeed I think we have been all this while out of the way. The noble lord at the bar has desired to have his counsel heard; this House has allowed him counsel in matters of law; I would desire that the counsel would state the case so to your lordships, that it may appear to be a case fit to be argued, that so it may receive your lordships' judgment thereupon. My lord's own bare proposing of such a thing, will not be enough to incline your lordships to be of

opinion, perhaps, one way or other; but I would pray your lordships, that you would direct the counsel that are assigned for my noble lord at the bar, to propose that to your lordships as a point of law that he ought to insist upon. I think it is apparent to every body, that no point of law can arise but upon matter of fact, which is agreed to be proved in any case; now the proofs of the fact we have heard; now, that which I would propose to your lordships is, that instead of hearing his counsel to argue in point of fact, what is not yet agreed upon to be the fact, they should state such a point of law as they would argue upon; and then whether you would think it a point of law, or not a point of law, we must go into another place, where it may be debated, whether it be such a point of law as that counsel should be heard to it.

Earl of Peterborough. My lords, I hope you will forgive me for interposing in this matter, but that which I have to say to it is this: I am far from giving any opinion as yet, as to the matter of fact, whether my lord of Warwick was Mr. Coote's friend or his enemy; I know it is not a proper place for that matter to be debated in: but my noble lord at the bar desires to have his counsel heard upon that point, as if the fact was agreed: truly, till the fact be agreed, I question whether we can give any judgment or opinion one way or other. If I observed aright, the evidence for the king aimed at somewhat else: I shall not say what my opinion now is, till we come to debate it among ourselves; but here is a desire of having counsel heard, but there is no question of law stated, but it depends upon a matter of fact which is not yet determined by your lordships, before whom the consideration of both fact and law doth lie, whether a person that is engaged on the side of the party that is killed in a quarrel, where several persons on both sides are concerned, be as much guilty as those that are concerned on the other side?

Marq. of Norm. My lords, I do suppose that you may hear the counsel to state the question, without your determining any thing upon it, as to your opinion one way or other; for your hearing of counsel is only in order to prepare your lordships for the debate among yourselves, if there remains any doubt with you. It seems, my noble lord at the bar has proposed that his counsel should be heard: If the counsel will state the point to be argued upon, your lordships may here consider, whether it be such a one as it is fit to hear counsel to; then, no doubt, you will hear counsel to it. This, I suppose, you will hear from them, or otherwise your lordships will not think fit to give yourselves the trouble to go and debate that which is no settled question to be debated of.

E. of Rochester. My lords, I am afraid, of necessity, you must adjourn to your own house, for I find my lords are here arguing one with another; some are of opinion, that the counsel should state the question, that they should be heard upon; others of my lords are of opinion,

that it is only a matter of fact, not a matter of law, upon which counsel should be heard; then it must be debated between your lordships, which is not proper for to do here; therefore I would humbly move your lordships, that you would adjourn to your own house.

E. of Peterborough. I suppose your lordships will be pleased to enquire of the counsel, whether they do insist upon this point.

L. H. S. My lord Warwick, if your lordship insist that your counsel should be heard upon the point which you have offered, it seems there is such a difference of opinion among my lords, that for the debating of what shall be done in the case, my lords must adjourn; but if you do not insist upon it, they will go in the ordinary method, to consider of the evidence that has been given, after it is summed up on both sides; for if you have no more evidence to offer, you are to make your observations upon the evidence that has been given.

E. of Warwick. I submit it, upon the whole matter to your lordships, whether my counsel can be heard, or not, to that point; how far, I being of Mr. Coote's side, can be guilty of his death.

L. H. S. That is a matter of fact, which is not yet determined; and therefore the question which you suppose to arise upon it, is not yet ripe to be resolved. If you have no other witnesses to produce, that which remains, for I think I may properly acquaint you with the method of proceeding, is, that you are now on your part to sum up the evidence that has been given, which is your own work, as not being allowed counsel as to matter of fact; you are at liberty to make such observations as you may think for your advantage upon the evidence, and so to close your defence.

E. of Warwick. My lord, I submit it upon the whole matter to your lordships.

L. H. S. Mr. Attorney General, my lord of Warwick submits the matter, as it has been proved, to their lordships, without any summing up of the evidence; you who are of the king's counsel, if you think fit, will sum up the evidence on yours, in order to their lordships consideration of it: This you know is the time for doing it. Make Proclamation for Silence.

Cl. of the Cr. Serjeant at Arms, make Proclamation.

Serj. at Arms. O Yes, O Yes, O Yes, my lord high steward of England, his grace, does straitly charge and command all manner of persons here present, to keep silence, upon pain of imprisonment.

L. H. S. Gentlemen, you that are of the king's counsel, now is your time to sum up the evidence for the king.

Then Mr. Solicitor, (sir John Hawles) began to sum up the evidence, but his voice was so low, that he could not be heard by the lords that sat at the upper end of the house.

Duke of Leeds. My lords, I think it of so great importance to have a true state of the fact and evidence laid before us, and that we may hear what the king's counsel do say at

the summing up of the evidence, that if my lords be of my opinion, we shall be very defective to know what judgment we give when we come to give judgment, unless we are thoroughly apprized of the matter of fact and the proofs. I confess I am going to move that, which is a thing not according to the orders of the house, but much without the rules of the house, that the counsel should be heard in any other place but where they are, at the bar of the house; this is contrary indeed, I acknowledge, to the orders of the house, and so my motion is irregular; but yet, in order to our satisfaction, that we may be enabled to hear what the king's counsel do say to us, especially in summing up the evidence, I cannot but offer this to your lordships; for we can no more hear the counsel here, than if we were quite out of the house: Whether, therefore, your lordships will please to order, that any person that has a stronger voice should sum up the evidence; or whether you will dispense with the orders of the house so far, as that Mr. Solicitor may come to the clerk's table, or some other place within the house, where he may be heard by all, I must submit it to your lordships. It would be a great satisfaction for us to hear him, in order to our judgment; but I acknowledge in this I do make an irregular motion, as to the orders that are usually observed by your lordships: but I know not how to help it, in regard, without hearing, it is impossible for us to form our judgment.

E. of Roch. My lords, I have a very great respect for every motion that that noble lord who spoke last does make, and I am of his opinion, that it will mightily tend to the satisfaction of my lords who are to give their judgment in this case, to hear both the evidence and the counsel, and what observations are made on both sides; and that it is a great disadvantage that the counsel should have so low a voice, that all my lords should not be able to hear him; but yet I hope that may be remedied some other way than what is proposed by that noble lord; for if what he desires were done, it will be obvious, that in point of precedent many inconveniences will occur upon breaking the orders of the house, to comply with a motion which is acknowledged by the noble lord himself to be irregular; for it would be impossible to hear any body, if it be permitted to make such a great noise without; and it is that which renders the difficulty of hearing the greater. If that were quieted, your lordships might hear this gentleman as well as those of the other counsel: or, if this gentleman's voice will not so well reach your hearing, then there are other gentlemen of the king's counsel that have stronger voices; and if any of them would sum up the evidence, I believe it would be better heard, and consequently better apprehended by your lordships; for I had rather any expedient should be found out to comply with the orders of the house, and preserve them, than that any irregular thing should be done for the breaking the orders of the house, upon any account whatsoever.

L. H. S. Make another proclamation for silence.

Cl. of the Cr. Serjeant at Arms, make proclamation.

Serj. at Arms. O yes, O yes, O yes, my lord high steward of England, his grace does straitly charge and command all manner of persons here present to keep silence, upon pain of imprisonment.

E. of Bridgewater. Truly, my lords, the noise about the court is so great, that we who sit much nearer to the bar, than the noble lord who made the motion for the removal of the council into another place, cannot hear Mr. Solicitor what he says; and therefore I think some of the guard should be sent out to clear all the passages about the court, that there may be no noise; for it is the noise of the people without, that makes it so difficult to hear the king's counsel.

L. H. S. Let some of the guard without take care that there be not that noise made; and whosoever does make a noise, let him be taken into custody.

[Then another proclamation was made for silence; upon which there was a greater quietness in the Hall.]

L. H. S. Mr. Solicitor, there is hopes now, since there is not so great noise as there was, that you may be heard by my lords: you must use the best endeavours you can, that you may be heard.

E. of Roch. If that gentleman cannot speak out so well that he can be heard, those of the king's counsel that have better voices, must sum up the evidence.

Sol. Gen. My lord, I speak as loud as I can.

E. of Roch. There are others of the king's counsel, pray let them do it then; Mr. Attorney, he being nearer and within the bar.

L. H. S. I know not whether Mr. Attorney be prepared for the summing up of the evidence, because he examined the witnesses, and the king's counsel usually allot to themselves the particular parts which they intend to take.

E. of Roch. Then let Mr. Solicitor go on.

Sol. Gen. I would shortly observe to your lordships what evidence hath been given to you on behalf of the king in this case, against that noble lord, the prisoner at the bar, for the offence for which he stands indicted. The first witness that was produced was the drawer at the Greyhound-tavern in the Strand, where this quarrel, that was the occasion of the death of this person that was slain, happened; and he tells you, that that night there was at his master's house my lord of Warwick, my lord Mohun, capt. French, capt. Coote the person that was killed, and Mr. Dockwra; and after they had been there some time, that other person, that was the sixth concerned in the scuffle, Mr. James, was sent for, and he came in when it was pretty late; there they continued till one or two o'clock, and then they came down to the bar, and orders was given for to call coaches; but it being so late, and Sunday morning, they

could not find coaches, and then there was orders for the getting of chairs; when some chairs were brought, Mr. Coote and Mr. French went into two of the chairs, but my lord Mohun interposed, and said there should be nothing done that night, and that if they went away he would call for a file of musqueteers from the guard, and secure them; and thereupon they came out of the chairs, and went into the house, and there was the noise of swords clashing heard at the bar; captain Coote said he would laugh when he pleased, and frown when he pleased, and they parted; three were on one side, and three on the other of the bar; my lord of Warwick, my lord Mohun, and captain Coote, were on one side; captain French, captain James and Mr. Dockwra, were on the other side. Indeed he says my lord Mohun and my lord of Warwick did what they could to pacify them, and threatened to send for the guards; but away they went. The next witness was Thomas Browne, and he was the chairman that carried Mr. Coote, and he says, that there was an endeavour by my lord of Warwick and my lord Mohun to put off the business at that time, and that they did what they could to have put it off, and that even after they were in their chairs, when they were turned up St. Martin's lane, there they stopped at the back door of the Cross-Keys-tavern, and that while they stood there with their three chairs, three other chairs came by, and then captain Coote bid them put up, and follow after those chairs as fast as they could to Leicester-fields.

The next witness is William Crippes, who was the other chairman that carried captain Coote, and he gives your lordships much the same account that Browne gave before, and his evidence was just to the same purpose, that my lord of Warwick and my lord Mohun endeavoured to pacify the matter, and that there should be an end of the business for that night, and let it alone till another time; and that my lord Mohun threatened to send for the guards, and secure them, and would have had them gone home, that is Mr. Coote either with him to his lodging, or he would go to Mr. Coote's; but he could not prevail. Then my lord Mohun said, if he would go on, his lordship would go and see an end of the business.

The next witness was one Crattle, who was one of the chairmen that carried my lord of Warwick, and he says, that my lord Mohun and my lord of Warwick did endeavour what they could to put off the matter till the next morning, but that they could not prevail; that afterwards, when he carried my lord from Leicester-fields to the Bagnio, my lord borrowed a handkerchief of him to wrap his hand in, for he said he was wounded, but by whom that wound was given does not appear, nor how he came by that wound, any otherwise than as his lordship himself says, that it was given him by Mr. James.

The next was the other chairman that carried my lord of Warwick, which was John Gibson,

and his testimony need not be repeated, because it did not differ from the others. The next witness was Robert Applegate, who was the chairman that carried my lord Mohun; and he says, that there was an endeavour used by my lord upon his setting down in St. Martin's-lane, to quiet captain Coote, and prevent any quarrel at that time; but he says, when they would go on, my lord Mohun said, he would go and see the end of it; and thereupon they went on towards Leicester-fields to the end of Green-street, which is at the lower end of the square.

The next witness was Palmer, who was one of the chairmen that carried Mr. French to the Bagnio in Long-Acre; and he tells your lordships what happened upon his carrying him thither; how, immediately after his coming there, my lord of Warwick came thither, and they knocked at the door at the same time, and that captain French was very much wounded, and they went into the house together, and that French would have had them pull off his cloaths to see his wounds, for he believed he was a dead man.

The next witness was the chairman which carried Mr. James, and he only tells your lordships that he carried a gentleman into Leicester-fields; that my lord Mohun endeavoured to put off the business for that night; but who the person was that he carried he cannot so well tell, nor give an account of; but when he had set him down at the further end of the square, there he left him, and he knows no further.

Then there was the surgeon at the bagnio in Long Acre, who gives your lordships an account, that about two o'clock in the morning on the Sunday, my lord of Warwick and captain French came in there; captain French was wounded in the body, and my lord Warwick was wounded in the hand, and my lord Warwick did take extraordinary care of captain French, and would not have the door opened to any body, nor his lordship known to be there; that afterwards captain James and Mr. Dockwra came to the door, and my lord came to the door himself, and when he saw who they were, he ordered them to be let in; and that there was a discourse about going into the country, and that there was a fear that Coote was killed. This is the effect of the testimony both of the surgeon and his servants; and it is to be observed, that when captain French came in, his sword was not bloody, but my lord of Warwick's sword was bloody almost all over, and that was taken notice of the next day; and there are several witnesses, both men and women of that house, that give your lordships an account much to the same purpose. Then there was captain Duckinfield, who says, that my lord of Warwick came to his lodgings, and they went in a coach together to the tavern in Cornhill, and then there was a discourse of going into the country, and my lord said that he was afraid his friend Coote was killed; but that they had no absolute news of his being

killed at that time ; for it should seem my lord of Warwick forsook the field as soon as the fatal stroke was given, which, by whom it was given, is left to your lordships' consideration. Indeed it is pretended by my lord, that the wound that he had in his hand was given him by Mr. James ; but nothing of that is made apparent to your lordships upon the proofs.

Then we came to give your lordships an account of the nature of the wounds that Mr. Coote had in his body ; and for that we produced both the surgeon that did probe the wounds by the order of the coroner, and the coroner himself. Indeed we could not get a positive answer from either the surgeon or the coroner, whether the wounds were given by one and the same sword, or by different swords ; but then your lordships have the testimony of Mr. Turner, who was captain Coote's servant, and who knows his master's sword, and it hath been shewn to him, and he says, that it is his master's sword that he went out with ; and it can be easily judged whether he could give himself those wounds by that sword.

And your lordships have likewise had brought before you another sword, which was left at the bagnio in Long Acre, that was captain French's, that had no blood at all upon it ; but my lord of Warwick's, it seems by all the evidence, had a great deal of blood upon it.

Then came the witnesses for the prisoner at the bar, this noble lord, my lord Warwick ; and the sum of the testimonies that they have given, is of a great deal of kindness between my lord Warwick and captain Coote ; that my lord lent him a hundred guineas to purchase his commission in the guards, when he had but three of four hundred guineas which was necessary to make the purchase ; and there are several of them that do testify, that they always looked upon captain Coote and my lord of Warwick to be very good friends, and that there never was any quarrel between them ; and that is the sum of what the evidence on that side did testify. And this, my lords, I take to be the sum of the evidence that has been given on either side ; and when I have laid it thus before your lordships, I must submit it to your lordship's judgment, what opinion you will be of upon the whole matter ; only there is this one observation that I would make to your lordships upon this evidence, That there is not one witness that has given you an account satisfactory, by whose hand these wounds were given to Mr. Coote ; and therefore, though it is apparent my lord of Warwick was in the place where the mortal wound was given, yet by whose hand it was given is not yet known ; until that can be known, every person that was there must remain under the imputation of the same guilt, as having a hand, and contributing to his death ; it is certain, and cannot be denied, that this noble lord, my lord at the bar, was in the field, wherein there was actual fighting ; for he does not deny it himself, but says, that he was engaged particularly with captain James, when captain Coote was engaged with capt.

French, between whom, as it is alledged, the quarrel was ; but that is no way, in point of fact, made appear to your lordships ; and there being such suspicions and circumstances of the blood upon my lord of Warwick's sword, and the great concern that he was in when he came to the bagnio, and desiring to be concealed, and that nobody should know that he was there, and the care he took of Mr. French, who is the pretended person that did the fact, is that which is to be submitted to your lordships ; and it is to be observed, that Mr. French's sword was not bloody, but only dirty ; but my lord of Warwick's sword was very bloody from the hilt to the point, and he was in a great consternation when he came into the house.

There is likewise a circumstance which your lordships will please to observe, that even Mr. Coote's sword was brought into the house by some of the company that were there ; and whatsoever this noble lord pretends of his friendship to Mr. Coote, yet, it seems by his care that he took of captain French, he had as much friendship for him.

There is another circumstance that has been testified, which it will be fit for your lordships to take into consideration, and make some observation of ; that is, the nature of the wound : It seems, he had two wounds, one on the left side of the breast, near the collar bone, and that was downward ; and yet his man, that was here produced as a witness, does testify, that he was one that used his right hand, and then it is a wonder that he should receive such a sort of a wound in that part ; and the other wound was on the left side too, but it was upward, and how that could be given to one that was a right handed man, is certainly a very great wonder ; and the wounds being both given upon the same side, it cannot but be concluded, that they were given by one and the same sword.

Another circumstance which relates to my lord of Warwick is, that when he came into the Bagnio, after the fact was over, he would have himself denied to be there, and went to the door when James and Dockwra came in ; and his declaring his desire of going into the country ; these, we say, are circumstances that do induce a doubt, that my lord of Warwick had a concern upon him of great guilt of having a hand in this man's death : it is indeed pretended by my lord of Warwick, that Mr. Coote was a person that my lord of Warwick had a kindness for ; but it is plain by the evidence, that he left him dead in the field, and did not take any care of him, but took a great deal of care of captain French, who, it is pretended, was the person that fought with Coote, when he came to the Bagnio ; and there is nothing of kindness at this time pretended, nor any thing of a defence to this matter offered by my lord of Warwick, but only what the chairmen say, that he endeavoured to put it off to another time. These, my lords, are all the observations that I shall make upon the evidence in this case ; how far this evidence, upon consideration, will weigh with your lordships, I must submit it to you. If my lord of War-

wick did do the fact, as these circumstances, we think, may incline your lordships to believe he did, it will surely be murder; but how far the evidence comes up to the proof of that, we most humbly submit to your lordships, who are the judges of it; and we leave it intirely to your consideration upon what you have heard.

L. H. S. Then it seems you have done on all sides.—*Counsel.* Yes, my lords.

Lords. Then adjourn, adjourn.

L. H. S. Is it your lordships' pleasure to adjourn into the House of Lords?

Lords. Ay, ay.

L. H. S. This House is adjourned into the House of Lords.

Then the Lords went back to their own House in the same order they came into the court in Westminster-hall, and debated the matter among themselves, what judgment to give upon the evidence that had been heard; and in about two hours time they returned again into the court, erected upon a scaffold in Westminster-hall; and after they were seated in their places, the Lord High Steward being seated in his chair before the throne, spoke to the lords thus:

L. H. S. Will your lordships proceed to give your judgment?—*Lords.* Ay, ay.

L. H. S. Your lordships will give me leave, as I ask your lordships your several opinions, to take so much time as to write down the opinion of every lord.—*Lords.* Ay, ay.

Then the Lord High Steward asked this question of every one of the lords there present, beginning with the puisne baron, which was the lord Bernard.

L. H. S. My lord Bernard, is Edward earl of Warwick guilty of the felony and murder whereof he stands indicted, or not guilty?

The lord Bernard stood up in his place uncovered, and laying his right hand upon his breast, pronounced his judgment thus:

L. Bernard. Not guilty of murder, but guilty of manslaughter, upon my honour*.

The same Question was asked severally of all the lords, who in the same form delivered the same opinion.

Then the Lord High Steward reckoned up the number of the Peers that were then present, and the opinions that were given, and afterwards acquainted their lordships with the Resolutions that they came to, in this manner:

L. H. S. My lords, your lordships are 93 in number here present, and you have all acquitted my lord of Warwick of the murder whereof he stands indicted, but you are of opinion that he is guilty of manslaughter: Is it your pleasure that he should be called to the bar, and acquainted with your lordships judgment?—*Lords.* Ay, ay.

* Mr. Barrington, Observations on 34 Ed. 3, infers from a Case in the year books, (Mich. 1, Hen. 4,) that the answer originally was upon my conscience, and not upon my honour.

Cl. of the Cr. Serjeant at Arms, make proclamation.

Serj. at Arms. O yes, O yes, O yes! chief governor of the Tower of London, bring forth the body of your prisoner, Edward earl of Warwick, forthwith, upon pain and peril will fall thereon.

Then the earl of Warwick was brought to the bar.

L. H. S. My lord of Warwick, your lordship has been arraigned upon an indictment for the killing Mr. Coote; you have pleaded not guilty, and put yourself upon your trial by your peers here present; my lords have heard the evidence given both against you and for you, and have considered of it, and are come to a resolution; and their judgment is, That your lordship is not guilty of the murder whereof you stand indicted, but that you are guilty of manslaughter. What has your lordship to say, why judgment of death should not be pronounced against you according to the law?

Earl of War. My lords, I desire that the benefit of my peerage may be allowed me, according to the statute of Edward the 6th*.

L. H. S. My lord, your lordship has demanded the benefit of your peerage upon the statute of Edward the 6th, and you must have it by law; but I am directed by their lordships to acquaint you, that you cannot have the benefit of that statute twice; therefore I am likewise directed by their lordships to say, that they hope you will take a more than ordinary care of your behaviour for the future, that so you may never hereafter fall into such unfortunate circumstances as you have been now under; my lords hope this will be so sensible a warning, that nothing of this kind will ever happen to you again; your lordship is now to be discharged.

L. H. S. Is it your lordships' pleasure to adjourn to the House of Lords?

Lords. Ay, ay.

L. H. S. This House is adjourned to the House of Lords.

Then the lords went in procession, in the same order that they came into the court.

* Mr. Barrington (Obs. on 12 H. 7, cap. 7,) says, "I find but one instance of a criminal's not claiming the benefit of clergy, which is that of the duke of Somerset." See in this Collection, vol. 1, pp. 509, 515, the proceedings against him. The expression of sir John Hayward, to whom Barrington refers (See his "Life and Reign of Edward the Sixth") in 2 Kennett, are observable, "The duke of Somerset might have craved his clergy; but he suffered judgment to pass." If lord Audley (See his case in this Collection, vol. 3, pp. 401, 402, 403, 2 Hale's Pleas of the Crown, c. 43. Leach's Hawk. Pl. Cr. b. 2, chap. 30, s. 25, chap. 53, s. 28.) had stood mute upon the indictment against him for the rape, he would have intitled himself to benefit of clergy, and so have avoided sentence of death upon that conviction.

403. The Trial of CHARLES Lord MOHUN,* before the House of Lords, for the Murder of Richard Coote, esq.: 11 WILLIAM III. A. D. 1699.

March 29, 1699.

ABOUT one of the clock the Lords came, in the same order as the day before to the trial of the earl of Warwick, into the court erected in Westminster-hall.

Cl. of Cr. Serjeant at Arms, make proclamation.

Serj. at Arms. O Yes, O Yes, O Yes! My Lord High Steward his grace does strictly charge and command all manner of persons here present to keep silence, upon pain of imprisonment.

Serj. at Arms. O Yes, O Yes, O Yes! All manner of persons who are obliged to give their attendance here this day, before his grace my Lord High Steward of England, let them give their attendance forthwith.

Cl. of Cr. Serjeant at Arms, make proclamation again.

Serj. at Arms. O Yes, O Yes, O Yes! His grace my Lord High Steward of England does straitly charge and command all manner of persons here present to be uncovered.

Cl. of Cr. Serjeant at Arms, make proclamation again.

Serj. at Arms. O Yes, O Yes, O Yes! Chief governor of the Tower of London, bring forth the body of your prisoner Charles lord Mohun forthwith, upon pain and peril will fall thereon.

[Then my lord Mohun was brought to the bar.]

L. High Steward. (Lord Somers.) My lord Mohun, your lordship is now brought upon your trial for the murder of Mr. Coote, for which you stand indicted by the grand jury for the county of Middlesex. The king, who knows that justice is one of the pillars which supports a throne, will have a strict account taken of the blood of any of his subjects, without respect to the quality of the slain, or of the person who stands charged with his death. There is not one of the noble peers here present, who are to be your triers, but does heartily wish your lordship innocent; but on the other side, if you should appear to be guilty upon the evidence, you ought not to hope that any consideration of relation, friendship, or pity, will prevail against justice. And therefore, since in your present condition every thing that is valuable in this world is at stake, it will be highly necessary for your lordship to recollect yourself, and to have your best thoughts about you. Facts of this nature are frequently at-

tended with such unhappy circumstances, that a noble person may be justly covered with shame to have faults and weaknesses exposed to such an assembly as this, although he be not conscious to himself of the guilt of blood: but your lordship ought not to be so far discomposed with any thoughts of this kind, as to neglect your defence against this heavy accusation of murder. In order to this, it is necessary for your lordship to hear with temper what will be said against you, and by no means to interrupt the counsel or witnesses. I will take care to give your lordship notice when the proper time comes for you to make your observations upon the evidence, to examine your witnesses, and to say what you think proper for your own defence; and when my lords have heard, and fully and maturely considered the whole matter, their lordships will give such a judgment as the law and justice require.

L. H. S. Read the indictment to my lord.

Clerk of the Crown. Charles lord Mohun, your lordship stands indicted in the county of Middlesex, by the name of Charles lord Mohun of Okehampton in the county of Devon, late of the parish of St. Martin's in the Fields in the county of Middlesex, together with Edward earl of Warwick and Holland, late of the same parish and county, Richard French, late of the same parish and county, gent. Roger James, late of the same parish and county, gent. and George Dockwra, late of the same parish and county, gent. not having the fear of God before your eyes, but being moved and seduced by the instigation of the devil, the 30th day of October, in the tenth year of the reign of our sovereign lord that now is, William the third, by the grace of God of England, Scotland, France, and Ireland, king, defender of the faith, &c. with force and arms, &c. at the parish aforesaid, in the county of Middlesex aforesaid, in and upon one Richard Coote, esq. in the peace of God, and our said sovereign lord the king, that now is, then and there being, feloniously, wilfully, and of your malice afore-thought did make an assault; and that the aforesaid Edward earl of Warwick and Holland, with a certain sword made of iron and steel, of the value of five shillings, which he the said Edward earl of Warwick and Holland in his right hand then and there had and held drawn, the aforesaid Richard Coote, in and upon the left part of the breast of him the said Richard Coote, near the collar-bone of him the said Richard Coote, then and there feloniously, voluntarily, and of his malice afore-thought, did strike, stab, and thrust in, giving to the said Richard

* See his former Trial for Murder, Vol. 12, p. 950, of this Collection. See, also, Holt, 479; and East's Pleas of the Crown, c. 5, s. 134.

Coote, then and there with the sword drawn aforesaid, in and upon the left part of the breast of him the said Richard Coote, near the collar-bone of him the said Richard Coote, one mortal wound of the breadth of half an inch, and of the depth of five inches, of which said mortal wound he the aforesaid Richard Coote then and there instantly died: and that you the said lord Mohun, together with the said Richard French, Roger James, and George Dockwra, then and there feloniously, wilfully, and of your malice afore-thought, were present, aiding, abetting, comforting, assisting, and maintaining the said Edward earl of Warwick and Holland, the said Richard Coote in manner and form aforesaid, feloniously, wilfully, and of his malice afore-thought, to kill and murder; and so the said Edward earl of Warwick and Holland, and you the said Charles lord Mohun, Richard French, Roger James, and George Dockwra, the aforesaid Richard Coote, in manner and form aforesaid, feloniously, wilfully, and of your malice afore-thought, did kill and murder, against the peace of our sovereign lord the king, that now is, his crown and dignity.'

Cl. of Cr. How say you, Charles lord Mohun, are you guilty of this felony and murder, whereof you stand indicted, or not guilty?

L. Mohun. Not guilty.

Cl. of Cr. Culprit, How will you be tried?

L. Mohun. By God and my peers.

Cl. of Cr. God send your lordship good deliverance.

Cl. of Cr. Serjeant at Arms, make proclamation.

Serj. at Arms. O yes, O yes, O yes! All manner of persons that will give evidence on behalf of our sovereign lord the king, against Charles lord Mohun, the prisoner at the bar, let them come forth and give their evidence; for now he stands at the bar for his deliverance.

L. Mohun. My lords, I desire I may have the benefit of pen, ink, and paper.

L. H. S. Your lordships are pleased to permit my lord Mohun to have pen, ink, and paper?

Lords. Ay, ay.

[Pen, ink, and paper were carried to my lord, by one of the clerks of the House.]

Mr. Cowper. May it please your lordships, my lord Mohun, the prisoner at the bar, stands indicted by the grand jury of the county of Middlesex, before commissioners of Oyer and Terminer in that county; and the indictment sets forth, That Edward earl of Warwick and Holland, Charles lord Mohun, baron Mohun of Okehampton in the county of Devon, Richard French, Roger James and George Dockwra, the 30th of October, in the tenth year of his majesty's reign, with force and arms, at the parish of St. Martin in the Fields, in the county of Middlesex, upon one Richard Coote, esq; feloniously, wilfully, and of their malice afore-thought, did make an assault; and that the said

Edward earl of Warwick and Holland, with a drawn sword then in his right hand, the said Richard Coote, upon the left part of his breast near the collar bone, did strike, stab, and thrust, giving him thereby a mortal wound of the breadth of half an inch, and the depth of five inches, of which wound he instantly died; that my lord Mohun, Mr. French, Mr. James and Mr. Dockwra, feloniously, wilfully, and of their malice aforethought, were present, aiding, and abetting my lord of Warwick and Holland, the said Richard Coote, in manner aforesaid, to kill and murder; and then concludes, so that the earl of Warwick and Holland, the said lord Mohun, Richard French, Roger James, and George Dockwra, the said Richard Coote, in manner and form aforesaid, feloniously, wilfully, and of their malice afore-thought, did kill and murder, against the peace of the king, his crown and dignity. To this indictment my lord Mohun has pleaded not guilty, and for his trial has put himself upon God and your lordships, his peers. We shall call our witnesses, and produce what evidence we have to give to prove my lord Mohun guilty, and to submit it to you.

Attorney General. (Sir Thomas Trevor.) My lords, this noble lord, my lord Mohun, the prisoner at the bar, stands indicted for the death of Mr. Coote, one of the king's subjects, as your lordships have heard in the case that was before you yesterday; to which indictment he hath pleaded not guilty, and for his trial has put himself upon my lords, who are his peers; I shall very shortly open the substance of the evidence that we shall offer for the king against my lord, the prisoner at the bar; we shall produce evidence to prove, that at the time laid in the indictment, the 29th of October at night, and the next morning, which was Sunday, my lord the prisoner at the bar, and my lord of Warwick, (who has been found guilty of manslaughter upon this indictment before your lordships) and those other persons that are named in the indictment, captain French, captain James, and Mr. Dockwra, and the gentleman that was killed, happened to be at the Greyhound tavern in the Strand, which was then kept by Mr. Locket, and continued there a great part of the night, indeed till the next morning, about one or two of the clock in the morning; there was my lord of Warwick, my lord Mohun, captain French, captain Coote, and Mr. Dockwra; but very late in the night the other gentleman, Mr. James, was sent for: A messenger was sent particularly to have him come to them; there they continued drinking till about one or two of the clock in the morning, then coaches were sent for; then the drawer of the house will acquaint your lordships, that he went for them, and could not get any at that time, being a very dark night; and when there could be no coaches had, then there were chairs called for, and the drawer went to call chairs; and as we shall make it appear to your lordships, when the drawer came back, there did appear to be a quarrel

among them, for there was clashing of swords, and they seemed to be divided into two parties; on the one side were my lord of Warwick, my lord Mohun the prisoner at the bar, and Mr. Coote; on the other side were captain French, captain James, and Mr. Dockwra; and first there were two chairs came to the door, into which Mr. French and Mr. Coote went, and when they were in the chairs my lord Mohun came out, and said he would kill any of the chairmen that went away; and so they put up again, and the gentlemen came out, and came into the house; but afterwards Mr. Coote went into the first chair, and my lord of Warwick into the next, and my lord Mohun into the third, and then they went away; and the other three gentlemen went into the other three chairs, and followed them. Your lordships will hear whither they were all carried. When they came to the end of St. Martin's lane in the Strand, my lord Mohun would indeed have endeavoured to have persuaded Mr. Coote in particular to have gone home for that night, and let the business alone till another time; but Mr. Coote would go on; and while the three chairs carried my lord of Warwick, my lord Mohun, and Mr. Coote to St. Martin's lane end, which were the three first chairs that went away from Locket's, the other three chairs that went after them overtook them, and then by Mr. Coote's command, the chairmen that carried him went forward towards Leicester fields; and then this noble lord, my lord Mohun, did say, If you go on, I will go and see the end of it, and ordered the chairman that carried him to go after those chairs in which my lord of Warwick and Mr. Coote went; and accordingly they did go till they came to the hither end of the square in Leicester fields, near Green street end, where my lord Mohun got out of his chair, and paid for all the three chairs three shillings. But we shall not be able to give to your lordships an account particularly as to my lord Mohun, what he did afterwards, but we shall call our witnesses to prove what we have opened; and when our witnesses are heard, we shall leave the matter to your lordships' judgment.

[*Samuel Cawthorne*, which was the drawer at the tavern at Locket's, was sworn, and gave his evidence to the same effect that he did the day before.]

Att. Gen. Pray, will you acquaint my lords, who were at your house the 29th and 30th of October last, Saturday night and Sunday morning?

Cawthorne. There were my lord of Warwick, my lord Mohun, captain Coote, capt. French, Mr. Dockwra, and Mr. James.

Att. Gen. How long did they continue there?

Caw. Till between one and two o'clock in the morning.

Att. Gen. Pray, will you acquaint my lords what happened at your master's house at that time; you remember what evidence you gave

yesterday; tell the whole matter again, because it relates to another noble lord that is now at the bar.

Caw. The reckoning was called for about that time, and I went up and took the reckoning, and all the gentlemen came down to the bar, and coaches were sent for; I went for them, but no coaches could be had: then chairs were sent for, and I called for chairs, and there came two chairs to the door, and into those two chairs went capt. Coote and capt. French; and my lord Mohun and my lord of Warwick endeavoured to quiet them, and to put off the business till another day, and thereupon they came out of the chairs, and came into the house again; my lord Mohun did desire there might be no quarrel, and would have Mr. Coote go home with him to his lodgings at Westminster, or he would go with Mr. Coote, and said there should be no quarrel that night: there were then three of them on one side of the bar, and three of the other side, and their swords were all drawn. My lord of Warwick, my lord Mohun, and Mr. Coote, were of one side, and captain French, capt. James, and Mr. Dockwra, were of the other side: I was without the house when the swords were first drawn; but I heard my lord Mohun say, I have got a cut finger by endeavouring to part them; and at first when the chairs came on, my lord Mohun said, if they did quarrel, he would send to the guards for a file of musqueteers, and secure them; so that he did what he could to prevent any quarrel at all; and when he had received the wound in his hand, I helped him to a napkin to wrap his hand in, upon the bleeding of it: then my lord of Warwick, my lord Mohun, and captain Coote, went away in three chairs, and my lord Mohun gave order to go down to Westminster; and there were three chairs called for by the other three persons; two did come, and capt. French and capt. James went into them; and the sixth not being come, they staid till it did come, and then they three went away too; the chairs were all ordered to go home with them; my lord of Warwick and my lord Mohun gave order to their chairs to keep close with Mr. Coote; and the other three chairs immediately followed.

Att. Gen. Pray, will you consider, and recollect with yourself, was Mr. James there at first?

Caw. No, I was sent for him about ten o'clock at night, and there he continued with them till they went all away in the six chairs, and he was almost fuddled when he came in.

Att. Gen. When James came in, was his sword drawn?

Caw. His sword was in the scabbard, but the scabbard was broken, and he took and broke his sword stamping upon it.

Att. Gen. Pray, can you tell, you being up and down in the room, what was the occasion of the quarrel?

Caw. Indeed I cannot tell; but some words past when they were below stairs by the bar

from capt. Coote, that he would laugh when he pleased, and frown when he pleased; and Mr. Dockwra did say, that they would fight them whenever they pleased when they went away; but I did not observe that there was any quarrel between them while they were above, nor any swords drawn till after I came from calling the chairs.

Att. Gen. Were all the swords drawn at once?

Caw. They were all drawn when I came in from calling for the coaches and the chairs, and three were within the bar, and three were without; they were putting up their swords when I came in again; indeed I do not know any thing of the quarrel.

L. H. S. My lord Mohun, will you ask this witness any questions?

L. Mohun. Indeed, I think I need not ask him any question; but yet, if your lordships please, I would ask him this, Whether directly or indirectly I was any ways concerned in the quarrel? or, whether I did not endeavour all that ever I could to quiet them?

Caw. Yes, indeed, my lord Mohun did endeavour all that ever he could to prevent any quarrel at that time.

L. Mohun. Did I say any thing tending to the promoting of a quarrel or fighting among them?

Caw. No; my lord Mohun did not promote any thing of the quarrel between them, but he did say two or three times, that he would send for the guards to secure them, and keep them from fighting, both at the door of the house, and at the bar, and asked for a napkin to wrap up his hand in, for the wound which he said he got in endeavouring to quiet and part them, and prevent their fighting.

L. Mohun. That is all that I would ask him, whether I did not endeavour all that I could to prevent any quarrelling or fighting at that time?

Caw. Yes, indeed, my lord did so.

L. H. S. He has said so already, my lord, and therefore there does not need any further examination of him to that point: if both sides have done with this witness, let him go down. (Which he did.)

L. H. S. Then, Mr. Attorney, who is your next witness?

Att. Gen. Our next witness is Thomas Browne, who was one of the chairmen that carried Mr. Coote into Leicester-fields. [Then he was sworn.]

L. H. S. What is the question you would ask him, Mr. Attorney?

Att. Gen. My lords, I desire he may be asked and examined, and acquaint your lordships, who it was that he carried from Locket's the 29th of October last to Leicester-fields, and what time it was of the night?

Browne. I carried Mr. Coote in my chair.

Att. Gen. Whither were you directed to carry him?

Browne. To Leicester-fields.

Att. Gen. What time of night was it?

Browne. It was three quarters past one, as near as I could guess.

Att. Gen. Pray, what other chairs were there that went along with you?

Browne. There were two other chairs.

Att. Gen. Who were in those chairs, pray?

Browne. There were my lord of Warwick in one, and my lord Mohun in the other.

Att. Gen. Did you three go away from Locket's together?

Browne. Yes, we did; and when we were bid to take up, we went to the end of St. Martin's-lane, and turning up at the end of St. Martin's-lane, there my lord of Warwick and my lord Mohun called out to capt. Coote to stay, and to turn down to go to Westminster; but Mr. Coote would turn up the lane, and my lord of Warwick and my lord Mohun made a stop at the back door of the Cross-Keys tavern, and both of them persuaded Mr. Coote to put it off till the next morning; but he would not, he said he would make an end of it that night.

Att. Gen. Pray, recollect yourself, did they name among them what their business was that they would make an end of?

Browne. No, they did not.

Att. Gen. Who was it that stopped at St. Martin's-lane end?

Browne. When we were turning up at St. Martin's-lane end, my lord of Warwick and my lord Mohun called out to stop, and asked Mr. Coote whither he was going? and when he said, to Leicester-fields, my lord Mohun called out to us to set down, which we did, at the back-door of the Cross-Keys tavern; they did both of them, my lord Warwick and my lord Mohun, persuade Mr. Coote to go home to Westminster, and not to end the business that night; but he would go on; and while we were there, there went three other chairs up St. Martin's-lane on the other side of the way; then Mr. Coote, who was in our chair, bid us take up, and follow those chairs into the fields, and swore, Damn him, he would run his sword into one of us, if we did not make haste, and overtake those other chairs, and go before them; I think his words were, 'Damn me, I'll run my sword into your breech, if you do not make haste, and get before that other chair.'

Att. Gen. You say then, they went all away together up to Leicester-fields?

Browne. Yes, they did so.

Lord Mohun. I desire he may be asked, Whether I did not desire him to go home with me to my lodging at Westminster?

Browne. Yes, you did, and begged of him as if it had been for an alms, that he would put it off for that night; but when the other chairs past by us at Charing-cross, in St. Martin's-lane, he would have the chair taken up, and us to make what haste we could to get before them thither, or else, he swore, damn him, he would run his sword into one of us, if we did not make haste to get to Leicester-fields before the other chairs that went up the other side of the way.

Att. Gen. When the other chairs were past

by, and you went away to Leicester-fields, pray tell my lords what happened then?

Browne. We went away to Leicester-fields, when we came to Green-street end, and were entering upon the square upon the broad stones, Mr. Coote called out to us, and bid us to set him down, and so did the other two chairs; and when he put his hand into his pocket to discharge us, my lord of Warwick put his hand in his pocket to pay the three chairs, and Mr. Coote offered half a guinea to discharge the chairs, and my lord Mohun did produce 3s. and with it discharged all the three chairs, and they all three walked away together forward upon the broad stones, on the right hand side of the way; it was so dark a night, I could not see half a dozen yards from me: it was the darkest night, I think, that ever I saw in all my life, and therefore I cannot tell what became of them after they went out of the chairs.

Att. Gen. Pray, did you see my lord Mohun afterwards?

Browne. No, I did never see my lord Mohun afterwards till now here at the bar.

Att. Gen. You say it was so dark, that you could not see three yards from you; pray, what did happen afterwards when you were in the field?

Browne. A little while after we had set down these gentlemen, I filled my pipe out of my box, and before I could light it, I heard a calling of chairs, chairs, and I went up towards the end of the square, where the noise was; and when I came there, they would have had me lift the chair over the rails, and I told them, if I did I could not lift it over again: but they would needs have me lift it over, and I did so; and by the light of the lanthorn I saw captain French and captain James holding up captain Coote, and they did desire me to take him into our chair, but he was in such a condition that I could not get him into the chair; it was before I could well light my pipe the chairs were called.

Att. Gen. Who did call, can you tell?

Browne. No, indeed, I cannot tell who did call chairs, but it was a voice from the upper end of the fields, and we lifted our chair over the rails into the fields, and there were two gentlemen holding up another man; I have heard it said it was captain French and captain James, and they cried out, Dear Coote, Dear Coote! and would have had him gotten into the chair, but we could not; and my lord of Warwick did then say, if any damage did come to the chair, though it were 100*l.* we should be satisfied for the damage; but we were not able to get him into the chair, and so there we left him.

Att. Gen. You say you saw two gentlemen holding up Mr. Coote, and it was a very dark night, how could you tell who those gentlemen were?

Browne. I could not see any thing of them till we came up with the candle close to them.

Att. Gen. And what did they say when you came up close to the chair?

Browne. They offered me an 100*l.* satisfac-

tion for any damage to my chair; but they could not get him in, for he was at that time dead, I believe, for we went to hale him up, and to get him into the chair, but we could not do it.

Att. Gen. Can you tell who the two persons were that held him up?

Browne. No; but by the description of the persons they had such cloaths on, as that they must be captain French and captain James; but indeed I cannot swear directly who they were that were there, nor who they were that called for chairs at the upper end of the field; but when our chair was lifted over again over the rails, and we came to the corner to see who should be taken in, there came one to us who bid us carry him to the Bagnio in Long-Acre; and thither we did go accordingly.

Att. Gen. Pray, can you tell who the persons were that held up the gentleman they would have to be got into the chair?

Browne. No, indeed, I cannot.

Att. Gen. Pray, can you describe them so as to know them, whether my lord of Warwick, and my lord Mohun were those two gentlemen?

Browne. My lord of Warwick and my lord Mohun were not there, I am sure, for I know them very well; I was acquainted with them before; and when I came up to these gentlemen with the candle, there was one of them was bigger than my lord of Warwick, or my lord Mohun; and the elder of them had other sort of cloaths than either of them had on at that time, as we could see when we came up close with the candle to them.

Att. Gen. Were there any lights of the lamps, that are usually in the streets at that time, about the square?

Browne. Yes, there were those lights; but it was a very dark night, and we could not see two yards before us, that I am sure of; and there was nobody else that I saw at that time at the upper end of the field, but those two gentlemen, holding up of captain Coote, whom we had brought up before to the square, and left him with the earl of Warwick and my lord Mohun at the bottom of the square; but whether they all went, indeed I cannot tell: we called watch; but they said it was not within their ward, and therefore they would not come. When we saw how ill Mr. Coote was upon our coming up, and that he could not get him into the chair, we went away, lifted our chair over the rails again, and carried a gentleman to the Bagnio in Long-Acre.

L. Mohun. I have a question to ask this witness, and that is, how far the place is whither he carried the chair, that is from Green-street end, to the place whither the chairs were called for again, at the upper end of the pales, where he found the two gentlemen holding up Mr. Coote, and endeavouring to get him up into the chair?

Browne. I believe it is about fifty yards as near as I can guess.

L. Mohun. I desire to know, whether he

means fifty yards from the upper end to the lower end of Leicester-fields?

Browne. Yes, I believe, my lord, it is, and better.

L. Mohun. I desire to ask him, whether Green-street be not the very lower end of the square?

Browne. Yes, my lord, the lower end of the square, coming out of St. Martin's-lane into Green-street.

Att. Gen. But did you see three other chairs in that place?

Browne. Yes, while I was filling my pipe out of my box, three other chairs did come by, and went away; but within a little while after the filling of my pipe, or rather before I could well fill it, or light it, we heard calling for chairs again towards the upper end of the fields, and we carried up our chair thither, and there we found, as I have told you, two gentlemen holding up Mr. Coote, and crying out, my dear Coote, my dear Coote!

Att. Gen. Can you tell who it was that called for the chairs the second time, when you were in the fields?

Browne. No, indeed, I cannot; but they would have us bring our chair over the rails, and we did lift it over; and when we came up to them, I saw only two gentlemen, whom I did not know who they were particularly, till we came up close to them, that we could see their cloaths, by the light of the candle in our lanthorn; and they would have had us put Mr. Coote into our chair, and he being very much wounded, they would have had us carry him away; we told them it would spoil our chair, and we could not besides lift him over the rails again; they promised we should have any satisfaction for damage to our chair, even to the value of a hundred pounds; we went to heave him up to put him into the chair, and did all we could to have got him into the chair, but we could not; so we lifted the chair over the rails again; and when we came to the corner of the rails, at the way that goes to Long-Acre, there we took up a gentleman, whom we carried to the Bagnio in Long-Acre; we called out to the watch; but they said it was not within their ward, and they would not come.

Att. Gen. Can you tell who were the persons that were at the upper end of the fields?

Browne. No, indeed, I cannot tell who they were.

Att. Gen. Was my lord Mohun and my lord Warwick the two?

Browne. No, my lord Mohun was not there, nor my lord Warwick; I know them so well, that it could not be them; one of the gentlemen was bigger than my lord of Warwick, and the other of them had other cloaths than my lord Mohun.

Att. Gen. Was that the way they walked up, when they came out of the chairs, that led to that end of the fields where you found Mr. Coote wounded?

Browne. Yes, it was.

Att. Gen. My lords, this is but the repetition of the evidence that he gave to your lordships yesterday.

L. H. S. If you have done with this witness; my lord Mohun may ask him any questions.

L. Mohun. I desire to have him asked, how far is the place where he carried the chair at first into Leicester-fields, from the place where they put over the chair within the rails, and would have taken in Mr. Coote?

Browne. It is about fifty yards, as near as I can guess.

L. Mohun. I desire to know of him, whether the place where we were set down, that came in the first three chairs, from Locket's into Leicester-fields, to the place where he found Mr. Coote supported by the two gentlemen, be not from one end of the fields to the other?

Browne. The place where we set down captain Coote is at the lower end of Green-street, and the place where we found him wounded, was at the upper end by Leicester-house.

L. H. S. I think it is understood, that Green-street, which comes out of St. Martin's-lane, is at one end of Leicester-square, and Leicester-house is at the other end.

Att. Gen. Pray, where was it that you saw the two gentlemen holding up captain Coote, and cry out, my dear Coote! my dear Coote!

Browne. It was on one side of the cross way, that leads out of the fields towards Newport street, and by Leicester house.

Att. Gen. But you say three chairs did go up towards the upper end of the fields?

Browne. Yes they did so; but our three chairs that came away first from the Greyhound tavern, set down at Green street end, and the three gentlemen that came in our chairs went up the pales to them; but whither they went I cannot tell, but soon after we heard calling for chairs again, and so we went up, where we found the two gentlemen holding captain Coote, and saying, my dear Coote! my dear Coote!

Att. Gen. But when you were called the second time, that is, into the fields, where was the place you say that you found them in?

Browne. It was within the rails, one side of the cross-way towards Leicester-house.

L. Mohun. Pray, was that the direct way that I went from the place that I was set down, that is, the lower end of Green street, to the place that they afterwards went to, which was the bagnio in Long Acre?

Browne. When captain Coote, and my lord Mohun were set down, and walked away upon the paved stones of the square, to the place where I found the two gentlemen holding up capt. Coote, was the quite contrary way from the end of Green street to the Standard tavern.

L. H. S. Who is your next witness, Mr. Attorney?

Att. Gen. The next witness that we call, is Robert Applegate. (Who was sworn.)

L. H. S. What do you ask this witness?

Att. Gen. My lords, this is the chairman

that carried my lord Mohun to Leicester fields from Locket's; he will give your lordships an account when he carried him, who he carried, and what happened afterwards, which is all but to the same purpose with the evidence that he gave yesterday. But pray, who was that whom you carried on the thirtieth of October last to Leicester fields?

Applegate. I carried my lord Mohun from Locket's, at the Greyhound tavern in the Strand, to Leicester fields.

Att. Gen. Pray, how many chairs were there of you that went away together?

Applegate. There were three of us that went away together, one carried my lord Warwick, we my lord Mohun, and the third carried captain Coote, which was the first chair that went away.

Att. Gen. Whither did you go?

Applegate. We went to the corner of St. Martin's lane.

Att. Gen. Who do you say were in the other two chairs?

Applegate. My lord of Warwick, and my lord Mohun.

Att. Gen. When they came out first, what orders or directions were given?

Applegate. My lord Mohun said, That he and my lord of Warwick, and captain Coote, would go all three together down to Westminster, and there they would all lie together, or be together that night.

Att. Gen. What answer was given to what my lord Mohun said?

Applegate. Indeed I do not remember any answer that was given at all; but after that my lord Mohun went into the chair, and ordered us to follow down the other two chairs towards Westminster, and we put up the chair and came away; and when we came to St. Martin's lane, the chair that carried capt. Coote turned up the lane, and we being ordered to follow the other chairs, went up the lane too; but my lord Mohun perceiving that they were not going down to Westminster, called out to stop, just when we were entered into St. Martin's lane, over against the back door of the Cross-keys tavern, and made the other chairs to stand, and all the three chairs were set abreast before that place, and my lord Mohun asked capt. Coote, whither he was going? And he answered, to Leicester fields: He begged of him, as one would beg for an alms, that he would not go that night, for the business could not be done that night, and it was better to put it off till the next morning.

Att. Gen. Did they name what the business was, that was to be done?

Applegate. No; but my lord Mohun did say, it was impossible to be done that night.

Att. Gen. Well, and what happened afterwards, while you were in that place?

Applegate. While we were there, three other chairs passed by us on the other side of the way, and going forward up the street, capt. Coote ordered their chairs to follow, and so we did to Green street end, and there we set them down.

Att. Gen. Pray, can you remember what was said by my lord Mohun at the time when the other chairs passed by?

Applegate. He was then desiring and begging of capt. Coote to go home to Westminster, telling him that it could not be done that night; but it must be deferred till the next morning; but capt. Coote said he would not delay it till the next morning, but he would go to Leicester fields that night; and all three chairs were ordered to go forward, and we did go on forward to Leicester fields; my lord Mohun, indeed, did beg and desire as heartily as, I say, a man for an alms, that they would let it alone for that night; but capt. Coote would not, and ordered his chair to go forwards.

Att. Gen. You say, my lord Mohun begged as heartily as if it were for an alms to defer it for that night?

Applegate. Yes, he did so; so that I do really think that he was not concerned in the matter.

Att. Gen. If he were so earnest to defer and put off the business, how came you to carry him thither, that night? What expressions did he use particularly in St. Martin's lane, after the other chairs were passed by?

Applegate. He said, If you must go, I will go with you and see it; and he bid us take up and follow the other chairs wherein capt. Coote and my lord Warwick were; and we did go.

Att. Gen. And where did you set my lord Mohun down?

Applegate. At the hither end of Leicester-square, at the corner of Green-street, the lower corner of the paved stones, going up to Leicester-house.

Att. Gen. What became of the three gentlemen that you set down at the end of Green-street?

Applegate. They went all three together up the stone pavement, towards the upper end of the square, towards the Standard tavern, I think.

Att. Gen. Did they go together, or did they go asunder?

Applegate. They went together, I think; I did not see them part one from another.

Att. Gen. Pray, did you see my lord Mohun afterwards?

Applegate. No, I did not.

Att. Gen. What became of you afterwards?

Applegate. I staid a little at the lower end of the square to take a pipe of tobacco, and when I had filled my pipe, I heard calling chairs, chairs, again, at the upper end of the square; and when we brought up our chair to the upper end of the fields, the first man that I did see was my lord of Warwick, who would have had us put over our chair within the rails; but we told him we could not get it over again if any one was put in it; but if they would come out into the square, there we were ready to carry them any where; and when we came to the upper end of the square, there was captain French, and we took him into the chair,

and he bid us carry him to the Bagnio in Long-acre; and at Newport-street end he would have had us stop and pull off his cloaths, for he believed he was a dead man.

Att. Gen. Pray, who did you see there at the upper end of Leicester-fields?

Applegate. Nobody indeed, but my lord of Warwick and Mr. French.

Att. Gen. Nobody but them two?

Applegate. No; nobody but them two.

Att. Gen. Where do you say that was, that the calling for chairs was, and where you brought your chair?

Applegate. It was just at the upper end of Leicester-fields, by Leicester-house, and by the Standard-tavern.

Att. Gen. Who was it that you there took up?

Applegate. It was captain French.

Att. Gen. Whither then did you carry him?

Applegate. We were ordered to go to the Bagnio in Long-acre; and thither we, and another chair that carried my lord Warwick, did go; and when we came there, we did knock a good while before we could get any body up; and when they were let in, we came away, and were bid to call for our fare the next morning.

Att. Gen. Pray, where was it that you took up captain French?

Applegate. It was the upper end of all of Leicester-fields.

Att. Gen. And you went away with him, did you?

Applegate. Yes, as soon as ever we took him up; it was as soon as ever we could, at the outside of the rails. I was the first chair that, upon the calling for chairs after they came thither, was by the Standard-tavern, and from thence we went into Long-acre.

Att. Gen. Whereabout is the Standard-tavern?

Applegate. It is at the further end of the fields by Leicester-house; it is by Cranburne-lane, which is the street that leads into Newport-street, and so into St. Martin's-lane; and then we were to go to the Bagnio in Long-acre.

L. H. S. My lord Mohun, will you ask this witness any questions?

L. Mohun. Yes, my lord, I have a question or two to ask him, I desire to ask him, Whether, when we were going along, and the chair in which capt. Coote was, turned up St. Martin's-lane, I did not call out to have him stop, and know whither they were going?

Applegate. Yes, my lord, you did.

L. Mohun. Pray, whither did I bid you go, when you first took me up at Locket's?

Applegate. My lord Mohun bid me follow those chairs; but go down to Westminster, for he said they all three would go together, and lie together that night.

L. Mohun. My lords, I desire this man may be asked, Whether there were not several ways of going out of the fields, besides those of Green-street and the Standard-tavern?

Applegate. Yes, my lord, no doubt there are.

L. Mohun. Then I will leave it to your lordships to make the observation; for there is no evidence that I was even seen in the field after I alighted out of the chair at Green-street end; and I hope your lordships do observe that he has told you, I was earnest in begging captain Coote to defer going to Leicester-fields till the next morning, and begged as heartily of him for it, as any beggar would do for an alms.

L. H. S. My lord, their lordships, no doubt, have made that observation; for he did say so.

L. Mohun. My lords, I have no more to ask him.

L. H. S. Mr. Attorney, who is your next witness?

Att. Gen. Our next witness is Peter Ketro, who likewise was a chairman that carried my lord Mohun into the place where the fact was done.

[Peter Ketro was sworn.]

Att. Gen. Pray, will you acquaint my lords who you carried upon the 30th of October last, from the Greyhound-tavern to Leicester-fields?

Ketro. Upon the 30th of October last, in the morning (which was Sunday) very early, we were called to the door of the Greyhound-tavern, and when we came there, there were several other chairs there; for there was no coach, it seems, to be had.

Att. Gen. And who was in your chair?

Ketro. My lord Mohun; and there were two other chairs that went away together, wherein were captain Coote and my lord Warwick.

Att. Gen. And whither did you go from thence?

Ketro. We went along the Strand, and when we came to the end of St. Martin's-lane, the chair that capt. Coote was in, we supposed by his order turned up the lane; for my lord Mohun had given us order to go down to Westminster; and then when we came there to the end of St. Martin's-lane, he called out to stop, and to have the other chairs stopt, and they stood still at the back door of the Cross-keys-tavern, which is at the end of St. Martin's-lane, and all the three chairs did make a stand at that place, and my lord of Warwick, and my lord Mohun and captain Coote talked together; and my lord Mohun did desire capt. Coote to go down to Westminster, and to put off the business for that night; for nothing of business could be done: then my lord of Warwick did say, if they did go on he would go on with them; but my lord Mohun did endeavour to persuade them to go down to Westminster to lodge, for nothing could be done that night; but when the other three chairs passed by, on the other side of the way, and captain Coote would needs go forwards to Leicester-fields, my lord Mohun did bid us take up and follow them; and he said, if they would go, he would go and see what came of it; so we took up, and followed the other chairs, and went up the lane, and

into Green-street, to the lower end of Green-street next the square, and there our three chairs set down my lord Warwick, my lord Mohun, and captain Coote, and were discharged.

Att. Gen. And what became of them after?

Ketro. There they went up upon the broad-stones, up towards the upper end of the fields.

Att. Gen. Did they all go together, or did they part?

Ketro. They went together, for any thing I know; I saw no parting, and indeed it was so dark a night, that I cannot tell what became of them after they went out of the chairs: It was one of the darkest nights that ever I saw.

Att. Gen. Well then, pray, what happened after that?

Ketro. I went to light my pipe of tobacco, and before we could light a pipe of tobacco, there was calling at the upper end of the square for chairs again; and so we went with our chair to the upper end of the fields; and when we came there, somebody called out to have us lift our chair over within the rails; but we told them, if we did so, we could not get it over again, if any body were put into it; and so we were bid to go to the end of the rails, in order to the getting out from that place, and getting in of any body that was to go into the chair; and when we came to the end of the rails we took up capt. French, and he bid us carry him to the Bagnio in Long-acre, and we did so; and at Newport-street end he would have had us have pulled off his cloaths, for he said he believed he was a dying man; but we carried him on to the Bagnio in Long-acre, and there came after us the lord of Warwick in another chair; and there we set them down.

Att. Gen. I have a question to ask you, friend; did you not see my lord Mohun after you set him down at Green-street end?

Ketro. No, indeed, not I: I did not after he went out of the chair.

Att. Gen. Can you tell whither he went after he went out of the chair?

Ketro. No, I cannot tell whither he went; they all three went up the paved stones together; but whither they went I cannot tell.

Att. Gen. Did you hear of any other chair that was at the end of the fields at that time?

Ketro. There was another chair at that time, at the upper end of the fields.

Att. Gen. Did you hear them desire to take Mr. Coote into that chair?

Ketro. No, I did not.

Att. Gen. Nor do you know any thing of their putting Mr. Coote into a chair?

Ketro. No, indeed, not I; what they did as to the other chair that was before, they can best tell, for I cannot.

L. H. S. Who is your next witness, Mr. Attorney?—*Att. Gen.* Richard Edwards.

L. H. S. What do you call him to?

Att. Gen. Because we would not trouble your lordships with the repetition of every one of the witnesses that were here yesterday; this is the man that carried Mr. Dockwra into the field.

[Edwards was sworn.]

L. H. S. Mr. Attorney, What do you ask this witness?

Att. Gen. Pray do you acquaint my noble lords here, who you carried in your chair to Leicester-fields?

Edwards. Indeed, I cannot tell; there were three chairs that took up three persons at the Greyhound-tavern in the Strand, after three other chairs were gone away, and every one had a gentleman in them; I, for my part, did not know who was in our chair; but when we shut up the chair we were bid to go to the Standard-tavern in Leicester-fields; and thither we did go, and there we set down the gentleman that was in our chair, and away we went; and as we went up St. Martin's-lane, we passed by the three other chairs that turned up before, at the back-door of the Cross-keys tavern.

Att. Gen. Did you see the other three chairs in Leicester-fields afterwards?

Edwards. No, indeed, I did not; but went up to the Standard tavern, and set down the gentleman that was in our chair, and there left him, and went away.

Att. Gen. Pray, can you tell who it was that you carried?

Edwards. Indeed, I cannot very well tell; but I believe it was captain James, or Mr. Dockwra.

Att. Gen. When you came to the Standard-tavern, pray, what happened? What passed there?

Edwards. To the best of my knowledge, I took hold of the knocker of the door; and knocked at the door, and the gentleman came out and was set down there: and he gave me a shilling, and away I went with my chair.

Att. Gen. When you set him down at the Standard-tavern, pray, what did he say?

Edwards. He gave me a shilling, and bid me go about my business; and so we went away.

Att. Gen. Was you there when you heard them call chairs back?

Edwards. No, we went away as soon as we had set him down at the Standard-tavern.

Att. Gen. Did you observe which way they went after you set him down?

Edwards. No, indeed, I did not; I never minded which way they went, after we set him down.

Att. Gen. Which way did you go?

Edwards. We went away down towards Charing-cross.

Att. Gen. Did you see any other chairs in the square when you went down?

Edwards. Yes; there were other chairs at the other end of the square.

Att. Gen. Did you see any gentlemen as you came down, walking towards the Standard tavern, upon the paved-stones.

Edwards. No, indeed, my lords, not that I remember; but I did see the other three chairs as I passed by Green-street end: who

were in them, or what was become of them that were in them, that I cannot tell.

Att. Gen. What did they say to you any of them at that time?

Edwards. They asked us if we were going away, and we told them yes; we were discharged.

Att. Gen. But pray, did you not meet any of the other gentlemen upon the paved stones?

Edwards. No, indeed, I did not see, to the best of my remembrance, any other gentleman upon the paved stones.

Att. Gen. What did the other chairmen say to you?

Edwards. They asked if we were coming away? And we left them behind us.

L. H. S. Has my lord Mohun any questions to ask him?—*L. Mohun.* No, I have not.

L. H. S. Mr. Attorney, who is your next witness?

Att. Gen. Jackson, who was the chairman that carried captain James. (He was sworn.)

Att. Gen. Pray, will you acquaint my lords who you carried away from Locket's to Leicester fields?

Jackson. Captain James: There were six chairs in all: I do not know who went in the other chairs, but in the three chairs that went together when we went, there was captain Dockwra, captain French, and captain James.

Att. Gen. And where did you set him down?

Jackson. At the Standard tavern, in the square in Leicester fields.

Att. Gen. What became of him after you set him down?

Jackson. We knocked twice at the tavern door, and then he gave us a shilling, and we went away presently, and went down on the left hand upon the paved stones, towards Green street end.

Att. Gen. Did you meet any persons coming up upon the paved stones?

Jackson. Yes, my lord, I did.

Att. Gen. Can you tell who those persons were?—*Jackson.* Indeed, I cannot tell.

Att. Gen. How many were they in number?

Jackson. They were two or three; but it was so dark, that I cannot tell how many they were.

Att. Gen. Which way were they walking?

Jackson. They were going up towards the middle street.

Att. Gen. How far was that from the Standard tavern?

Jackson. It might be about sixty yards from the Standard tavern.

Att. Gen. You say there were three chairs standing at the end of Green street when you came by?

Jackson. Yes, there were so.

Att. Gen. Had you no discourse with them?

Jackson. No, indeed, I had not.

Att. Gen. Did you not ask them, why they stayed there?

Jackson. No, indeed, I did not; we passed by and went home.

Att. Gen. You know my lord Mohun, don't you?—*Jackson.* Yes, I do, very well.

Att. Gen. Was not my lord Mohun in that company?

Jackson. He was, when the six chairs were called to Locket's; but I did not hear any discourse, that I can remember, that passed among them, nor do I know, or did hear, what became of my lord Mohun afterwards.

Att. Gen. Were those the other three chairs that went away from Locket's first, that you saw at Green street end?

Jackson. Indeed, my lords, I believe so; I cannot swear that they were those three chairs; when we had set down captain James, we did not look back any way at all, but went away home, it being so late and so dark.

L. H. S. My lord Mohun, will you ask this witness any questions?

L. Mohun. No, my lord.

Att. Gen. Then, my lord, we shall call William Salmon, who was the surgeon that did search the wound by the coroner's command, when he took the inquisition upon the view of the body. (Who was sworn.)

Att. Gen. Pray, did you view the body of Mr. Coote after he was dead?

Salmon. Yes, I did view his body by the command of the coroner at the watch house, where it lay in St. Martin's lane.

Att. Gen. Pray then, will you acquaint my lords what wounds you found upon the body?

Salmon. There was one upon the left part of the breast, near the collar bone; which, upon probing, I found to be half an inch in breadth, and four or five inches deep downward; the other was a wound that was in his left side, just under the short ribs, and that was upward; and upon probing of it, I found it was about the breadth of an inch at the orifice, and about the depth of five or six inches, and pierced through the diaphragma.

Att. Gen. Pray, did you observe any difference in the wounds, or in the orifice of them?

Salmon. That below was a large wound, larger than the other.

Att. Gen. Were the wounds, do you think, given with two swords, or with one and the same sword?—*Salmon.* Indeed, I cannot tell.

Att. Gen. Did you look upon either, and which of them, to be mortal?

Salmon. I looked upon both to be mortal.

L. H. S. If you have done with him, Mr. Attorney, will my lord Mohun ask him any questions?

L. Mohun. No, I shall ask him no questions, for I think I need not; I was never proved to be in the company, in the place where the fighting was.

Att. Gen. We have done with calling of witnesses, till we hear what my lord Mohun says to it.

L. H. S. My lord Mohun, this is the time (the king's evidence being finished) for you to call your witnesses, and make your defence.

L. Mohun. My lords, I shall not call many

witnesses, for I think there is nothing that fixes any thing of guilt, as to capt. Coote's death, as to me; but I shall call one witness that was here (as I understand) yesterday, but not examined, and that is a person that saw me afterwards, and knows that I had a wound in my finger laid open, and that wound was received at Locket's, by endeavouring to part them, when they were quarrelling there at that time. (The witness stood up.)

L. H. S. Though you are not upon your oath, yet you are as much obliged, in justice and conscience, to speak the exact truth, as if you was upon your oath; therefore have a care what testimony you give.

Witness. Yes, my lord.

L. H. S. What is the question you would have this witness asked?

L. Mohun. What he knows of my being wounded about this time? and what I declared concerning that wound, how I received it?

L. H. S. I will not refuse to ask the question, but I must acquaint your lordship that it signifies nothing in point of evidence at law, what you yourself did declare after the fact was over. It is material what you did to prevent this mischief before it happened, but not what you said or declared after the thing was done. You hear my lord's question, what say you to it?

Witness. I was at my lord Mohun's several days after this business happened, at the lodging where he lay, and where I saw him: he had a hurt in his hand, and it was laid open, it was in the finger; and that, he said, was all he got by endeavouring to part people from fighting.

Att. Gen. Pray, Sir, when was this?

Witness. It was several days after the death of Mr. Coote.

L. H. S. I told your lordship before, that in point of law such evidence would signify nothing; because your declaring any matter, after the thing was done, in relation to the fact, could not be admitted as legal evidence; if any of my lords be of another opinion, I suppose they will declare it.

L. Mohun. My lords, I submit it to your lordships; I only desire he may be asked, whether he saw my hand or no? and how it was?

Witness. I saw my lord's finger, and it had been laid open some time before; and he said, he had received that wound by endeavouring to part capt. French and capt. Coote: that is all I know of the matter.

Att. Gen. But, pray, when was that that he declared so? How long after the death of Mr. Coote?

Witness. It was several days after that.

L. H. S. You hear, in point of law, that can be no evidence at all: if you have no other witnesses to call, your lordship would do well to sum up your evidence, and make what observations you think fit upon the evidence which has been given for the king.

L. Mohun. My lords, I hope I shall make my defence against this accusation, with all

the modesty and submission to your lordships that becomes me. I am very much ashamed to be brought before your lordships upon any such account as this again, after having been once before your lordships upon such an account before. I may very well say, I am not guilty at all of having any hand in Mr. Coote's death; and I can assure your lordships, I will avoid all occasions of giving you any trouble of this nature for the future: I do not doubt but to acquit myself of all guilt, in relation to this matter; and, indeed, with submission to your lordships, there has been no evidence given, relating to me, that does infer any guilt upon me, to prove that I was at the place where the fact was done; therefore I shall only make some few little remarks upon what has been said, and leave it all to your lordships' consideration.

The king's counsel first have called the drawer of the house, and he has satisfied, that I did so far endeavour to part them, that I threatened to send for the guards and secure them, if they would not go home; and when they went into the chairs, I went into my chair, on purpose to follow them down to Westminster, whither I would have had them gone. The prick that I got in my finger, of itself speaks, that I endeavoured to part them, and so the drawer he has told you; I am sure it was the occasion of a great deal of pain to me, it being forced to be afterwards laid open. The chairman that carried Mr. Coote swears, that I, at the door of the tavern in St. Martin's-lane, did make them stand, and when I came up to them, I begged, as for an alms, that they would go home; and I asked Coote whither he was going? which proves that I was not conscious of any design of going to fight at that time. Your lordships are likewise told, that when he came to Green-street end, I was set down upon the paved stones. I was so, indeed, and I went up about five or six yards, but that is all that is proved; but I did take the quite contrary way to the place where Mr. Coote was wounded. Then there was another chairman, one Applegate, and truly what use they make of him, I cannot imagine, as an evidence against me; for he says, I was very earnest in St. Martin's-lane to hinder any quarrel, and indeed at the tavern door, at Locket's, I was so at first; and when we came to St. Martin's-lane end, he says, that I ordered them to make them stop, and ask Coote whither he was going? And he saying he was going to Leicester-fields, I endeavoured all I could to persuade him to the contrary, and did entreat him that he would go no farther, but go down to Westminster to his lodging, or lodge with me; but Mr. Coote would not give me time, at that time, the other chairs coming by, to give him further reasons, but would go away: and then it is objected, that I should say, that if they would go, I would go and see: that was, my lords, I would go on till I could have a further opportunity to prevent any fighting among them: and the witness Ketso says, my

lord of Warwick did bid the chair to follow the other chair in which captain Coote was. My design was for Westminster, to go to my lodgings; and when we came to the end of the square, if I did go up the whole stones, it was directly the contrary way to the place where it is proved this fact happened. For the next witness, Edwards, he says he saw nobody walking upon the paved stones; and truly, I did go the direct way into Newport-street: and for my not appearing before, it was for avoiding confinement; and I must submit the whole matter to your lordships, how far any guilt is fixed upon me, not being proved to be in the field at the time when they fought, or seen to be in the company when they came up and found Mr. Coote wounded, and dying, or dead. It is a plain case I could have no hand at all in his death; and so I think I need give no further trouble to your lordships, for I believe your lordships cannot but be satisfied, that as I have pleaded, I am not guilty of killing this gentleman: nay, it is impossible that I should go into the field to be a second, when my own right hand was wounded, for I was not able to hold my sword in my sword hand, because of that wound. I submit the matter entirely to your lordships, from whom I am sure to meet with every thing that will be suitable to honour and justice.

L. H. S. The king's counsel are now to sum up the evidence for the king.

Mr. Solicitor General (sir John Hawles,) began to sum up the evidence for the king, but his voice was so low, and the noise in the Hall was so great, that he could not be heard; and therefore the Lord High Steward moved the house that he might stand by the prisoner at the bar, which was something nearer than the place where the king's counsel stood, as was done the day before; and it was ordered accordingly.

L. H. S. Mr. Solicitor, pray raise your voice as much as you can, that all my noble lords may hear you.

[Several of the lords did move, That one that had a better voice might sum it up, and particularly Mr. Cowper; but it being usually the part of the Solicitor General, and he only having prepared himself, he was ordered to go on; but for the better hearing of him, several of the lords towards the upper end of the house, removed from their seats down, as they did the day before, to sit upon the wool-packs.]

Sol. Gen. My lords, I am of counsel for the king against this noble lord, my lord Mohun, the prisoner at the bar, who has been upon his trial this day, and it comes to my turn to sum up the evidence that has been given against him, which is but a repetition of what your lordships, no doubt of it, have taken exact notice of; but I must shortly sum up the chief of the particulars thereof, and make a few remarks what of that evidence sticks particularly upon my lord Mohun. The first witness was

the drawer of the house, at the Greyhound in the Strand, who gives you an account, who were at his master's house the 29th of October last, and particularly, that my lord Mohun was there in the same company wherein this gentleman was that was unfortunately killed, and that he continued in that company till very late that night, or rather, very early the next morning; when, after the reckoning was paid, they came all down to the bar and called for coaches; and he tells you, that he was sent out, and he tells you what he was sent for, he was sent for coaches, and so cannot give any account what passed while he was gone; but when upon calling for coaches, none could be had, there was order for chairs to be called, and chairs were brought to the door; and when he came in again he heard the clashing of swords, and there were three on the one side of the bar, and three of them on the other: indeed he does say, he did not see when the swords were drawn; but at that time they were putting up their swords, my lord Mohun was in the company; upon which I would observe to your lordships that there had been some fighting; for the witness says, upon my lord's question, that my lord called for a napkin to put his hand in, for his finger was cut; and he said, this is all that I have got by endeavouring to part them; so that it shews there was a quarrel, and my lord Mohun was in it. When the chairs were brought to the door, they went into them; there went Mr. Coote into one, into the second my lord of Warwick, and into the third my lord Mohun; so that still my lord Mohun was in the company, and they went away together; and though it is pretended by my lord, that he did all he could to prevent the quarrel, yet he gave directions to the chairmen that carried him to follow the other chairs, and your lordships perceive what the business was that they went about; and the other three chairs followed after presently, so that they all went away together; nay, my lord himself does not disown his being in the company till they came into Leicester-fields. Next I would observe what fell from Browne, who carried the very gentleman that was killed, Mr. Coote, that my lord Mohun was in one of the three first chairs, and that they all went together, till that my lord Mohun called out to stop, upon the turning up into St. Martin's-lane; and though they stopped in St. Martin's-lane, and my lord Mohun did intreat them to let it alone at that time, yet it was only to let it alone till the morning; and when the other three chairs passed by on the other side of the way, and Coote would have them go on, my lord Mohun said, if they would go on, he would go with them and see it. Applegate, the chairman, that carried my lord Mohun, says the same: and so it is plain my lord Mohun did go on with an intention to make one in the affray; for Applegate says, that when my lord Mohun could not prevail upon his persuasions, and when Coote went away, after the other three chairs were passed by, my lord Mo-

bun said, if you do go, I must go and see it; and they did go all together: and the chairman says, he set my lord Mohun down at the end of Green-street, at the lower end of the fields, where the other two chairs set down captain Coote and my lord of Warwick, and that they all three walked up together towards the Standard tavern; still all this proves my lord did go there, and that he himself did say he would go and see it: and it is plain that my lord Mohun did go as far as Leicester-fields, and it is only his declaration concerning himself, without any proof, that he went away and did not go into the fields, to the place where the fact was done; and we think it is sufficient proof that he was one of them that were concerned, because we do prove, that he was all along in the company till the very time that they came into the place where the thing was done. Then there is the chairman that carried Mr. James, and he tells your lordships, that the three first chairs that went up St. Martin's-lane went to the Standard tavern, and there knocked at the door, and paid the chairmen, and went out of their chair; and so says the other chairmen that carried capt. Dockwra and capt. French; and they say also, that when they came down the paved stones again, they heard chairs called for, but they did not interpose at all in the matter; but the other two chairs it seems did, for they went up to the upper end of the square, where there were two persons holding up Mr. Coote, and after they put the chair over the rails, in order to have him carried away in a chair, but they could not get him into the chair. I would likewise observe from the evidence of the surgeon, who gives you an account of what nature the wounds were; one was in the breast, near the collar-bone, on the left-side; the other was under the short ribs, on the left side too, which could not be given him by the person that he was fighting with, he being a right-hand man, as was proved by his servant. My lord Mohun has called but one witness, which is only about a little circumstance of his being wounded in the hand, and having the wound laid open, but that was two days after the fact was done; my lord Mohun could not but know that the matters he was to answer, related to a time before. It must be agreed to me, that they all three, my lord of Warwick, my lord Mohun and Mr. Coote, went all away together, that they were carried to Leicester-fields, that they were set down together, and walked up together upon the stone pavement, when the others were gone towards the upper end of the fields; so that in all probability, they all went together into the place where the fight was, and were all concerned; and if so my lord Mohun must be equally guilty with the rest, my lord Mohun knowing what business it was they were going about. It must be left to your lordships, whether he shall not be presumed to be there when the fact was done, especially his saying when he could not prevail in St. Martin's-lane, to put the matter off till another time, that if they did go on, he

would go and see it; so that putting these two circumstances together, his going in one of the chairs with my lord Warwick and Coote, and what he said after when the chairs stopt in St. Martin's lane, we think are circumstances to induce your lordships to believe, that he was present at the time of the fact committed, or very near the place; and if that be so, how far he is guilty must be submitted to your lordships' consideration; and this is all that I shall trouble your lordships with without repeating the particular evidence, which your lordships I am sure very well remember.

L. Mohun. My lords, I desire I may say one word in answer to what Mr. Solicitor has observed. I think your lordships have had no evidence given you where Mr. Coote was killed; but only the chairman that was desired to bring over his chair within the rails, says, it was towards Panton-street, which is quite contrary to the place where I was set down, at Green-street end; I must then be at a very great distance from the place where the fact was done.

L. H. S. If all have done on both sides, then your lordships have nothing left but to consider of the evidence which has been given, which, I suppose, you will do among yourselves.

Lords. Ay, adjourn, adjourn.

L. H. S. Is it your pleasure, my lords, to adjourn into the House of Lords?

Lords. Ay, ay.

L. H. S. This House is adjourned into the House of Lords.

[And the Lords went back in the same order to the House of Lords, and there they staid for about two hours time, debating the matter among themselves, and afterwards returned again into the court in Westminster-hall, and were seated all in their places, as they were before, and the Lord High Steward was seated in the chair before the throne.]

Cl. of the Cr. Serjeant at Arms, make Proclamation.

Serj. at Arms. O yes, O yes, O yes, my lord high steward of England, his grace, does straitly charge and command all manner of persons here present to be uncovered, and keep silence upon pain of imprisonment.

L. H. S. Is it your lordships' pleasure to go on now to give your judgment?

Lords. Ay, ay.

L. H. S. Then I must pray your lordships to give me time to write down your opinions distinctly, that I may be able to acquaint you with certainty of the numbers.

Lords. Ay, ay.

[Then the Lord High Steward stood up, and put the question to every lord, beginning with the youngest baron, to know what his judgment was; and the lord to whom he called, stood up in his place uncovered, and laying his right hand upon his breast, delivered his judgment in the manner following.]

L. H. S. My lord Bernard, Is Charles lord
3 Y

Mohun guilty of the felony and murder whereof he stands indicted, or not guilty?

L. Bernard. Not guilty, upon my honour.

[The same question was asked severally of all the Lords, who in the same form delivered the same opinion.]

[Then the Lord High Steward seated himself again in the chair, to take the number of the peers who had given their judgment.]

L. H. S. My lords, 87 of your lordships are present, and you all are unanimously of opinion, That my lord Mohun is not guilty of the felony and murder whereof he stands indicted.

Lords. Ay, ay.

L. H. S. Let the prisoner be called to the bar.

Cl. of the Cr. Serjeant at Arms, make proclamation.

Serj. at Arms. O Yes, O Yes, O Yes, my Lord High Steward of England, his grace, does straitly charge and command all manner of persons here present to keep silence, upon pain of imprisonment.

Cl. of the Cr. Serjeant at Arms, make proclamation.

Serj. at Arms. O Yes, O Yes, O Yes, chief governor of the Tower of London, bring forth the body of your prisoner Charles lord Mohun, whom you have committed to you, in order to be brought hither this day, upon pain and peril will fall thereon.

Then he was brought forth to the bar, and the Lord High Steward addressed himself to him in this manner:

L. H. S. My lord Mohun, you have been indicted for the murder of Mr. Richard Coote, upon which indictment your lordship has been arraigned, and upon your arraignment has pleaded not guilty, and for your trial you have put yourself upon your peers, my lords here present; and they have heard the evidence, and have considered of it, and delivered their judgment upon the whole matter; and I am to acquaint your lordship, they are all unanimously of opinion, that your lordship is not guilty of the felony and murder whereof you stand indicted; and therefore your lordship is discharged from your imprisonment, paying your fees.

Then the lord Mohun made his reverence to the Lords, and expressed himself thus:

Lord Mohun. My lords, I do not know which way to express my great thankfulness and acknowledgment of your lordships' great honour and justice to me; but I crave leave to assure your lordships, that I will endeavour to make it the business of the future part of my life, so to behave myself in my conversation in the world, as to avoid all things that may bring me under any such circumstances, as may expose me to the giving your lordships any trouble of this nature for the future.* [And then making his reverences to the lords, he went away from the bar.]

Cl. of the Cr. Serjeant at Arms, make proclamation.

Serj. at Arms. O Yes, O Yes, O Yes, All manner of persons here present, are commanded to keep silence, by my Lord High Steward of England, his grace, upon pain of imprisonment.

L. H. S. My lords, the trial being at an end, there is nothing remains to be done here, but the determining the commission.

Lords. Ay, ay.

L. H. S. Sir Samuel Astry, let proclamation be made in order to the dissolving the commission of High Stewardship.

Cl. of the Cr. Serjeant at Arms, make proclamation.

Serj. at Arms. O Yes, O Yes, O Yes, My Lord High Steward of England, his grace, does straitly charge and command all manner of persons here present, and that have here attended, to depart hence in the peace of God, and of our sovereign lord the king; for his grace, the Lord High Steward of England, intends now to dissolve his commission.

And then the White Staff being delivered to his grace, the Lord High Steward, he stood up, and holding it in both his hands, broke it in two; and then leaving the chair, came down to the Wool-pack, and said, Is it your lordships' pleasure to adjourn to the House of Lords?

Lords. Ay, ay.

L. H. S. This House is adjourned to the House of Lords.

And so they went back in the same order that they came into the court, and all the assembly broke up.

* He was nevertheless killed in a duel by the duke of Hamilton, who also fell. See vol. 12, p. 950, note.

404. A brief Account of the Trial of CHARLES DUNCOMBE, esq. before the Lord Chief Justice Holt, at the King's Bench Bar in Westminster-hall, upon an Information for false indorsing of Exchequer Bills, and paying them into the Exchequer, as if they had been first paid into the Excise Office upon that Branch of the Revenue: 11 WILLIAM III. A. D. 1699.* [Now first printed from a MS. in the Possession of the Earl of Radnor, who has obligingly imparted it for this Collection, A. D. 1812.]

June 17, 1699.

THE Court waited a long time for D'Acosta the Jew, the king's evidence, upon which my Lord Chief Justice reproved the king's counsel, and asked them if they had ordered it so on purpose; to which Mr. Attorney replied, that D'Acosta promised to be here. One of the defendant's counsel said it was the Jews' Sabbath; that the Jews would not fight on the Sabbath, but rather be cut in pieces, and that the king's counsel might have dispensed with the attendance of the defendant's counsel. Mr. Attorney answered, that D'Acosta promised to be there, and made no objection as to the Sabbath, but he supposed the defendant's counsel had put him in mind of it.

Mr. D'Acosta being come, the Jury was sworn as follows: Warwick Lake, esq.; Leonard Hammond, esq.; Richard Bever, esq.; Thomas Blackmore, William Fenn, Francis Heath, Francis Peters, Michael Shepherd,

* "Another sort of offenders were this session animadverted upon by the commons, but had the good fortune to escape with impunity. The exchequer bills were at this time of very great use in the nation, by supplying the scarcity of money, during the re-coining of the silver species. Now because there was an interest of 7*l.* 12*s.* per ann. allowed upon the second issuing of these bills out of the exchequer, after they had been paid in, on any of the king's taxes, whereas at their first issuing out of the exchequer they bore no interest, this encouraged several of the king's officers, both in the exchequer, the customs, and the excise, to contrive together to get great sums of money by false indorsements on these exchequer bills, before they had circulated about, and been brought into any branch of the king's revenue. The most considerable persons, who had carried on this unwarrantable practice, were Mr. Charles Duncombe, receiver-general of the excise; Mr. John Knight, treasurer of the customs; Mr. Bartholomew Burton, who had a place in the excise-office; and Mr. Reginald Marriott, one of the deputy tellers of the exchequer; which last, to procure his pardon,

Richard Poston, Matthew Fern, Robert Hedin, James Cole.

The Jury being sworn, Mr. Attorney exhibited the Information, which being read,

Mr. *Montague*, counsel for the king, opened it to the effect following:

The Record now read, is an Information brought by Mr. Attorney against Charles Duncombe, esq. for a high misdemeanor in the execution of his office as cashier of the excise. It shews that the lords of the exchequer had directed bills to be issued out, and that Mr. Duncombe being cashier of the excise had received 20,000*l.* and more of the king's money upon that branch of the revenue, and according to his duty ought to have paid it in specie for his majesty's use as the commissioners directed. On the 5th day of May, the commissioners of the excise ordered him to pay 10,000*l.*; notwithstanding which, he, intending to defraud the king and to lessen the credit of the exche-

compounded to accuse the rest. Upon a full proof of the matter, Duncombe and Knight, who were members of the house of commons, were first expelled the house, and committed prisoners to the Tower; Burton sent to Newgate, and bills ordered to be brought in to punish them. The bill against Mr. Duncombe, whereby a fine of near half his estate, which was computed at 400,000*l.* was set upon him, quickly passed the house of commons, notwithstanding the opposition that was made to it, particularly by sir Thomas Trevor the attorney-general. But, being sent up to the house of lords, and the house being equally divided, the duke of Leeds gave his casting vote for rejecting the bill. But, Mr. Duncombe being set at liberty by the order of the house of lords, without the consent of the commons, the latter resented it to that degree, that they caused him to be remanded to the Tower of London, where he continued till the end of the session. The bills against Knight and Burton had the same fate; and so all the noise this sort of forgery had made, in town and country, was hushed on a sudden, and no more heard of it." Tindal.

quer bills, did on the 8th of May pay in 7,860*l.* principal money in exchequer bills, falsely indorsed, for money that he ought to have paid into the exchequer in specie, he knowing that those bills had never passed the revenue of the excise.

Mr. *Attorney* (sir Thomas Trevor) argued next to the effect following, viz. That Mr. Duncombe had received into his hands as cashier of the excise the sum of 20,000*l.* and more of the king's money, which had been paid in for the revenue of the excise in old money, sent afterwards to the Tower to be re-coined, and came back again in milled money to Mr. Duncombe the cashier. This money being in his hands, he was to have paid in according to the direction of the commissioners of excise. They ordered 20,000*l.* to be paid for several uses, and part of it being 10,000*l.* and more to be paid into the exchequer by their order of the 5th of May for that purpose. But Mr. Duncombe intending to make an unlawful gain to himself, and to prejudice the king, did not pay in milled money according to their order, but purchased to the value of 7,860*l.* in exchequer bills upon a great discount for it; at that time exchequer bills issued for such and such sums were discounted at 5*l.* per cent. so that he saved 5 per cent.; this came to 400*l.* more or less, that he gained by this bargain. But those exchequer bills he could not pay into the exchequer without being indorsed, to shew that those bills had been really paid into the excise upon that branch of the revenue; for, by the act of parliament, they were to be paid into the exchequer as money that had formerly been paid on the revenue, and the persons were to write their names upon them as they paid them; whereupon Mr. Duncombe prevails with Mr. D'Acosta to set his own name and other feigned names, some of them of persons not in being, others the names of persons that were not privy to it; and Mr. Duncombe knowing that they were falsely indorsed, paid them into the exchequer in part of 10,000*l.*, though he knew they were not paid in to the excise. It was a misdemeanor in his office and a deceit to the king, for him who was entrusted to pay the king's money to buy exchequer bills by which he gains so much per cent. and pays them into the exchequer at so much damage and loss to the king: this we shall prove by our witnesses.

Mr. Serjeant *Darnel* spoke next, and insisting a little upon the information, called for the king's evidence.

The first was Mr. Clayton, with the order of the lords of the treasury.

Mr. *Darnel*. Mr. Clayton, give an account of what you know of exchequer bills issued by the lords of the treasury.

Mr. *Clayton*. This is the order of the lords of the treasury, which was read as follows:

"April 26, 1697. Stephen Cox, Charles Montague, John Smith, Thomas Littleton.
"To sir Robert Howard, auditor of the
"exchequer."

"Whereas by act of parliament for granting

"an Aid to his majesty by a land tax, payable
"for one year, we are authorised to issue bills
"of the exchequer not exceeding 1,500,000*l.*,
"and to issue the same in such proportion as we
"shall think fit. And whereas, by an act last
"parliament, and by the king's proclamation,
"when the receivers of the revenue pay those
"bills into the revenue, they are to have tallies
"struck, and their bills are to be cancelled, as
"more fully therein appears. These are in
"pursuance of the authority granted unto us
"by the said act, &c. for issuing, receiving
"back, and cancelling the said bills, and fol-
"lowing the orders to be observed, to require
"you if you cause indented bills to be issued
"for such sum or sums, as any three of us or
"the lord high treasurer for the time being
"shall direct, and that you see the same num-
"bered and marked with the portcullis, al-
"lowing interest of 5 per cent. and that you
"keep an exact and true account of the same,
"and deliver the same to the tellers of the ex-
"chequer, taking their receipts and keeping
"an exact account in the nature of a controul,
"and charge the tellers with the money so by
"you delivered, and keep a true account of all
"bills they receive from you; and that the
"said tellers be required to observe these par-
"ticular directions, and such further rules as
"we shall find necessary; and that we may
"have the better information how the same are
"complied with, you are every Friday to ex-
"amine the accounts of the tellers distinctly,
"and to keep their receipts and cancelled bills
"separate from the other accounts in the ex-
"chequer, and this shall be your warrant."

Serj. *Darnel*. We shall next prove the commission of the excise to appoint Mr. Duncombe their cashier. Show the commission.

L. C. J. How do you prove it to be a true commission?

Mr. *Attorney*. It is a true copy examined in the Six Clerks office.

Then the Commission was read.

Sir *Tho. Powis*, one of the defendant's counsel. It were proper before you come to make this objection, that you should lay it in the information, that the commissioners caused money bills to be issued out, to be paid into the exchequer; they are first to prove that, but they have not yet proved it, for this is only a general instruction that they should issue bills when commanded.

Then an Order of the Treasury was read, dated 27th April, 1697, signed, Fox, Smith, Littleton; directed to sir Robert Howard, importing, "That for enlarging the capital stock of the Bank of England, there should be issued out to the lord Ranelagh upon an unsatisfied order in his name, 332,648*l.* for payment of his majesty's forces, and contingent charges to be applied, to pay money due for quartering of soldiers betwixt 1694 and 1696, 200,000*l.*; to clear quarters and subsistence in England, 77,648*l.* for the service

"in Flanders 55,400*l.*; and that they should take care that this should be duly paid, and charge themselves with it."

Mr. Attorney. Call Mr. Clayton. Mr. Clayton, were the bills issued according to this order?—Clayton. Yes.

Sir Tho. Powis. Upon what account were they issued?

Clayton. On the 1,500,000*l.* act; for we did not make out any bills upon the second act till three months after.

Sir Tho. Powis. If this be sufficient proof, it is strange; it recites the Capitation act, and a 2d act for deficiencies, and making good the stock of the Bank. The order recites directions for exchequer bills to pass in all payments, except the 3*s.* Aid, so that there are no exchequer bills made according to the act; for their order is subsequent to both. The first orders exchequer bills to go in all payments, so after both are passed, here are exchequer bills that ought to be made to pass in all payments, and not to pass in all payments, so that there is no exchequer bill agreeable to the intention of the 2d act.

L. C. J. The first hath an exception. The second says, all exchequer bills shall pass in all payments whatsoever. The first and second having both passed, they ought to have made their bills payable accordingly.

Mr. Attorney. Their order is only upon the issue of the first act, that the exchequer bills shall be current in all payments but the three shillings aid.

Sir Barth. Shower. It is before any proclamation, p. 384. "Be it further enacted, that exchequer bills be taken not only by receivers, but by all collectors of the Land tax and supply," &c. Observe this order of theirs recites both acts, therefore they ought to have framed their exchequer bills to be current in all payments, and not with an exception.

L. C. J. The exchequer bills are made according to one. Will you make two sorts? First, the one act says, they shall pass in all payments except the 3*s.* aid, and the other act says, exchequer bills shall be current in all payments whatever; they have authority in one act to make exchequer bills current in all payments except the 3*s.* aid, and in another to make them current in all payments whatsoever.

Mr. Attorney. It is another act that makes them current in all payments: so that you are mistaken, sir Bartholomew.

Sir Barth. Shower. It is to make exchequer bills general when there is a clause in one act that they shall be current in all payments except the 3*s.* aid, and then by another act in the same session they are made current in all payments; then, what authority had they to make exchequer bills with an exception, when the act authorizes them to make them payable in general.

Serj. Darnel. If the fact were so as sir Bartholomew alledges, it will not conclude that there can be no exception.

Mr. Munday. It appears by the evidence

produced that they are to make bills according to their order.

Mr. Attorney. Though there be a general clause in the act, yet there is another proviso about contracts for exchange.

L. C. J. At this rate, gentlemen, there is not one exchequer bill in England good; you will destroy all exchequer bills. Go on with your evidence.

Mr. Attorney. Call Noel. Mr. Noel, did you know Mr. Duncombe when he was cashier of the excise?—Noel. Yes.

Mr. Attorney. Call Rumney. Mr. Rumney, What do you know of Mr. Duncombe's receiving milled money?

Rumney. On the 4th and 5th May, 1697, he received 20,135*l.* 5*s.* 3¼*d.* recoined from old money?

Mr. Attorney. How did he receive it?

Rumney. He received it from Mr. Fouquier, accountant to the excise.

Mr. Attorney. How do you know he received it?

Rumney. I went to Mr. Duncombe's office; I helped to carry it, part on one day and part on another.

Mr. Attorney. What do you know of money paid to Mr. Duncombe, Mr. Fouquier?

Fouquier. On the 27th February, 1696, he had 357 ounces 8 dwts. hammered money; On the 5th of March, 358 ounces hammered money repaid to his clerk: On the 4th of May, ——— produce of the money so brought in on the 27th February ———; on the 3d day of March, then there was paid him on the 4th and 5th

One of the Defendant's Counsel said, You speak by your book. Did you see it carried in?

Fouquier. I always received it and paid it thus to his clerk.

Mr. Attorney. Mr. Blessington, produce the order of the commissioners for the payment of the money into the exchequer.

Blessington. There is the order of the Commissioners to pay the money into the exchequer.

Then it was read, dated May 5th, 1697.

Mr. Attorney. Notwithstanding this order, he bought those exchequer bills, caused them to be indorsed, and paid them into the exchequer in part of the 10,000*l.* Mr. D'Acosta, give an account to my lord and the jury what number of exchequer bills you sold to Mr. Duncombe, for what, and when?

D'Acosta. I did, upon the desire of the lords of the treasury, furnish bills for his majesty's service in Flanders the 19th March 1697; I was to be repaid in exchequer bills when they came out. The exchequer bills were accordingly delivered to me on the 9th of May 1697, and wanting money at that time, I contracted with Mr. Duncombe to sell him 83 exchequer bills, amounting, with interest, to the sum of 7,894*l.* 9*s.* 6*d.* deducting 5 per cent. which came to 394*l.* 4*s.* 6*d.* The remainder Mr. Duncombe paid me on the 12th of May.

Mr. Attorney. Who did you deliver them to, and from whom did you receive them?

D'Acosta. I delivered them to alderman Duncombe. I received them from the lords of the treasury, on the 4th of May 1697. I brought them to him myself; he received them, and looked upon them; he told me I should set my hand to them, and I did so to several.

Mr. Attorney. Why did you set your hand to them?

D'Acosta. I thought it necessary for the currency of those bills, they being but come about a week before; but considering with myself at the same time, that it might be a reflection upon me to discount so many bills, I told Mr. Duncombe so then; he bid me put my own hand, or the name of any other person to them; so I put my own name to part of them, and to the rest, I set other names.

Mr. Attorney. What names did you set?

D'Acosta. Any names I could think on; the names of persons that dealt with me or others.

Mr. Attorney. The discount at 5 per cent. you say amounted to 394*l.* 4*s.* 6*d.*; did you set your hand to those bills, when Mr. Duncombe was by?—D'Acosta. Yes.

Mr. Attorney. How came it you did not write this indorsement?

D'Acosta. He desired me to do nothing, but to set my hand, without filling up any thing.

Mr. Attorney. Did you write your name upon all of them?

D'Acosta. I wrote my name upon several of them.

Mr. Attorney. Whose names did you write upon the rest?

D'Acosta. I do not remember any other names but that of my partner, and some others that dealt with me.

Mr. Attorney. Look upon those bills; you know the numbers of those bills you sold.

D'Acosta looked upon some of the bills and said, I think this is my hand; this is the name of John Romberg, one that I dealt with.

Mr. Attorney. Did you write that indorsement?

D'Acosta. No, I wrote nothing but the name upon it; there was a blank, I know not who wrote the rest.

Mr. Attorney. When did you pay those exchequer bills?

D'Acosta. On the 9th of May, 1697.

Mr. Attorney. Did you write no indorsement upon them?

D'Acosta. No, only my hand and a blank.

Mr. Attorney. Did you set down no day?

D'Acosta. No.

Mr. Attorney. Did not you scruple the putting your name to them at first?

D'Acosta. No, I made no scruple, because he told me there should be a name to them; but considering at last that it was a large parcel of bills, and that it would be a reflection upon

me to discount so many bills, I told him of it, and he bid me write my name.

Mr. Attorney. Did he desire you to write nothing else?

D'Acosta. No, he desired nothing of filling up, or any day; I only set my own and some other names to them; for this thing that is wrote over the names, I know nothing of it; some other body hath writ it.

Mr. Attorney. Did he give you no directions what names to write?

D'Acosta. He gave me no directions, but said any name.

Mr. Attorney. What was the reason you set down feigned persons, and feigned names?

Sir T. Powis. You wrote your own name to many of the bills; tell the reason why you did not write it upon all?

D'Acosta. Because I was afraid it might disoblige the lords of the treasury, to discount so many, and wrong my own credit; I moved it so to Mr. Duncombe, and he bid me set my name.

Mr. Attorney. Was there any advantage at that time by setting names to the bills; did you discourse of any advantage by it; or do you know of any contrivance in the matter? was it for your own sake or Mr. Duncombe's that you wrote your name?

D'Acosta. Mr. Duncombe desired me to set my name to them; I knew of no advantage by it; the bills that I had were the first that were issued, and the first that I had, I carried to Mr. Duncombe. Those bills were delivered to me on the 4th of May, and betwixt that time and the 12th that I signed them, I could not tell the manner of them. Mr. Duncombe desired me to set my name to them, and I thought it was necessary to do so, and accordingly put my name in blank to them.

Sir T. Powis. When you put your own name upon so many, you were unwilling, it seems, to put your name to any more; was it for your own sake, or Mr. Duncombe's, that you scrupled it?

D'Acosta. It was for my own sake.

Sir T. Powis. Did he direct any body else's name to be set to the bills?

D'Acosta. I brought those bills, as I have said, blank; I delivered them to him; he told me I must set my name to them; I signed several of them, and then considered the reflection it would be upon me, if I signed so many of them, as I said before, and moved it so to him, and he bid me set my name.

Mr. Northey. Did you take it to be of any import, when you set your name to them?

D'Acosta. I thought it to be no more but a kind of receipt, as the indorsing of bills is betwixt merchant and merchant.

Sir B. Shower. You say you discounted them to him at 5 per cent.; Was that less or more than the lords of the treasury allowed you?

D'Acosta. What the lords of the treasury allowed me was upon another point. I gave them my bills to be paid in Flanders; so that

whatever discount there was on the other side of the seas, was upon the account of exchange; for beyond sea we give so many gilders per ——— sterling.

Sir *B. Shower*. Had you not a greater discount from the treasury upon that exchanging, than upon common exchanging; was there nothing of that betwixt you and the lords of the treasury?

D'Acosta. I cannot tell how much I had, for the course of the exchange varies every week or every post.

Mr. *Northey*. Mr. Duncombe had no occasion to sink the value of those bills; for we say there was more allowed to Mr. *D'Acosta* over and above the common rate of exchange.

L. C. J. That was upon another account if it was so; but I do not see of what use it will be to you if it was so.

Sir *Tho. Powis*. We shall apply it by and by. When you remitted the money to Flanders, Mr. *D'Acosta*, did not you write to your friend to accept the bills so and so, pray how was this money paid, what exchanging had you?

D'Acosta. I have said already the exchanging varies every post, I cannot positively tell, but my bills were paid with honour, and I received the value here in exchequer bills.

Sir *Tho. Powis*. Did you deal on the same terms when you received the value in exchequer bills as if you had received it in milled money, cannot you tell the difference?

D'Acosta. When I made my bargain on the 19th of March, the bills were worse, because the second act was not then made: when I received them, I was to take them in payment as they were then delivered me there, being none issued out upon the first act; they were discounted sometimes at more, sometimes at less, they were discounted afterwards at 9 and 10 per cent.

Sir *Tho. Powis*. Would you not have had more allowed than 5 per cent. if you had remitted them in milled money?

D'Acosta. Yes; but how much I had for them I cannot say, for I took them on all hazards; I have known the exchange rise in one year from 27 to 36. Can any merchant say, then, what profit he had on individual bills, when I made use of my money in *Hamburgh*, *Italy*, &c. and received all sorts of coin.

Sir *Tho. Powis*. Cannot you remember about March how the exchanging betwixt Flanders and England was?

D'Acosta. If I had known what questions would have been asked me, I could have been provided; but now I do not know.

Sir *Tho. Powis*. Do not you know how many stivers you had per pound sterling in March, 1696?

D'Acosta. I do not remember.

L. C. J. How much had you per cent. cannot you tell?

D'Acosta. I gave my foreign bills two months before I had the exchequer bills; if I had had the value of the bills when I drew

them, I reckon it would have been 12 or 13 per cent. but I had them two months after.

L. C. J. How much per cent. suppose you had received the value in money?

D'Acosta. 12 or 13 per cent. if in money when I delivered my bills, but I was to have the value in exchequer bills when they came out, but did not then think of the second act of parliament, which made them better.

L. C. J. When you came to discourse of those bills with Mr. Duncombe, was it he proposed it to you, or did you propose to sell them to him?

D'Acosta. I proposed it to Mr. Duncombe, telling him I had so many exchequer bills to dispose of, at ———

L. C. J. Did you deal with him on the account of the public, or only with Mr. Duncombe?

D'Acosta. I dealt with him as Mr. Duncombe, and not on the account of the public.

L. C. J. Had you any message from Mr. Duncombe to have those bills from you?

D'Acosta. No, I went myself to him, hoping for a better profit.

L. C. J. Did you think at the time that the discounting of the exchequer bills at 5 per cent. would have sunk the exchequer bills?

D'Acosta. No.

Sir *Tho. Powis*. Were those the first bills delivered out of the exchequer?

D'Acosta. I take it they were the first bills. The lords of the treasury promised me I should have the first payment as soon as they came out.

Sir *T. Powis*. How long did you keep those bills?

D'Acosta. From the 4th to the 12th of May.

Sir *T. Powis*. Was there not a discount upon exchequer bills before Mr. Duncombe had yours?

D'Acosta. I think not, but I believe there was about the same discount amongst merchants.

Sir *T. Powis*. Do you know it was so?

D'Acosta. I do not know it of my own knowledge, I did not see it done; but those that did it told me they did it.

Sir *T. Powis*. Did you agree with the treasury for other remittances?

D'Acosta. Yes, about 3 months before.

Sir *T. Powis*. You discounted 5 per cent on the ——— bills, had you more or less for the second?

D'Acosta. I cannot positively tell how much, but I furnished more gilders per £. sterling than before. Those bills after the 2nd act were more secure than before, therefore we had reason to allow more for them.

L. C. J. What discount was there upon the second bills after the second act?

D'Acosta. I have known the discount to be more than 9 per cent. upon the exchanging between man and man.

L. C. J. Did you discount more upon the second bills than upon the first?

D'Acosta. I discounted less.

Sir T. Powis. Was not your contract for those remittances before any bills were issued?

D'Acosta. Yes.

Sir T. Powis. How many of those bills did you deliver to Mr. Duncombe?

D'Acosta. Eighty three.

Sir T. Powis. Were they delivered out after the second act?

D'Acosta. Yes, after the 2nd act and proclamation, but the contract was made before.

Mr. Attorney. Call Mr. Fern. Mr. Fern, what do you know of Mr. Duncombe's paying those bills into the exchequer?

Fern. His man should have paid money into my office, and offered me exchequer bills, but I would not receive them, and so he went to another.

One of the King's Counsel. It was a settled course among them for such and such branches of the revenue to be paid into the respective offices. This money should have been paid into Mr. Fern's office, Mr. Duncombe's messenger offers Mr. Fern so much money, Mr. Fern takes down the sums, but when he came to receive the money it proved to be exchequer bills, upon which Mr. Fern said, Those bills were but issued out last week, you cannot have received them in the excise as yet, I cannot take them; if you won't, says he, I will come to you again by and by.

Fern. Upon the 8th of May, 1697, Mr. Duncombe's man came to me to tell me how much he was to pay that day. I entered it, and he went to the next office where he was to make some other payment; then he came to me again and offered me exchequer bills for 3,222l. 13s. 6d. I refused them, because we had issued them out so lately, that I knew they could not have circulated through the revenue so soon. I asked him if they had been received in the excise; he told me he believed not; then I told him I could not take them, and upon that he went away from me.

Mr. Attorney. Do you know the man?

Fern. He employed two men generally. I cannot tell well which of them it was; but it was one he used to employ to tell money.

Mr. Attorney. Did you ever see him before that time?

Fern. Yes, several times; he used to come to me as Mr. Duncombe's man.

Mr. Attorney. Why did he come to you?

Fern. He came to me as clerk to Mr. Cary, one of the tellers; it fell to my lot to receive part of the excise.

Mr. Attorney. Do you know the man when you see him?

Fern. I think it was one Stent or one Rumney, but cannot tell which.

Mr. Attorney. Why came it to your lot to receive this money?

Fern. By agreement amongst ourselves, we subdivided the receipt of the king's revenue; I received that part some time before, therefore he came to me.

Mr. Attorney. In part of what sum was it to be paid?—Fern. On the 2-3ds excise.

Sir T. Powis. They all the while endeavour to affect Mr. Duncombe with fraud and deceit, that he paid it not into his own office but into another; pray how does any thing this man hath said prove a fraud upon him?

L. C. J. Let them go on with their evidence.

Mr. Attorney. When the servant came, did he not tell you he came to pay it from the excise?

Fern. I entered it in my book upon the 2-3ds, and additional excise, but when he told me it would be exchequer bills, I razed it out.

Mr. Attorney. Did he say he would pay it upon the excise and from Mr. Duncombe?

Fern. Yes, and I set it down upon those particular proportions as he directed me in drawing the bills, and he offered exchequer bills in discharge of that money.

Mr. Attorney. What answer did he make to your objection.

Fern. I asked him, if the money was paid into the excise, and he answered he believed not.

Mr. Attorney. When was this?

Fern. It was upon the 8th of May.

Mr. Attorney. What directions had you before the 8th of May about receiving exchequer bills?

Fern. I had no directions but the act.

Sir Tho. Powis. It was only difference of opinion.

L. C. J. He told you on what account he refused the exchequer bills before, because he knew they could not have circulated through the revenue in so little time.

Sir T. Powis. Was Mr. Duncombe receiver of the excise at that time?

Fern. He came from Mr. Duncombe at that time, and I did not know Mr. Duncombe was out.

Mr. Attorney. Call Mr. Peters. Mr. Peters, acquaint my lord and the jury with what you know of this matter?

Peters. On the 12th May 1697, Mr. Duncombe's servant, but which I cannot tell, brought me three parcels of exchequer bills in three papers; I take it to be Rumney. They were indorsed Principal and Interest; he told me I must charge them on the particulars of the excise, on additional duty, ——— double excise, ———, Excise for 99 years, ———. Low wines, &c. sweets, duty on coals, ———. Brandy, ———. Salt, ———. I charged more upon the additional duty, ———, upon the excise, ———. Low wines and spirits, ——— two thirds excise, ———. Excise for 99 years, ———. Duty on salt, &c. which came in all to 1,089l. 0s. 4½d.

Mr. Attorney. Did you see any names upon the bills?

Peters. I found one with the name "Frazer" upon it, I took them to be all according to the act which obliged us to take them. I delivered them to the clerk to examine, and while that was doing, struck a tally and entered "received in cash," ——— that he paid in exchequer bills.

Mr. Attorney. Do you remember any indorsement upon the bills?

Peters. No, nothing but a name.

Mr. Attorney. Were they paid to you as part of the excise?—Peters. Yes.

Mr. Attorney. Did you not endeavour to satisfy yourself?

Peters. I took them upon Mr. Duncombe's credit; his servant did not tell me one thing or other concerning them, nor did I ask him, but struck a tally for the sum.

Mr. Attorney. Was it your lot to receive them?—Peters. Yes, in a great proportion.

Mr. Attorney. Were they indorsed with the day of the month?

Peters. I saw nothing but the name.

Mr. Attorney. Had you known them not to have passed through the excise, would you have received them?

Peters. I would not, but the method then was not generally known, for after that time we received bills from Mr. Barton without names, and sent them back to the excise, and they indorsed them.

Mr. Attorney. When did you first discover that they had not passed the excise?

Peters. About three or four days after they were taken out as cash, and delivered to the clerks of the Million office, they said they could not receive them, but I cannot remember whether it was because they were not indorsed, or that they did know the method of them. Some time after I acquainted Mr. Duncombe with it that they were refused; and he answered, he had got his tally for them, and would not take them again.

Mr. Attorney. Did you offer them him again, upon any discount?

Peters. I desired him to take some of them again, about 2,000*l.* worth, but he would not, but I offered him no reward for it if he would.

L. C. J. What, did you go to Mr. Duncombe to tell him the bills were refused, and desire him to take them again?

Peters. Yes, I desired him to take some of them again.

L. C. J. Were they indorsed?

Peters. There was a name I indorsed but not the day.

L. C. J. Who put the day upon them?

Peters. The clerks.

L. C. J. Why did they put the day upon them.

Peters. Because the act of parliament says, the interest should cease from the day of their being paid into the exchequer, and therefore it was thought fit to enter them on the same day he paid them.

L. C. J. If they had been indorsed and paid by a brewer into the exchequer, it would have saved the interest to the king undoubtedly; but as you say the interest would have been computed sunk from the day he paid them to you?—Peters. Yes.

Mr. Solicitor. (Sir John Hawles.) Was there any loss by those bills being received?

Peters. Yes, there was a little loss to the

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king after; the interest should have sunk from the time they were paid into the excise, therefore they ought not to have been paid into the exchequer.

Mr. Solicitor. Are those bills any of them paid into the exchequer, upon Mr. Duncombe's account, (a parcel of bills being shewed at the same time)?

Peters. I know nothing of that lock upon them.

Mr. Solicitor. Do you know any of the hands that have writ upon them?

Peters. Yes, one of the hands is Mr. Presgrove the present clerk of the office, another is Samuel Edwards's hand; another is Lawrence Cook's hand.

L. C. J. Let me see one of them; and looking upon it said, How came it to be indorsed upon the bill, 'paid into the excise?'

Peters. It was the method of the indorsement; when they were taken out, we wrote so upon them, because I received them as paid into the excise, &c.

Sir B. Shower. The clerks of your own office made the false indorsements; it was their fault and none of ours.

Mr. Attorney. They relied upon Mr. Duncombe, because he paid them as if he had received them from that branch of the revenue. Was there any loss by the payment of those bills?

Peters. Yes, there was 250*l.* loss to me.

Sir B. Shower. Your lordship sees now, that here is nothing at all but a man's name on the bill, and that was necessary.

Just. Turton. Neither the name, day of the month, nor indorsement, are in Mr. Duncombe's hand.

Mr. Attorney. We only say he brought them as such; one teller scrupled the taking of them, another did not; so that all the time the bills remained in the tellers hands. Were not those names set to them when they were brought to you, Mr. Peters?

Peters. Yes, I took them to be the names of the people that had paid them, looking upon it as formal, and knowing nothing further of it.

Sir T. Powis. What did Mr. Peters take to be meant by those names?

Mr. Attorney. It is a prosecution for a crime, why should he be asked that question. Would you have received them, Mr. Peters, if those names had not been put to them?

Peters. I believe not.

Mr. Attorney. Whose names do you remember to have been put to them?

Peters. I remember but one, that is Mr. Frazer, and I took it to be according to the act of parliament to warrant our taking bills as coming from the excise.

Sir T. Powis. What bills came to you, were they not in several parcels?

Peters. In three.

Sir T. Powis. Were there not some indorsed as received in the excise?

Peters. I looked but to one, and gave the rest to the clerk to examine.

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Sir T. Powis. You say one parcel had one name upon them?

Peters. I saw the name Frazer upon one bill, and of all of them that were taken out of the chest, there was not any of them had any thing else upon them but a name.

Sir T. Powis. Did you neither at that time, or at any time after, see the sum of those bills made up that had indorsements upon them as being paid into the excise?

Peters. Not one.

Sir T. Powis. Did you know nothing, or never see that sum of 1,397*l.* indorsed as paid into the excise?

Peters. I knew nothing of it at that time, but afterwards understood that 1,300 and odd pounds were regularly indorsed.

Sir T. Powis. Where did you hear that?

Peters. I heard it at the Parliament House.

Sir B. Shower. Was there 1,300*l.* regularly indorsed?

Peters. I heard so, but knew it not.

Mr. Northey. What entry did you make of these bills?

Peters. I gave it to the clerk to compute.

Mr. Northey. Who had you that account from, that some of them were regularly indorsed? had it you from any of the clerks?

Peters. No, I heard it from Mr. Duncombe himself, but not when he gave me the bills; it was after that, and I understood it was 1,395*l.*

Mr. Northey. How did you enter those bills?

Peters. I entered them in parcels, as I said before.

Mr. Northey. Why did you enter them as paid into the excise?

Peters. Because I took them as such. These three parcels were in covers as I received them, and having seen one parcel, I gave them to the clerks to examine.

Sir B. Shower. Was there any interest computed to a further day than the 12th that you received them from Mr. Duncombe?

Peters. No.

Sir B. Shower. Was there any indorsement of the day when you received them?

Peters. No.

Sir B. Shower. Can you tell when Mr. Presgrove indorsed any of them?—Peters. No.

Sir B. Shower. Can you tell whether they had the same indorsement then as now?

Peters. No.

Sir B. Shower. It must be the fraud of Presgrove and them.

L. C. J. Supposing that Mr. Duncombe hath no interest after the 12th of May, that does not excuse him from having the interest to that time.

Sir B. Shower. We ought to have it, the law says so. Mr. D'Acosta had interest of Mr. Duncombe to the 12th. Were there any bills in the parcel that made up 1,300*l.* and odd money?—Peters. I cannot tell.

Mr. Attorney. Call Mr. Presgrove. Mr. Presgrove, on the 13th of July the chamberlain of the Exchequer issued out some money bills?

Presgrove. I paid them accordingly; there

were bills given me out of the king's chest to pay the same with.

Mr. Attorney. Do you know if these bills (shewing them) were paid by Mr. Duncombe?

Presgrove. Yes, they were; there are two indorsed in my hand, and there are two others.

Mr. Attorney. How came you to write it in July, when the bills were taken out with only a name upon them?

Presgrove. I remembered that in May before, Excise was wrote upon them, and I sealed up the papers, having omitted the writing upon them, so we only thought it an omission; we suppose Mr. Duncombe or his people wrote Excise upon the cover of the parcels; we found it written upon the bills when they were taken out of the king's chest.

Sir T. Powis. When they were paid in by Mr. Duncombe, do ye know that any had Excise writ upon their outside?

Presgrove. Yes, upon the outside of the paper in which the bills were contained, but not upon any of the bills.

Sir T. Powis. Can you say they were the same bills Mr. Duncombe's servant delivered to Mr. Peters?

Presgrove. I can only say they were the same bills that were delivered out of the king's box.

Another of the Defendant's Counsel. Mr. Peters remembers no other name but Frazer; they cannot be part of those bills.

Mr. Attorney. Do you remember a parcel of 1,395*l.*—Presgrove. I do not.

Mr. Attorney. Were any of those three parcels marked with the day of the month when they came through the excise?

Presgrove. No.

Mr. Attorney. Mr. D'Acosta, look upon the names of those four bills.

D'Acosta. To the best of my knowledge they are part of those that I delivered to Mr. Duncombe; Arthur Page indorsed three of them; I take this to be his own hand writing.

Mr. Attorney. Was there any more than names writ upon them when you delivered them to Mr. Duncombe?—D'Acosta. No.

Mr. Attorney. Let the jury see them: [Which was done accordingly.]

Mr. Attorney. My lord, we have done with our evidence; we do not charge Mr. Duncombe with having made those indorsements, with writing every name or setting down the day of the month to deceive the trustees, that should not puzzle the cause. It is plain matter of fact we charge him with, that he caused Mr. D'Acosta's name and others to be put upon the bills, and paid those exchequer bills into the excise as in the information.

Sir T. Powis. If they are done, we are of counsel for the defendant. The matter now before your lordship and the jury is whether Mr. Duncombe hath done any thing, or committed any such offence as the fact is laid in this information; and if the fact be a crime within any law now being or that was in being when that which he is charged with was done. We are now in a

court of law, where the nature of the crime must be tried, and that we are to enquire is, if it be a legal offence; for other power we meddle not with.

L. C. J. Other power! There is no other power in England but a legal power to punish according to law.

Sir Tho. Powis. My lord, I say other power I meddle not with, nor with any thing out of my sphere, but I shall shew your lordship that here hath nothing been done but by act of parliament and upon a right understanding of those acts of parliament, or that which wise and good men may take to be so, and then we shall see how it really stands in his condition.

The information is brought against him for these two crimes, for we agree as to the acts of parliament, that he was cashier and deputy to the commissioners of excise, and answerable to them for the money that came into his hands as their cashier. The information says that on the 5th day of May, he was ordered by the commissioners to pay 10,000*l.* or more into the exchequer; so far we agree; the first crime that he is charged with is on the 12th of May; he had the money paid into his hands on the 5th, on the 7th he was discharged from being cashier, then he was ordered to pay, and says, that on the 12th he did buy 83 exchequer bills, amounting to 7,884*l.* principal and interest, of *D'Acosta*, to the king's loss of ———, and his own unlawful gain, &c.

He paid them into the exchequer afterwards, as if they had been reserved in the excise, indorsed with several false names; this is all in the information that is criminal, and this they say he did to the great loss and prejudice of the king.

We insist upon it, that he had by law power and right to do it, for which the two acts must be consulted; the first directs bills not exceeding 1,500,000*l.* to be issued out, and to be received and paid in any aid except the 3*s.* aid, &c.

It was not a general currency for all purposes whatsoever, but with this particular exception, and to the intent that these bills might have a general credit, not only in payments to the king, but to the merchants and all other purposes; then says this act, after such time as his majesty shall by his royal proclamation, signify that the lords of the treasury have contracted with persons, &c. then they shall not only be payable to all receivers of the revenue, but into the exchequer, for any duty or revenue to the king, by any person or receiver whatever, upon any account whatever: So by this act, any of the king's receivers that had received money in the country might have brought bills, and paid them into the exchequer for money he was to pay to the king, though it never was paid into the revenue, therefore we insist upon it, that if we be within a less compass, there is no reason for the prosecution.

L. C. J. If it be so as you say, there will be no crime.

Sir Tho. Powis. It is our great disadvantage

that the thing is to be taken to be otherwise: I propose to make it out by the words of the act, the last act which shews that money being scarce, these bills were to supply the species of money in every thing, not only in the revenue payment of taxes, &c. but to supply money in any payment to the king; so that if any payment whatever be made to the king, and though a debtor to the king, an officer in any part of the revenue, or that paid him next, he might bring exchequer bills to the exchequer and pay the king's duty.

It will extend to any sum whatever upon any account to the king, so to any person, not only to the king's debtor on any score, but to any person, though the king's officer in express words: This was the express meaning on the frame of the act, we make these bills of universal currency in payments by any man, as if it were money, nay they shall have interest for them till they be paid unto the king; so they were better than money, and by an established method a man may make it money when he will, by giving a recompence to those that exchange those bills for money, so that the goldsmiths desired rather bills than money. We can make money, say they, every hour of the day by them, and therefore make it our interest to take them before money, because we have 5*d.* per day per cent. till it come into the exchequer, but it shall not be of this conveniency till notice be given of the contract made.

These receivers shall pay it into the exchequer on any account whatsoever, but they have narrowed the contract and raised the premium to 5 or 6 per cent. and so make the contract narrow, and will exchange them only if brought through the revenue, if delivered out of the exchequer immediately, as soon as they found the bills sunk, then people were puzzled with exchequer bills, there were specie bills and other bills, there were many that did not care to know them, and when they found this puzzle they did not care to meddle with them; they would not be troubled with discounting, and with the difference betwixt specie bills, and those that were not so, for the act doth not require the indorsing of that branch of the revenue they came through; so that if they see what part of the revenue they came through, they will exchange them, and if not they will not receive them. It was those difficulties and the narrowing the contract that sunk the exchequer bills. If *sir Francis Child*, or any other goldsmith, give a bill, every *Child* will receive it, but if goldsmiths make a difference in their bills, and say such a bill shall be a specie bill and such a one not, there is nobody will take them: your lordship will find this to be the intent of the act.

The present case as to *Mr. Duncombe* was this; he was to pay money to the king that remained owing by him to the king. He was debtor and not accountant, not that we make this our defence, we do not need it; but this was his condition he then stood in. If he had

the liberty to pay it in, it was no more an offence in him than in any other man, unless they have any thing to say against him as he is Mr. Duncombe; but say they, you received it in hard milled money, and needed not have gone with bills, for you had 20,000*l.* in hand. But this is so far from being a fault, that if it were the course of the exchequer formerly that the receivers ought to bring the very numerical sums and pieces that they received for the revenue, this act over-rules it, and says, if any man on any account whatever, &c.

Here comes the act, fo. 89, the king for establishing the ancient course of the exchequer, &c. Then there comes a clause, that it should not extend to vary or alter, &c. so that it over rules the course of the exchequer, and so could not direct that payment in the method of this act should be disturbed by this act.

Mr. Duncombe paid bills for 1,597*l.* 9*s.* 5*d.* by him received in the duty of excise, and regularly indorses the same. The act says, men in office should have interest of 5*d.* per day, &c. and when money from any office is paid into the exchequer, there must be the name of the person and the day set down to stop interest, and those that he received so in his office of excise, every one of those the interest of them is immediately stopped, so Mr. Duncombe acted regularly. They say he might have carried in the rest in specie; so he might, and probably he would have done so, if it had not been for D'Acosta, for it is not proved that Mr. Duncombe fished about for exchequer bills; but Mr. D'Acosta knowing him to be a monied man, came and asked him if he would have exchequer bills, upon which he sold him 7,884*l.* 9*s.* 6*d.* at 5 per cent. discount. Now, if that be no crime, as it is not, the act allowing him to pay it without discount, if he paid it so, he answered it to the king according to the act, and so he hath hindered the discrediting of those bills, the first time they were delivered out they were discounted; for, says D'Acosta, they gave him these bills with discount, they made a contract before they came forth, then he should have so much exchange and discount beyond the exchange, because he was to be paid in bills; so that before ever they came abroad, they were disparaged with a witness; for, if the——— think them less worth than money, every body will think so too. Mr. Duncombe takes them with less discount than they allowed them at, so that he rather gave credit than otherwise to those bills, they rose higher and the discount was less upon them, so hitherto there is no crime. Then the proclamation comes out in the words of the act making the said bills payable on all accounts whatever.

Then as to the indorsement, if that was a crime, it was in D'Acosta your own evidence; he swears he put his own name to them, and he knew no hurt in putting his name to them. Those bills he paid in to Mr. Duncombe on his own private account; but those that Mr. Duncombe had received in the excise for 1,300*l.* he had abused the king if he had not indorsed them

and stopped the interest; but from D'Acosta he received them, as I or any other man might have done. Mr. D'Acosta was to have received interest for them till he paid them in, but Mr. Duncombe paid them and stopped the interest.

These indorsements upon them, D'Acosta says, were not for Mr. Duncombe's sake, but for his own sake, and that he put on his own and his partners' names.

When Mr. Duncombe brought them into the exchequer, he had a great deal of trouble about this business; had he then, when he paid them in, told Mr. Peters that he had received them all in the excise, it would have made the case worse; but they have cleared him of that. Mr. Peters is an unwilling witness on our side, he owns he did not tell him any such thing, so that Mr. Duncombe is innocent; he is so far from accusing him with it, that he clears him, and says, he told him no such thing.

We shall prove distinctly the parcel received in the excise, that it was a parcel regularly indorsed. There was no occasion for their being deceived, they had the opportunity of casting them up, so that this was a good payment in point of law, and the king had no damage.

Sir B. Shower. We submit it to the consideration of your lordship and the jury upon our evidence, if we had any intention to defraud the king; we shall shew we could not have any such intention, for the interest was to cease when the bills were paid in, and Mr. Peters swears the loss was his own and not the king's, so that the king had no prejudice in fact. D'Acosta discharges Mr. Duncombe from any design to defraud the king, he says, it was his own motion not Mr. Duncombe's. Then in respect of that act about their being received into the exchequer, Mr. Duncombe did not tell them that they were paid into the excise, Mr. Duncombe's man told Fern at the same time that they were not paid into the excise. There is no proof that he paid them as such; on the 5th of May, he was directed to make this payment; on the 7th of May he was removed; on the 12th he paid those bills into the exchequer; judge then if there can be any evidence to satisfy the jury that he designed a deceit when a distinct parcel being 1,300*l.* are mentioned to be taken in the excise, and the other not so. Peters passed them, and so it is not possible there could be any deceit in this matter. The bills were in 3 parcels, some of the clerks must take notice which came from the excise and which not: the interest was cast up to the 12th of May upon 83 bills, so that they must know they came not all from the excise. For the other point of Mr. Duncombe's being cashier of the excise, had their money in specie and paid it in exchequer bills; the jury must consider if Mr. Duncombe did pay them as coming from the excise, Mr. Duncombe not having signed or indorsed them as such.

If Mr. Duncombe had been in office and not paid in the money, the first information ought to have been for paying that in other coin different from the coin he was to pay when under

articles to the contrary. But this was a payment as debtor afterwards; or if Mr. Duncombe had died, his executor must have been sued as another debtor, and he might have paid in these bills as a lawful payment. Exchequer bills rose upon an exigency of state; page 130 will tell us the frame of them, and the reason of issuing them out.

Then the Clause was recited.

This transaction was after both the acts, when both of them were in force. Another clause provides, that the receivers of the revenue should out of such milled money as they had in their hands pay the value of those bills to any man that offered them, so that the receivers were obliged to take exchequer bills, and to give money for them.

The second act makes them generally current, including the third aid; and also at the receipt of the exchequer from the said commissioners receivers collectors; but if it be said these words do not take in the cashier, it is said in another place, any other person or persons, certainly this will take it in, no man can use words larger than those universal terms, any person in any payment on any account whatever; but there is yet a stronger than all this: the act of parliament was Mr. Duncombe's rule, he was subject to take notice of the contract by which they were to exchange all bills coming through any branch of the revenue or not. The second act, page 338, was read, and page 522. The two proclamations were agreeable to this act.

Mr. Duncombe was far from any fraud in this matter, we must open the evidence in this matter to remind you of it, and so went on as before. Mr. Duncombe doubted the doing of it when he was cashier, but Mr. Burton made no scruple to pay those bills when sent up to him in milled money or bills. But when the matter came to be questioned, he consulted the commissioners of the excise upon it, they differed in opinion if they could take them from officers as officers, Mr. Duncombe was obliged to pay them to the king as cashier to the commissioners of the excise. Mr. Burton upon this, between the 7th and the 12th of May, received and took exchequer bills, for that which should have been paid in milled money or guineas, or specie money received upon the excise, and Mr. Duncombe having notice of it, thought he might as lawfully pay them to the king, as Mr. Burton might receive them into the excise. Mr. Burton paid in exchequer bills for what he did not receive so, but there was no notice taken of it. He did for six months, till the contract made them scruple it, not that they thought it to be an offence in them or any one else, all the officers made use of these exchequer bills. But now because the contract was made, they scrupled whether they should pay any but specie bills; we submit it to the consideration of your lordship and the jury, if Mr. Duncombe had taken exchequer bills of his own he might not have paid them unto the king as money. If

this was then the received practice and opinion, though that would not excuse in all cases, yet if the words of the law be with us, and if the reasonable construction of the words of the law be on our client's side, we hope the jury will not bring him in guilty. If the practice be that which wise and good men, such as Mr. Duncombe is supposed to be, would have done in the like case, we hope they will not find him guilty. If there be such words in any act of parliament as obliges particular officers to pay in the individual pieces of money they receive, it is beyond the memory of man that ever any one was prosecuted for not doing so.

In the act, the proviso respects auditors, collectors, tellers and receivers, we insist on this proviso (which was read, Provided always, &c.) It shews that they had in their other law made an alteration in the method of paying it into the exchequer; if in the other act it be said, it is to be at the receipt of the exchequer, &c.

Serj. Dolbin. Mr. Duncombe had a right to pay it by the act of parliament and proclamation; no man that read the proclamations could tell what was specie and what not; any man that came to the exchange could not imagine that the contract was narrowed, because the act of parliament led them into the mistake; if it be their duty to receive it, it is the duty of the subject to pay it; but they distinguish his case and say he was cashier of the excise. But we have proved he was not so then, so that this part of the information must fall; but if he had been cashier, it was not his duty to pay it in specie; if he paid it in current coin as these bills were at that time, there was no fraud at all in it; so that that part of the information is out of the case; and while he was cashier and servant to the commissioners of the excise, it was their payment and not his; he struck his tally, so that the payment was by them and not by him; but say they, they were indorsed in false names, but that appears to be nothing at all by the evidence: the act says there shall be indorsed the name of the person that pays, and the day of the month, but we did not pay it in till the —, indorsed without name and date; so that this indorsement, such as it was, was of no signification, but the indorsement taken notice of by this act says, the interest shall cease.

The bills thus paid in were paid in part of the 7,800*l*. Mr. Peters does not speak *ad idem*. Mr. D'Acosta believes the bills were the same that Mr. Duncombe had from him. D'Acosta says the bills that he sold to Mr. Duncombe were indorsed, &c. but none of those that Peters had, had names; none of these three parcels that he had, had any names, but one that had Frazer upon it. Those showed to the jury have no names: we have the right of the king's subjects to make payments in exchequer bills. There is a penalty in the law of exchequer bills be counterfeited, therefore Mr. Peters ought to make it appear to the world whence he had those bills.

Mr. Northey. My lord, I shall beg leave to state the material points in the information,

there are many things not material talked of; I shall point at the particular matters: 1st. that they were paid into the exchequer, that they have stated in the information we paid them in, it must be allowed a payment.

The next point, whether Mr. Duncombe in his circumstances, might pay in exchequer bills, that is not the question, though if it were, it is plain by the act he might do it.

The question is this, whether Mr. Duncombe who paid them in, paid them in *ac si* as if they had been received in the excise by him, and if as truly indorsed according to the act, with the man's name that pays them in, and the day when he pays them; they are positive we did do so; we are positive to the contrary; we delivered Mr. Peters several parcels, one parcel indorsed with the men's names and the days when paid, these we told him we received from the excise. This makes an end of this information, if our witnesses prove it: we observe that by his own evidence it was impossible it should be paid in, as received by us for excise, for the act enjoins the indorsing to stop the interest, but Peters allowed interest for these bills, till the 12th of May; Mr. Duncombe was discharged the 7th of May, Mr. Burton came in his place, and told Peters who knew this, that he should allow them *ac si* to the 12th, when Mr. Duncombe was discharged on the 7th. This demonstrated that he did not tell Mr. Peters that he received all those bills for excise; he could not tell him he received them that day for excise; this is positive proof in the matter.

We observe further, that Peters witnesses he took the bills by consent and delivered them to his man; he did not ask him if they were right, he hath a memory for that, but though he knows Mr. Duncombe's servants, he cannot remember which of them brought the bills to him. But we have the servant here who will refresh his memory, when Mr. Duncombe's servant brought them those bills, they say they had not seen the act of parliament, and that the lords of the treasury had given no directions in it. We shall read the king's proclamation of the 23d of April 1697, to shew that if we were mistaken, we were led into it, by the best exposition of the act of parliament that could be. Then the proclamation was read reciting all the clauses of the act.

Sir B. Shower observed upon it, that nothing could be more plain, but least the officers should mistake, though he could not tell how Peters could. It says we do hereby, &c. enjoin — and tellers. There is Mr. Peters. We have this for us, what can be plainer? It is plain by this first witness, there is no fraud in Mr. Duncombe. This man told them that the bills had not passed the excise; then, says he, I cannot receive them, but he cannot tell why. It is plainly contrary to the proclamation, which enjoined him to receive them. Peters should have seen if the bills had been regularly indorsed, he took them upon credit; and hereupon it is alledged against us, that we paid

them into the exchequer, as if they had been received from the excise.

Mr. Harcourt. Mr. Duncombe is charged with lessening the credit of the exchequer bills and of the exchequer, but if the fact be doubtful; if this might have been done by law that he hath done. If it had been enacted generally before, if allowed by the commissioners of the excise afterwards, and by the direction of the lords of the treasury. It is hard for Mr. Duncombe to be prosecuted for such an offence: what he did was done in many instances before, but whether their practice may excuse him there is no necessity of enquiring into or of relying upon, that he is strictly justified by the law, though where a person is indicted for a fact in its own nature doubtful, the practice of others may give some light towards the vindicating or condemning him. Though Mr. Duncombe be so indicted, there is not one fact alledged against him sufficient to induce the jury to believe him guilty.

The information is not for his paying these bills as money, or if it were, the act is a full answer to it. Had Mr. Duncombe been indicted for that, the answer must have been the act itself; and supposing this fact had been designed to be done before the act, it could not have been better excused than by this act.

The exchequer bills were not falsely indorsed, the information is mistaken in that point; there is no other indorsement but what the act describes, and a name without a day mentioned is nothing; it was their fault they took them as paid into the excise, for not looking upon the 2d parcel they paid them in as being truly indorsed. It is the most absurd thing in the earth, that we should come to pay bills that had not the day of the month upon them as if they had been paid into the excise, as if we had not common sense to see that the exchequer could not be imposed upon in that manner.

In the next place, it would not have been criminal had he paid them so. If a person had received money, and told them that he did receive money for the excise but bills, then they had proved their information, but they say he paid them in as if they had been received for excise.

Your own witnesses put it wholly upon these two. If you fail in proving those two, then we must leave it to the consideration of my lord and the jury, whether you have proved your information. The 1st witness says, Mr. Duncombe's servant disowned it, and therefore he would not take them, the other witness, he takes them; so that what is criminal is done by the witness, he commits a notorious fraud to justify himself, and makes false indorsements as if we had done it.

Mr. Munday. How far the fact charged in the information is criminal hath been largely taken notice of.—It is manifest from D'Acosta's evidence that he was the first person that made a contract about exchequer bills; now the lords of the exchequer themselves did not know

what success they would have, therefore they make a contract with Mr. D'Acosta, allowing him a large exchange and discount upon the bills. He tries among the brokers how he could put them off, and at last finds out Mr. Duncombe knowing him to be a monied man, and at D'Acosta's request, Mr. Duncombe took some of those bills at 5 $\frac{1}{2}$. per cent. discount, which is much less than the lords of the treasury had discounted to Mr. D'Acosta, this is plainly to advance the value of those bills; and the next contract Mr. D'Acosta made with the lords, it was for a much less value, so that it was for the particular reputation, that Mr. Duncombe gave to those bills that they were not more undervalued. It is plain, then, that he did not diminish the credit of the exchequer bills.

In the next place, it is as plain that the king was not defrauded for the discount. I must pay it, says your own witness. The interest must be allowed to the time they were brought in, there is no contradiction, no deceit there; so that it is manifest that as the fact was not criminal, neither was it done for any such purpose as to defraud the king.

If in the country collectors and receivers had cash in their hands from old money carried into the country mints, and they give bills in London for gold or new milled money, yet the merchants pay it in those bills. Consult the king's counsel, they will tell you that it would give credit to those bills for the exchequer to take them, and if so it was beyond contradiction an advancement of their reputation for Mr. Duncombe to buy those exchequer bills.

Mr. Eyres. I shall put your lordship in mind of a case that was before your lordship in the Guildhall of London, but I do not offer it as the offence in evidence. Dyer the news-writer had an information preferred against him as having wrote a news-letter, with a design to cast a slur upon the justice of the kingdom, concerning the prosecution of the gentlemen for the Lancashire plots, and saying that in Mr. Standish's house there was so many arms found, that is to say, so many birding pieces, so many hunting saddles, &c. but there was no such things found: though this would have been an offence, if it had been charged that he did it with a design to scandalize the justice of the nation, and as not having told the whole truth, but having charged it upon the falsity of the information, he was acquitted.

L. C. J. You mistake it; it was upon a mistake of the session of gaol delivery that he was acquitted; the meaning of the indictment was for ridiculing the Plots.

Mr. Eyres. I submit it to your lordship; the question now before us is, if there hath been any fraud or deceit committed by Mr. Duncombe, what a condition would many people be in? if all that owed the king money, should have informations brought against them here in the court of King's-bench, that they have not paid the king's money in specie but bills, with a design to lessen the credit of the exchequer or to defraud his majesty.

L. C. J. The question is, whether the king's receiver having actually in his hands the king's money, whether he can detain their money to his own use, and pay the king in exchequer bills, and if those receivers be robbed, whether the king must actually answer it. If a bailiff receives his master's rent in the country, and keeps the money in his hand till he can conveniently pay it, if he be robbed in the mean time he shall be allowed it upon his account; but if he put the money into another man's hand, and that man be robbed of it, he might be accountable for it; so that I do not see the law allows the king's officer to convert the king's money to his own use.

Then the 129th page of the Act was read.

Mr. Brown. Mr. Peters tells it, he charges himself with so much money; it is impossible the king should be deceived, for Mr. Peters discharges Mr. Duncombe of so much money paid.

Mr. Attorney. Let them go on regularly; sometimes they go on with law and then with matter of fact; let them go on with their evidence first.

Mr. Brown. This we prove, that Mr. Peters was teller; then that he received those exchequer bills from us; that he owns the receipt of them, and those bills so received are thrown down into the talley-office, and a talley is struck from them, whereupon Mr. Duncombe hath his *quietus*; for that the mistake is in Mr. Peters, and not in Mr. Duncombe, for Peters ought not to have taken them if they ought not to have been taken, but it is plain he charges himself with the money actually received, so if the king was no sufferer by this transaction, we shall show that Mr. Duncombe was very fair, and if they had not been wilful in the thing, they might have distinguished betwixt those that were regularly indorsed as coming through the excise and those that were not.

Then the 130th page about the Capitation Act was read, afterwards the 2nd paragraph.

Sir B. Shower observes, that the 1st act not only allows them to pay exchequer bills in for the aids, but allows the payment of them from those who have the receipt, the receivers have the liberty of paying it. Read the next clause, we shall shew your lordship that the king desires those bills rather than money.

Then the Clause was read.

Sir T. Powis. Your lordship sees that upon the first act adapted to pay the aids, money was scarce in the country, and therefore it makes those bills not only payable by those that receive the revenue, but a breach of their trust if they did not exchange these bills for money, so that if I had exchequer bills, I go presently to these men the receivers; and say, take you the bills and give me money for them, and they are obliged to it to give credit to the bills, and to stop the interest due upon them from the

king. If the bills be not brought in, then the receiver kept the money and the bills paid interest, so that it is better for the king to have the bills than the money.

L. C. J. But suppose exchequer bills come to the receiver, and the receiver buys those bills, does he do well in that?

Sir T. Powis. Yes, he defrauds not the king, for if Mr. Duncombe had brought his money to Westminster-hall, I or any man might have stopped him and demanded money for exchequer bills, and it would have been a fault in him not to have given me money for them.

Mr. Attorney. The extent of the Act is no further than to money paid on the duty charged that session. Read the clause, page 132.—“And be it further enacted,” &c.

Then was read the 2d act, page 384.—“And whereas by an act,” &c.

Sir B. Shower. This clause is plain, it ought to have been paid into the exchequer without coming into any other aid, and he shall be allowed interest till it be paid into the exchequer, so that it is payable into the exchequer without coming into any branch of the revenue.

Then the next clause was read.—“It is hereby enacted,” &c.

Then page 388.—“Provided always,” &c.

Then page 522.—“Provided, nevertheless,” &c.

Then page 593.

Then the Proclamation of 23d April, 1697, which *sir B. Shower* observed was before the 12th of May, the time when Mr. Duncombe is accused of having defrauded the king, and that Mr. Peters was enjoined by that proclamation to take them as a teller.

Mr. Northey. Subsequent to this, there is a clause in another act already read.—Then the Proclamation of July 30th, 1697, was read.—We don't insist upon these things to justify the fact, but to shew that this was the general practice of all persons whatever to take those bills.

Call Mr. Cook, Mr. Sheldrack, and *sir John Foch*.

Sir T. Powis. We shall now prove that there were bills drawn by many in the country. Mr. Sheldrack, pray acquaint my lord and the jury, whether when receivers in the country had the product of old money recoined, paid back to them in milled money, whether when they draw bills upon merchants in London for so much milled money of the king's in their hands, did they draw these bills expressly to be paid in milled money and gold, and whether they came with exchequer bills, if you took those bills or made them pay money?

Mr. Sheldrack. In May, 1697, I had application made to me, having the care of the bills of exchange. Merchants came to me and urged me to take exchequer bills in discharge of the bills drawn upon them, upon which I went to Mr. Duncombe, who was then cashier of the

excise, and acquainted him with it; he told me there was a new cashier a coming in, and he was a going out, and therefore bid me put them off for a day or two, telling them that I was to receive directions from the new cashier, and that we could not receive bills yet, because the state of the accounts of 200,000*l.* or thereabouts was to be made up and transferred betwixt Mr. Duncombe and Mr. Burton. On the 17th of May, about 11 o'clock, Mr. Duncombe came to the office, the transfer was made, and all the bills and notes examined by Mr. Burton and his brother, and as soon as they were satisfied there were bills to answer the sums, Mr. Burton discharged Mr. Duncombe.

Sir T. Powis. Had you ever any directions about taking exchequer bills?

Sheldrack. Mr. Burton told me that the exchequer bills being newly issued, it was necessary to credit them as much as we could; the same directions were given to the bill-men, and I told them it was proper they should attend the new cashier for his orders.

Sir T. Powis. What money did you receive in exchequer bills?

Sheldrack. From the 7th of May to the 22d of October we received exchequer bills in all payments, making 247,321*l.* 9*s.* 2½*d.* many of them bills made payable in gold and milled money, the value received from the collectors, expressing whence they paid them; there are two or three that enter them before they come to me, that can witness the same thing.

Sir T. Powis. How much did you receive in gold money during the time?

Sheldrack. Between 7th May, 1697, and the 22d of October that we were ordered to take no more exchequer bills, we took 22,977*l.* 11*s.* 11½*d.* in gold and milled money.

Sir T. Powis. Was this all known to the commissioners?

Sheldrack. I gave them an account of it all under my own hand, and particularly the days when the sums were received, so much in exchequer bills and so much in milled money.

Sir T. Powis. Did they ever reprove you for it?

Sheldrack. No, Mr. Duncombe met me soon after, and asked me how I liked Mr. Burton, our new cashier; I answered him I took him to be a very honest gentleman. Then he asked me what I did about exchequer bills? I answered, that Mr. Burton ordered me to take them in all payments. Betwixt the 7th of May and the 12th, we received 4,000*l.* in exchequer bills, upon several bills of exchange drawn from the country by several receivers, some of them payable at 20 and 30 days after date. From the 22d of May, we had bills in hand for 100,000*l.* most of them according to the same time, at 28 or 30 days after date, or sight, so that it was 40 days before they became due, and were not usually paid in three weeks after, and then paid in exchequer bills and the discount of 7½ per cent.

Sir T. Powis. It was better for the money to be in the country, and for the king to have the

bills, for when they came in the interest ceased running on in the country, so that they did it in consideration of the king's interest.—Mr. Sheldrack, when you had bills drawn at 30 days sight, would they have paid them sooner if you had taken it in exchequer bills?

Sheldrack. No.

Sir T. Powis. How do you know that?

Sheldrack. I am charged with all bills, and have given out bills several times, and the king being to pay 5*d.* per cent. per day, it looked like a great abuse, and they ought to have given general directions to their collectors to pay it at six days sight, upon which sir John Foach and others ordered us to alter the method of it according to the trade of the country, and ordered me, if bills were not paid in twelve days after they became due, to return them to the collectors they came from.

One of the King's Counsel. Mr. Sheldrack, you did take exchequer bills from the merchants instead of these bills, did you ever know any money brought up to town by the receivers, and exchequer bills brought into the revenue instead of money?

Sheldrack. I know nothing of that.

Sir T. Powis. Those merchants that accepted bills in milled money and gold, if you had called upon them, they were not able to pay it in money at the end of the time if you would not have taken bills from them?

Sheldrack. I lost twenty of the best merchants, that paid 300,000*l.*; Mr. Walker and company, Samuel Trowel, Josiah Hilyard, &c. because I would not take any more exchequer bills.

Sir T. Powis. Did you use to exchange exchequer bills brought to you?—*Sheldrack.* No.

L. C. J. You make much of this, because bills expressing to be paid in gold and money were paid in exchequer bills, was it therefore a good payment?

Sir B. Shower. These collectors carried in old money to the mints; they had it recoined, and instead of sending it up they get good bills for it payable in money or gold, and yet merchants paid it into the excise in exchequer bills; this shews that it was the public practice.

L. C. J. But you seem still to infer that it was a good and lawful payment, and would impose so upon the court, but we tell you it was not so, there was no necessity of taking it so, the merchants were obliged to pay them in milled money or guineas, but this that you talk of is done by consent, whereas you alledge that it was good in law.

Another of the King's Counsel.—He consulted his merchants about it; he thought it was best to give credit to those bills, but they did not say that it was to be done by law.

Mr. Montague. Mr. Sheldrack, when the collectors paid money in the country had they not the benefit of discount in it?

Sheldrack. No doubt of it; the collectors one half, and the merchant one half.

Sir B. Shower. We say it was so far from being a cheat that it was advantageous to the

king; we do not urge it that it was a good payment, but that it was the opinion of those that were trusted with the king's revenue to make their bills current.

L. C. J. They had authority to do so.

Sir B. Shower. They had no more than the law gave them.

Sir T. Powis. All that we use it for is this: we are charged with fraud and a design to deceive the king, whereas it appears that those officers intrusted with the revenue thought it so far from being so, that when they saw bills to be paid in milled money or gold, they looked upon it to be no deceit, but allowed it.

Sir B. Shower. Mr. Duncombe did not do it till Mr. Burton did it.

Another of the Defendant's Counsel. Did the price of exchequer bills rise or fall after you were forbid taking them?

Sheldrack. They fell.

Q. Had you any directions from any body else but Mr. Burton about them?

Sheldrack. No.

Q. Had you any directions to indict any body for it?—*Sheldrack.* No.

Q. To sir John Foach. What application was there made to you and the other commissioners of the excise about these exchequer bills?

Sir John Foach. Mr. Burton, in two days after his entry upon his office, came and acquainted us that there were a great many bills, as Mr. Sheldrack says, and the merchants would not pay them but in exchequer bills, upon which we debated it amongst ourselves and consulted the act; and upon the clause, p. 384, some were of opinion that the parliament had made exchequer bills silver and gold; upon which we represented it the Tuesday morning following to the lords of the treasury, and discoursed with them an hour or two upon it. The lords debated it, whether the law was so or not, and at last desired that Mr. Attorney and Mr. Solicitor should attend on the Thursday following, when Mr. Burton and Mr. Knot waited to know their opinion, and they told me the lords had given directions to take them; after which, they were taken to a great many thousand pounds without any contradiction.

Q. How did you know the lords of the treasury ordered it so?

A. We gave credit to Mr. Burton, who told us so.

Sir T. Powis. Had you any directions from the treasury to the contrary?

A. Not till October following.

Q. Did you attend the lords often?

A. We attended them every week; they knew that such payments were made.

Q. When was it that you first attended them about it?

A. It was betwixt the 7th and 12th of May, a day or two after Mr. Burton came in.

Sir T. Powis. The lords of the treasury gave power to issue out those bills in such a method as they thought proper, but could not vary it from the act of parliament, so that there was nothing to make it criminal but the opinion of

the lords of the treasury, and of the commissioners of the excise.

L. C. J. Must we therefore be of the same opinion?

Sir T. Powis. No, we do not say so; but the jury must not think that we acted fraudulently in the matter.

Another of the Defendant's Counsel. It was the general opinion at that time, and constantly practised, the lords of the treasury approved it in payments, and the commissioners of excise accounted constantly before the lords of the treasury.

Mr. Cooper. Sir John Foach, upon what consideration was it that those bills were allowed to pass; you were mentioning some reasons of state why those bills were allowed to be taken?

A. Some were of opinion we could not by law receive them, others thought it was fit to give them credit.

Q. You said there were some merchants refused to pay money, but only in exchequer bills?

A. Mr. Burton told us he was so informed by his officers.

Q. That was then one reason why they were received?

A. The lords of the treasury permitted us to receive them till October following, that we were prohibited.

Q. Was there no notice taken that you had received them so, by those that prohibited you?

A. Never that I heard of.

Sir B. Shower. It was reckoned good payment in every body but Mr. Duncombe. Call Mr. Fitch, Mr. Sturton, Mr. Dawtree, and Mr. Milner.

Q. Mr. Milner, what do you know of the payment of exchequer bills, for bills drawn in milled money and guineas?

A. I had all from one Petit in 1697, and he told me if I would I might pay those bills in exchequer notes, which accordingly I did for what bills I had drawn upon me to be paid in new money.

Q. Did they insist upon it that you should do so?

A. They came to me and told me I might do so.

L. C. J. They were his friends; suppose a man be bound to pay worth in guineas and silver, will paying it in exchequer bills be a good payment, or a rule for others?

Sir B. Shower. No, we do not say that this is to be our rule, but we say that those that consented to take exchequer bills in lieu of gold and money, designed the public benefit.

L. C. J. Had Mr. Duncombe the same design?

Sir B. Shower. Certainly he had, for we obliged Mr. D'Acosta, who might otherwise have gone to the brokers with his bills, and then they would have been 10 or 12 per cent discount.

L. C. J. It is imposing upon the court to say, because some did it that therefore it is lawful.

Sir Tho. Powis. We are not now upon what they thought law, but proving that they did not think it a fraud.

L. C. J. You are in the right now.

Sir Tho. Powis. Mr. Fitch, what number of exchequer bills were there actually received at the excise office?

A. I was employed by Mr. Duncombe about the exchequer bills; there came a considerable number of them, there was to be the name of the person or his servant, and the date upon these that were paid, and accordingly there were bills thus regularly indorsed for 1,300 and odd pounds.

Q. John Cook, do you know any thing of the payment of the same bills into the exchequer from Mr. Duncombe to Mr. Peters?

J. Cook. On the 12th of May, 1697, Mr. Duncombe received exchequer bills from Mr. D'Acosta, and going to the exchequer to pay them to Mr. Peters, told him he had two parcels of bills, one of them that had passed the revenue and the other not: one parcel of 1,300 odd pounds that came from the excise office was indorsed, and the other parcel from D'Acosta came not through the excise office.

L. C. J. Did you hear Mr. Duncombe say so distinctly?—*A.* Yes, my lord.

One of the Defendant's Counsel. They were divided into parcels; the fact speaks it.

L. C. J. Were the bills delivered by you, or by Mr. Duncombe?

Cook. I carried them, but my master delivered them with his own hand, and told him the difference betwixt them.

Mr. Attorney. Call Mr. Peters. Mr. Peters, as to Mr. Cook?

A. I knew nothing of him or of his relation to Mr. Duncombe; I knew not if I saw him that day or not, but am positive Mr. Duncombe did not deliver me the bills; it was either Stent or Romney.

Q. Are you positive that Cook was not there, when you received the bills?

A. I cannot be positive that Cook was not there, but I am positive that Mr. Duncombe was not there when the bills were delivered.

Q. When was it you saw Cook first?

A. I saw him a day or two after, but knew him not to be his servant, and some time after I had charged myself with the money, I saw Mr. Duncombe come in at the wicket gate of Westminster-hall.

Q. Was Mr. Duncombe there when the bills were brought?—*A.* No.

Q. Cook swears he was there, and told you the difference betwixt the bills expressly?

A. I do not know that I saw him at that time.

Serj. Darnel. Was there any thing said that the bills he had from D'Acosta had not passed the excise?—*A.* No.

Mr. Attorney. Did he name D'Acosta at that time?

A. No, upon the oath I have taken.

Q. Did you look upon the bills?

A. I looked upon one parcel, and they were signed Frazer.

Sir B. Shower. Mr. Peters, bethink yourself, did not you at first scruple the taking those bills as not coming through the excise?

A. No, I did not.

Q. But you swore it you shall have it by and by.

Mr. Attorney. It was Mr. Fern that said, when those bills were brought to him, he refused them, because they had not passed through the excise, and therefore it is the more likely they would conceal that objection from the other officer.

Mr. Peters. I knew nothing of D'Acosta, till I saw him in the declaration.

Q. Did Mr. Duncombe bring you no parcels of bills that day?

A. I saw him not till I saw him come through the wicket gate.

Sir B. Shower. You saw him so near as the hall gate, what did you say to him?

A. I said to him, Mr. Duncombe, I have charged your money.

Another of the Defendant's Counsel. Were the bills in 3 parcels?—A. Yes.

Q. This helps to clear the matter, that there was no fraud in it; shew him one of the bills, is that your name?

A. No, there is no name of mine here.

Sir T. Powis. Did the king lose any money by this?

A. No, not one farthing.

Q. Had not Mr. Duncombe a demand upon the loan at your office, of 5,000*l.* payable before that day, and there was not money in cash to answer him?—A. It was not paid.

Q. Mr. Stent, did you carry any bills to the exchequer from Mr. Duncombe?

A. No, I never did.

Q. Mr. Romney, did you?

A. No, I never did.

Q. Mr. Stent, what was it you carried then?

A. On the 8th of May my master gave me a note to strike a tally, I came to Mr. Peters, and desired him to take three orders on Mr. Palms, and told Mr. Peters, here is my note, and threw it down. Mr. Peters told me I must go to Mr. Fern, it was to be paid in his office, for I have no money, says he, before Mr. Fern, to take them, and I will take them up again by and by. Accordingly I went to Mr. Fern, and told him I had three orders of court on Mr. Palms, and that Mr. Peters desired him to take them again, but Mr. Fern refused to do it, upon which I went to Mr. Peters and told him so, then he went himself to Mr. Fern, but he still refused. Then Mr. Peters said to me, come, I will not be obliged to him, then he took the note and struck a tally, which I brought on the 8th of May to Mr. Brown at the excise office, and then I went to Teddington to my master's house, and was there on the 12th of May.

Mr. Fern. Did Mr. Stent bring you any exchequer bills?

A. He shewed me no exchequer bills.

Sir T. Powis. We say that the payment by Mr. Duncombe was a legal payment, and though that payment by merchants was not because of

their undertaking to pay it specially in gold or milled money, yet that will be of use to us by and by; but Mr. Duncombe's was as legal as if there had been an act of parliament that such a proportion of lead so and so stamped should go for money of such a value in all payments: this at that time was as good to the king as gold and silver if made so by law. If a receiver in the country had met a man with such a parcel of stamped lead money, and had said to him, I do not like this money, I will give you this for the king, and the receiver had accordingly taken it and given him other money for it, this would have been no abuse to the king; or suppose I have so many guineas, the king takes them at 22*s.* and if I say to a receiver, if you will take them at 22*s.* I will allow you so much, thus he makes a profit of them, but does no wrong to the king at all. It is the king's interest that all the exchequer bills should be brought in and sunk, for so they must do according to the act, so the act says when they come in on a proper fund, then that is the king's wish, he is not wronged by having them paid in, if they be paid in on a fund they stop the interest, if on a right fund they are sunk and never go out to pay interest again. If people who have these bills, stay a week before they call for their money though due when they receive those bills, it is a great deal for the king to pay so much interest every day, so that it is better for his majesty to have them all paid into the hands of his officers, and if they keep them two or three days in their hands there is a profit to the party, but no manner of deceit to the king. We therefore stand upon it that it was a legal payment according to the act and proclamation. The opinion of the officers of the king's revenue shews that it is no deceitful payment. Will they let a man that hath the king's money in his hand pay in exchequer bills? yes, because there is no deceit upon the king for so doing, the king is no loser by it. All those merchants that paid exchequer bills instead of guineas and milled money may have informations against them, and every one of the commissioners of excise may have informations against them of the like nature, for the thing is the same. He took not those bills whilst he was in the office, for those he took then were regularly indorsed, all those complained of were taken on the 12th day from D'Acosta, and why might not he take them? If any man had owed money to the king, he might go by law and ask those that had exchequer bills to let him have them to pay to the king for renewing a lease or any other debt, he brings them to the exchequer and they take from him, the king has his own to a farthing, and the receiver charges himself with the money.

Sir B. Shower. We put it upon them to distinguish it from a collector of the excise who hath milled money of the king's in his hand, and let them shew one word in any one act of parliament that orders exchequer bills to be paid in upon any branch of the revenue before they be paid into the exchequer. It is in any pay-

ment whatever, and the tellers are to receive it. We submit it to the jury if we have not satisfied their information by Mr. Cook, and contradicted Peters by two other witnesses, and as two other evidence swear they were not with him that day, they verify Cook and falsify Mr. Peters.

Mr. Peters. It was to the best of my opinion Rumney that brought me the bills, but coming down that same day or soon after, we talked with Stent about the matter, and he said it was he and not Rumney.

Mr. Stent. I told you that I was with you about three orders of court, and not about exchequer bills.

Mr. Attorney. The information against Mr. Duncombe is, &c. We have proved that he was cashier of the excise, that he received 20,000*l.* in milled money, that he was ordered by the commissioners of the excise to pay 10,000*l.* &c. that he paid 7,000 odd pounds of it in exchequer bills bought by him from D'Acosta at 5 per cent. discount, and that he ordered feigned names to be written upon the bills, and we have proved that the bills were indorsed with false names as if they had been received into the revenue of the excise. Mr. Peters hath sworn expressly that he took them to have been received into the revenue of the excise. Mr. Peters hath sworn expressly that he took them to have been received upon that revenue, he understood so by the names indorsed upon them, for that was at that time the usual method, and thence he concluded that the persons whose names were indorsed upon them had paid them. They contradict this, and alledge the difference betwixt the bills regularly indorsed and those that were not was told to the teller. If that be made out to the satisfaction of the court I know not, that must be left upon the credit of that witness and Mr. Peters. Mr. Peters denies it positively, that either Cook or Mr. Duncombe were there that day, and swears he did not see Mr. Duncombe till after, so that Cook is expressly contradicted in all his evidence; Mr. Peters expressly denies any thing said to him by that man at all, if Mr. Peters may be credited in this matter, and though he does not say positively that Mr. Duncombe or his man told him expressly that those bills were paid into the excise, yet except they had declared the contrary, the officer must take them so. If that be so, then the information is proved in every particular. There is no other part of our evidence in question but that of his having paid them into the exchequer as having come through the excise, Mr. Duncombe knew it plainly that they had not been so paid in, he knew they were falsely indorsed, and that by his own directions as D'Acosta swears, that by his direction several false and feigned names were wrote upon them. If this be proved, this is an offence, they cannot say it is no crime.

Sir B. Shower. That depends upon some clause of the act read to your lordship, by which those bills might have been paid by Mr. Duncombe though they had never been received in any branch of the revenue, the 2nd clause of

the 2nd act, and the first act fo. 131, it appears, &c.

Mr. Attorney. That is a mistake, that clause is in the first act that makes bills current and to be received in all payments by collectors and receivers only, in all such aids as were granted that session, only except the 3*s.* aid, &c. They are bound indeed if any body come and desire to have milled money in lieu of bills to exchange them, but Mr. Duncombe's money was not taken in upon any aid of that session, so that he was not bound if any body had come to him to have exchanged their exchequer bills for money; that clause does not extend to his case. It is restrained expressly to the clause in that act of parliament for the ease of the people in the country, the act says they should exchange bills brought to them upon such and such aids, but does not extend to other aids granted that session of parliament.

Sir B. Shower. The next clause is upon the subsequent act, fo. 385, therefore Mr. Duncombe might have paid them in exchequer bills.

Mr. Attorney. There is no ground for that. Then the clause was recited.

Thus far the clause makes them current only to collectors, receivers, or commissioners of any part of the revenue; they are made current at the receipt of exchequer, not only to the receivers but from the receivers to the exchequer, it was highly reasonable they should be able to pay them in discharge. The last words they ground upon are "from any other person and on what account soever," hence they would infer, that they may be paid by collectors or receivers that receive money in specie, but this cannot be. This provision is that they shall pay them into the exchequer when they have received them; they shall be paid by those receivers into the exchequer; the latter clause doth not extend to collectors or receivers but to any other subject, as suppose they are a fine for a lease to the king, they may pay it in exchequer bills, but receivers may not, for it is other persons; receivers and collectors are mentioned immediately before. This clause will not empower receivers and collectors to pay exchequer bills for money received on the king's duty, there is not a word in the act empowering receivers or collectors to pay exchequer bills into the exchequer when they did not receive them on the revenue.

Though the officers of the exchequer were not bound to receive exchequer bills that will not indemnify him, if this payment was unlawful and made to procure advantage to himself, as it is apparent it was, for he got 390 odd pounds by it, as is sworn by D'Acosta, so that so much of the king's money he got by this method: this is paying it deceitfully; he should have acquainted them with the truth of the matter, that they were not paid into the excise, and then if they had taken them, it would have justified him.

For the proclamation, it is no larger than the

act, it does not explain or construe it, but must be subject to the same construction. As to the general practice of merchants and others, if that had been allowed by the treasury, it will not therefore follow that he should do it. If they would indulge those people thus that had money to pay for the benefit of the country, it may be indulged to them on this account, but that will not excuse him. We have proved the information as it is laid, and as for the contradiction between Mr. Peters and Mr. Duncombe's servant, it must be left to the jury. It was an unwarrantable payment and a deceit to the king. There was a contract made for exchanging exchequer bills upon any of the loans, but that is no help to him that makes it prejudicial to the king, for the king must pay them a consideration for exchanging them. It aggravates this offence that it was an advantage to himself and a prejudice to the king.

Mr. Solicitor. The defendants have said much that is not proper, and which, if there be a verdict against him, we shall hear of again at another time. The point now in dispute is, whether Mr. Duncombe be guilty of the information of causing 83 bills to be indorsed with the name of D'Acosta, and we have proved his causing those bills to be indorsed. We do not say with what design this was done, but we have proved that they were paid into the exchequer. They have a witness that says, that when they were paid in, the teller was told that some of them had not passed the revenue of the excise. After this was found out by the officer they would have had Mr. Duncombe take some of them again, but he would not. Though by the act of parliament a person may pay those bills into the exchequer upon his private account as a tenant or debtor to the king, yet when he pays them into the exchequer he ought to indorse his name on them. If the person pay them to the king as having received them on the revenue, he is not to indorse his name only to the delivery of the bill, but it ought to be indorsed with the name of the payer.—That is the act. It is plain the bills were not indorsed with the name of Duncombe, he did not pay them any otherwise than as cashier to the excise. If he paid them in as a private person, they ought to have been indorsed with his own name, and not with those of other persons. Here is the evidence of the fact, as well as the evidence of Mr. Peters, he did think they had been passed that revenue, had Mr. Duncombe intended to pay them on his own account he should have set his own name upon them; but doing the contrary, it is plain he paid them in as cashier. If Mr. Duncombe had been met with here in the hall, and had exchequer bills tendered him to be exchanged for money, he was not obliged to receive them, he was not an officer but a deputy of the commissioners of excise, and discharged taking any such bills in the name of the commissioners, nor were the commissioners bound to exchange such bills brought to them. As to the frequent practice

of persons, that when bills were returned to be paid in milled money and gold, they paid them notwithstanding in exchequer bills; it was permitted because persons refused to do otherwise. It was the king's interest rather to make an abatement of 5 per cent. than to sue so many persons. Could not the king have given so much money to D'Acosta and got 300*l.* by it as well as Mr. Duncombe, why might not the king have done it himself? It is not to our purpose to say how much the king is damnified; if he be damaged, it is sufficient; the question is, if it be not a crime to design the damnifying of the king. They have adventured upon a point of law, we shall argue that afterwards.

Mr. Serj. Wright. It is admitted that Mr. Duncombe kept the cash of the excise; that he had his authority from the commissioners of the excise, and that on the 5th of May he received so many exchequer bills. The next thing is, he having this money in his hand was ordered to pay it, upon which he pays in exchequer bills to the value of 7,000 odd pounds. It is plain that D'Acosta was not the contriver of the false indorsements, and it is not denied, but Mr. Duncombe ordered D'Acosta to indorse them: When D'Acosta questioned it because of his own credit, Mr. Duncombe found him an expedient. We differ in this, that he being thus ordered to pay this money into the exchequer, he pays those bills, parcel of the money, as if he had received them in the excise. It is plain what we mean by indorsement.

They would excuse him thus; first, that he is not guilty, and secondly, if he did pay the said bills, that it is no offence; that he is guilty of the payment, is positively proved by Mr. Peters, so far as he is a good witness; and so Fern says there was an essay made upon him on the 8th of May, to have him receive them, but he having refused them, they went to another. Mr. Peters says they were brought to him as so much money paid into the excise. If Mr. Duncombe had acquainted him or had not acquainted him so, it is not material. What pretence had he to make a payment into the exchequer at that time, but in lieu of money that he had received in the excise? It is plain he paid them in as truly indorsed, when indeed they were falsely indorsed; this they do not contradict. Then as to the legality of the payment they insist upon; they insist, that by the letter of the act of parliament, they were made current, admitting them to be as general as they would have them, if they extend their own case. It is hoped the king's case will be as good as that of a private man; if a private man, Mr. Duncombe or any other, send his servant from the excise to the exchequer with 10,000*l.* in milled money, and by the way he meets a bargain of exchequer bills, and so gets 5*l.* per cent. to himself, and his master loses it, would any private man be so served; if any man send his servant to a goldsmith, to receive 1,000*l.* in new money or guineas, and he buys exchequer

bills with the money his master trusts him to receive, and bring him paper for his money, would any master bear with this? There is no difference in this case, betwixt the king and a private man, only the act makes them current in payment to the king and not to other people. It is a breach of trust for any man having money of another man's in his hands, to buy exchequer bills and to pay them instead of money. Little money was current till descried by act of parliament, suppose any man's servant had bought little money with his master's bills, instead of new money, it would have been an offence; this is the same case, for instead of 10,000*l.* in specie which carried an intrinsic value in it, he bought bills that had not the intrinsic value in them and paid them to the king. The act intended that all people indebted to the king for rent, taxes, customs, &c. might pay the king in that coin, but does not authorize servants to buy up other specie, and to pay the king in that; this was Duncombe's case, he kept the king's cash and diverted the money he received in specie, brought up exchequer bills at a discount, and paid them into the exchequer in fraud of the king, and therefore we hope Mr. Duncombe will be found guilty, if the fact be with us. That it is so there is no great reason to doubt; there can be no comparison betwixt Mr. Peters and Cook; for though Cook says, Mr. Duncombe delivered them with his own hand, and told him the difference of the bills, Mr. Peters positively denies it, and makes a far more considerable figure than Cook; the thing speaks so plainly of itself, the truth must be on Mr. Peters's side; It is plain he paid them in lieu of money received in the excise, which justifies the information to be literally true; it is plain he paid them in so, and we submit it to your lordship and the jury.

Mr. Serj. *Darnel*. A great deal of what the defendants have said has been improperly moved at this time; they ought to have reserved that to move in arrest of judgment: we hope we shall have a verdict against them, and then they will have a time for that purpose.

The *Defendant's Counsel*. We hope not.

Mr. *Darnel*. Your plea sets out and concludes, that the name is not falsely indorsed, though we prove it is, we do not charge you with the false indorsing of the day and the month, but with indorsing the name and no more. I would know what the meaning of a false indorsing of a man's name and by so many fictitious names is. It appears by all our witnesses that they took it to be indorsed as if it had been received from the excise.

Cook is falsified by one of the other two evidences in every particular, and one of them in another.

He swears Mr. Duncombe gave Mr. Peters the bills with his own hand; Mr. Peters utterly denies it, &c.; but that we must leave the jury to judge, whether Mr. Cook falsifies Mr. Peters, or if Mr. Peters falsifies Mr. Cook. The defendant's counsel justifies his receiving 10,000*l.* in money and paying it in exchequer

bills, converting the money to his own use, because he comes after and pays bills after he hath negotiated with D'Acosta, what colour is there in the act of parliament to excuse them? not one word in any act but when they are brought to the office on a branch of the revenue, but this will not extend to a receiver's purchasing bills and making use of the king's money to buy them. The first clause was answered by Mr. Attorney, it extends to the receivers of the aid in 1697.

They offer that it was beneficial to the king. It was for the king's advantage to stop the interest of the exchequer bills, but the exchequer bills cannot be sunk till they be paid in upon the fund from which they issued.

Mr. *Conyers*. The information charges three things upon Mr. Duncombe, &c.

The first is not controverted, that he did pay fraudulently of this 10,000*l.* 7,884*l.* in exchequer bills; it was a gain to himself and a fraud upon the king: he gains 5*l.* per cent.; he pays but 95*l.* per cent. which was a prejudice to the king; for if this money had come into the exchequer in specie, those that had demands upon the exchequer might have paid specie money to answer their demands. They say the ceasing of interest is beneficial to the king, but here the king is to pay 10*l.* per cent. for exchequer bills instead of money that ought to have been paid into the exchequer, so that from 7*l.* per cent. there is a loss to the king of 10*l.* per cent. This was done at that time by one that was an officer, though not at the actual time of payment, yet he received the money when he was an officer, and next he paid those exchequer bills as if they had been reserved upon the excise, which we must leave to the judgment of your lordship and the jury upon our evidence. He brought them in three separate parcels. It is not said that some of them were actually paid into the excise as they say, but the officer actually receives and takes them as paid from the excise, and takes them particularly in his book; so that it is plain, he that took them at that time did think them paid in for excise; then as to the indorsements upon the bill that they were falsely indorsed, and done so by his directions, we have fully proved; there was no settlement at that time what rate they were to be paid at, they put first the name upon them, and afterwards what they thought proper, as D'Acosta gives evidence; So that it is plain it was a false indorsement and done by Mr. Duncombe's direction.

As to their plea from the act, fo. 384, it will not admit of any such construction as they put upon it, whatever is said of collectors and receivers it will not extend to any man that hath received the king's money to allow him to pay exchequer bills for it.

They say it hath been done by several others, but if so, it is a fault in them and no excuse to him. They are guilty perhaps, and so is he, they are all offenders upon one act of parliament.

Mr. *Cooper*. My lord, it is difficult to avoid

repetition, but I shall abuse your lordship's indulgence as little as I can. Had it been a parallel case to that of coin it would have given us light to see into the nature of this offence. But from the act read, those bills are not to be sold to supply the room of money in all cases, but at first with narrow limitations, and afterwards with limitations again; the first issued were issued upon sinking the fund, the capitation act, the land tax, 3s. aid, and to be sunk. The first original of those bills were to be received in no other aid or tax but that on which they were first issued.

Then this provision was further made, that receivers and collectors of those funds, if any of them had money in their hands rising from those aids and revenues, it is limited to them in the 1,500,000*l.* act, &c.

None of these so authorized to make such exchange; no other but those, that those provisions are made upon can make such exchange by the recited clause of the act. What a ridiculous care it would have been in the parliament to keep the execution of the act in the hands of the lords of the treasury, if it was in the power of receivers, collectors, &c. to substitute another species in the room of money. To enforce Mr. Attorney's exposition, the 389th page of the 2d act in every paragraph makes a distinction, considering, &c.

The interest stops when paid unto any receiver, collector of the aid tax, &c.: shall that receiver and collector keep that in his pockets, and 1,000*l.* at the same time, and then clap these bills instead of money into the exchequer? This must be tolerable, if that which the gentlemen of the other side say be law, for the collectors in that case may keep the king's money, make use of it, and when the day comes, pay bills into the exchequer instead of the king's money.

Paying into the hands of the public receivers or collectors is the paying of it to the king, after the king's officer hath it in his hands, they will say, it is profit indeed to our client but no disadvantage to the public, but that will not altogether excuse it, the faster these bills came into the exchequer the faster they issued out in discharge of tallies, so that it was as much to the advantage of Mr. Duncombe as it was to the detriment of the public.

The question of fact between us is, if Mr. Duncombe bought these bills on a discount in order to make this payment, and if he ordered a false indorsement with feigned names, and if all their wit can suggest no other cause for these names, and if it appear that he sent his servants with those bills to discharge a charge upon him on the account of the excise, it must appear to be a fraud upon the public, suppose on the point of credit betwixt Mr. Peters and Mr. Cook, though it should be in the opinion of the jury against us, it will be no colour for them to acquit Mr. Duncombe.

Suppose Mr. Duncombe had brought them into the exchequer indorsed as paid into the excise, as it is plain he did, suppose he found

himself disappointed at one place and then goes to another, will that excuse him? they speak as if the fraud were in Mr. Peters, as if it were so that Mr. Peters's fraud could sanctify this matter; though he had trusted Peters with the thing, as it looks like something of this: that the leaving out of the date and putting nothing but the name was a temptation to any clerk of the exchequer.

L. C. J. That is not in your information.

Mr. Cooper. No, my lord, it is not, but supposing the privy of Mr. Peters, it would not justify Mr. Duncombe; they insist upon his not being an officer at the time of the payment, but as he was keeper of that cash and bound by articles for the performance of his trust till he made his last payment.

Mr. Montague. I shall only crave a word as to Peters's evidence; suppose what Mr. Cooper has said to be true, and supposing that what the other side says gain credit with the jury that Mr. Peters be guilty, and Mr. Duncombe not guilty in that point. If Mr. Peters took them from him as from Mr. Duncombe and not as cashier of the excise, and by him received upon the branch of the revenue. If D'Acosta had paid it to him as to Mr. Duncombe and not as cashier, and if Mr. Duncombe had paid it in as a private man he should have put his own name and not D'Acosta's to them. We charge him with having made the payments as from the excise, leave out Peters's testimony, we need it not for that, for it will plainly appear there was a discharge given to Mr. Duncombe, as if he had paid it as coming through the excise.

L. C. J. It was never the intent of the act of parliament that the king's cashier should keep the king's money to buy bills, and then pay them in as if he had received them on the revenue; the law does not allow receivers to convert the king's money to their own use and to pay it in paper, but that cannot be well and therefore you gentlemen who are counsel for the defendant, and have urged this as a lawful payment, we are all of opinion that the law is against you. Mr. Duncombe being the king's cashier, and having specie in his hand, and he to pay 7,800 odd pound in exchequer bills, whereof he hath converted the money to his own use; this is a crime, but whether he be guilty of it or not, we must leave it to the jury.

The information is, that being possessed of 10,000*l.* of the king's money, that he paid exchequer bills into the exchequer for it, that is the question, if Mr. Duncombe be guilty of this crime as laid in the information.

Serj. Darnel. With submission, my lord, that is not the question.

L. C. J. It is; I have read the brief.

Judge Rookshy. There is no evidence of any bills when the matter was so indorsed on these bills.

L. C. J. He paid them in as if received by him into the excise, that is the point.

Mr. Montague. He paid them in as parcel of that sum.

L. C. J. It is said he paid them *ac si &c.*

Mr. Montague. Suppose that be left out.

Judge Turlton. The indorsement goes only to the name.

Judge Rooksby. As to the matter of law, if it appear that there is an offence within this information, by that he is not only complained of as a subject injurious to his sovereign but as a servant injurious to his master. He was intrusted with the king's money, and when he received it, defrauded his master and paid it in, that that is less than the intrinsic value, for what he paid to the king for 100*l.* was but 95*l.*

L. C. J. That is true, but is that in the information?

Another Judge. That general clause cannot extend to Mr. Duncombe, for if it could be so, he might have as well paid the money 14 months after as when he did, he might have kept the money and alledged the act, but that he did not.

L. C. J. Gentlemen of the jury, the charge against Mr. Duncombe is for fraud and deceit against the king. It supposes that he was cashier of the excise, and as such received a great sum, being possessed to the value of 20,000*l.* in milled money. He dealt with D'Acosta for exchequer bills, for 7,000 and odd pounds, those he bought from Mr. D'Acosta at 5*l.* per cent. discount: this appears upon evidence, &c. as in the information, and he is charged with paying in those bills into the exchequer, as being truly indorsed, and as if he had received them upon that branch of the revenue. The question is, if he be guilty in such a manner as he is charged. The preliminaries to it are proved, as that he was cashier to the excise on the 4th and 5th of May, 1697, and that he was turned out on the 7th, and that he had this money in his hand is plainly proved.

That he did contract with D'Acosta is proved by D'Acosta himself. It seems that D'Acosta had contracted with the commissioners of the treasury for paying money beyond sea for the king, and was to have the value of his bills in exchequer bills. This contract was made some time before, and he had allowance accordingly, because it was to depend upon the credit of an act of parliament. He says, he did give for those bills bills of exchange, and having occasion for money, he came to Mr. Duncombe to know if he would buy any, afterwards he dealt with him, and let Mr. Duncombe have those bills on the 12th of May, Mr. Duncombe agreeing with him for money at the discount of 12*l.* per cent. and odd money. Then Mr. Duncombe desired him to set his hand upon the back of the bill, which he did, but beginning to reflect upon himself that he should forfeit his credit with the lords of the treasury to discount so many bills in so little time, he was unwilling to set his hand any further, upon which Mr. Duncombe bid him set any name, he did so, and Mr. Duncombe had the bills, and he his money.

Those bills were afterwards brought to Mr.

Peters, a teller in the office, and were received by him for 7,000 and odd pounds, but before they came thither, a servant of Mr. Duncombe's comes to him, says Fern, and discourses him on Mr. Duncombe's account about paying in those exchequer bills, and asked Fern if he would receive them, he says no, he could not think they had circulated through the excise in so short a time, and therefore he could not receive them, Mr. Duncombe's servant said they had not been paid into the excise, this was four days before they were paid into Mr. Peters, and supposed to have been attempted by way of preparation for what was done after.

On the 12th of May, the exchange was made betwixt Mr. Duncombe and Mr. D'Acosta. Mr. Peters says, that Mr. Duncombe's servant came into his office with those bills, and gave him all the particulars they were received for. Mr. Peters gave them to his servant to look over, and he looked all of them over, he says they were not indorsed with the day of the month but only with a name, so says D'Acosta, he took it for granted they had been paid into the excise, and thereupon charges himself with the receipt of so much money, struck a tally, and discharged Mr. Duncombe; after this it was discovered, that those bills were not paid into the excise as they seemed to be, truly says he it will be damage to me, I shall be a sufferer, and therefore desires Mr. Duncombe to take them again. No, says Mr. Duncombe, I am not obliged so to do. I have got a tally for my discharge, and will be concerned no further. Peters says it is a damage to him of 250*l.* he hath told you they were in three parcels, some of the exchequer bills he found regularly indorsed as paid actually into the excise, and they were put up into a chest with a cover over them, indorsed exchequer bills upon the excise. They found an omission of the day when they were paid in, and indorsed several of them, and supplied that omission. This is the substance of the evidence to induce you to believe Mr. Duncombe guilty. First, say they, here was a fraud in Mr. Duncombe to convert the king's money to his own use and to pay exchequer bills in lieu of money. Then there was an attempt made before on the clerk of the office where Mr. Duncombe's servant comes and tries if he would be put upon, this was before the agreement with D'Acosta, but in prospect as you are to suppose. But of the truth whereof you must judge, and then he comes to Peters who supposed them to be received in the excise, and accordingly Mr. Duncombe was discharged of so much money as paid out of the excise.

The defendants say Mr. Duncombe hath not done an ill thing in point of law, taking it to be true, that Mr. Duncombe paid those bills as so much money paid into the excise they say he might have paid it in bills received on any other account. If so, he that hath the king's money instead of the individual money pay exchequer bills. This is affected to be law, but all the court is of another opinion. We think it had been more reasonable for them to have thought

that the law would never allow the king's receiver to go away with the king's money and convert it to their own use, but when those collectors have received these bills and pay them as money, then they took them for money and it is but reasonable they should be allowed to pay them to the king as money, but the contrary was never the meaning of any act of parliament; therefore we are to expunge all that part of the defence out of the case, and must say that such a payment cannot be just in law.

The offence laid in the information is, that he paid in so many exchequer bills as if they had been paid into the excise. They say Mr. Peters is mistaken, all those bills brought by Mr. Duncombe's man were not on that account. Cook swears he brought the bills, and that Mr. Duncombe was by when he brought in three parcels, and he gave Mr. Peters a particular account what those bills were, he says that for 1,300 and odd pounds they were indorsed as paid into the excise, and he gave an account to Peters that those bills were actually received into the excise, and that there was no question about the other amounting 7,800*l.* paid as part of the 10,000*l.* Cook is positive as to this, he was by Mr. Duncombe at the time, if so there is a great alteration in the case, though it was a fault in Mr. Duncombe, to convert so much money to his own use, yet it is not the fault laid in the information.

Further, if the evidence Cook swears true, the bills being in several parcels, if Mr. Dun-

combe had a mind to pay them into the exchequer as they had been paid into the excise, why in different parcels? here is a plain distinction in this circumstance they insist upon to falsify the evidence of Peters.

Here again there are two other of Mr. Duncombe's men called, Mr. Peters says it must be one of them that brought him the bills, but they both swear that they never paid any exchequer bills, they don't remember they were at Peters's office. Peters says, he did see Mr. Duncombe at that time, but that he saw him afterwards in the hall but not at that time, this is a plain contradiction to the evidence. We must leave it to you gentlemen of the jury, upon the whole matter, whether you be satisfied that Mr. Duncombe is guilty of the crime or not as laid in the information. If he paid those bills into the exchequer, as if they had been first paid into the revenue of the excise for so much money. If you be satisfied he did, you must bring him in guilty, but if you be satisfied that he distinguished between the bills and told Mr. Peters what bills they were, you are to bring him in not guilty.

The Jury did immediately, without going from the bar, bring him in Not Guilty.*

* "This is a copy of the Trial of Charles Duncombe, esq. taken June 17, 1699, when he was tried before the lord chief justice Holt at the King's-bench bar, Westminster. Testified by me George Ridpath."

405. The Trial of SPENCER COWPER,* esq. ELLIS STEPHENS, WILLIAM ROGERS, and JOHN MARSON, at Hertford Assizes, for the Murder of Mrs. Sarah Stout: 11 WILLIAM III. A. D. 1699.

July 16, 1699.

Proclamation was made for all persons concerned to attend.

Cl. of Ar. YOU good men that are empannelled to enquire, &c. answer to your names, and save your fines. Then Ellis Stephens, William Rogers, and John Marson, being upon bail, proclamation was made for them to attend, which they accordingly did; and Mr. Cowper was brought into court by the under sheriff.

Cl. of Ar. Spencer Cowper, hold up thy hand. (Which he did.) John Marson, hold up thy hand. (Which he did.) Ellis Stephens, hold up thy hand. (Which he did.) William Rogers, hold up thy hand. (Which he did.)

Cl. of Arr. 'You stand indicted by the names of Spencer Cowper, late of the parish of St. John's in the town of Hertford, in the county of Hertford, esq. John Marson,

'late of the parish aforesaid, in the county aforesaid, gent. Ellis Stephens, late of the parish aforesaid, in the county aforesaid, gent. and William Rogers, late of the parish aforesaid, in the county aforesaid, gent. for that you not having the fear of God before your eyes, but being moved and seduced by the instigation of the devil, on the 13th day of March, in the 11th year of the reign of his present majesty, by force and arms, &c. at the parish aforesaid, in the county aforesaid, in and upon one Sarah Stout, spinster, in the peace of God and our sovereign lord the king, then and there being, violently, feloniously, voluntarily, and of your malice aforethought, did make an assault; and that you the aforesaid Spencer Cowper, John Marson, Ellis Stephens, and William Rogers, a certain rope of no value, about the neck of the said Sarah then and there feloniously, voluntarily, and of your malice aforethought, did put, place, fix and bind; and the neck and throat of the said Sarah, then and there with

* Mr. Cowper and Miss Stout are the Mosco and Zara of Mrs. Manley's New Atalantis.

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‘ the hands of you the said Spencer Cowper, John Marson, Ellis Stephens, and William Rogers, feloniously, voluntarily, and of your malice afore-thought, did hold, squeeze, and gripe; and that you the said Spencer Cowper, John Marson, Ellis Stephens, and William Rogers, with the aforesaid rope, by you the said Spencer Cowper, John Marson, Ellis Stephens, and William Rogers, then as aforesaid about the neck of the said Sarah Stout put, placed, fixed, and bound, and by the squeezing and griping of the neck and throat of the said Sarah with the hands of you the said Spencer Cowper, John Marson, Ellis Stephens, and William Rogers, as aforesaid, the said Sarah Stout then and there, by force and arms, &c. feloniously, voluntarily, and of your malice afore-thought, did choak and strangle; by reason of which choaking and strangling of her the said Sarah Stout, by you the aforesaid Spencer Cowper, J. Marson, Ellis Stephens, and W. Rogers, with the said rope about the neck of the said Sarah Stout as aforesaid, placed, fixed and bound, and by the squeezing and griping of the neck and throat of the said Sarah with the hands of you the said Spencer Cowper, John Marson, Ellis Stephens and William Rogers, as aforesaid, the said Sarah then and there instantly died. And so you the said Spencer Cowper, John Marson, Ellis Stephens and William Rogers, the said Sarah Stout, on the 13th day of March, in the year aforesaid, in the parish aforesaid, in the county aforesaid, in manner and form aforesaid, feloniously, voluntarily, and of your malice afore-thought, did kill and murder; and the said Sarah Stout, as aforesaid, by you the said Spencer Cowper, John Marson, Ellis Stephens, and William Rogers, feloniously, voluntarily, and out of your malice afore-thought, choaked and strangled; into a certain river there, being called the Priory River, then secretly and maliciously did put and cast, to conceal and hide the said Sarah Stout, so murdered, against the peace of our sovereign lord the king, his crown and dignity, &c.’

How sayest thou, Spencer Cowper, art thou guilty of the felony and murder whereof thou standest indicted, or not guilty?

Mr. Cowper. Not Guilty.

Cl. of Arr. Culprit, how wilt thou be tried?

Mr. Cowper. By God and my country.

Cl. of Arr. God send you a good deliverance.

[Then the other three pleaded Not Guilty, and put themselves upon their country in manner aforesaid.]

Then Proclamation was made for information.

Cl. of Arr. You the prisoner at the bar, these men that you shall hear called, and personally appear, are to pass between our sovereign lord the king and you, upon trial of your several lives and deaths; therefore if you will challenge them, or any of them, your time to

speak is as they come to the book to be sworn, before they be sworn.

(Then the pannel was called over.)

Cl. of Arr. Do you design to join in your challenges, or to challenge separately?

Mr. Cowper. If we should challenge separately, there must be so many separate trials; and therefore to prevent the trouble of the court, I am willing there should be but one challenge for all.

Cl. of Arr. Gentlemen, do you all agree to that?—Prisoners. Yes, yes.

(Then after some challenges, as well on the part of the king as of the prisoners, there not being a full jury of the principal pannel:)

Mr. Cowper. If your lordship please, the pannel is now gone through, I desire they may shew some legal cause for their challenges.

Mr. Jones. I conceive we that are retained for the king are not bound to shew any cause, or the cause is sufficient, if we say they are not good for the king, and that is allowed to be a good cause of challenge; for what other cause can we shew in this case? You are not to shew your cause, you challenge peremptorily; so in this case the king does.

Mr. Cowper. My lord, I stand at the bar with some disadvantage, to encounter a gentleman, that hath no concernment; but however, I do take it for law, that there must be a cause shewed, and that cause must be a legal one, and what that cause is they must certainly make out. I do think it ought to appear that there is some relation, or some notorious affection or friendship, or something of that sort; or otherwise it is not a legal cause of challenge; and if there seem to be any difficulty in this particular, I hope your lordship will assign me counsel to argue it with the king's counsel.

Baron Hatsell. Mr. Cowper, you are not under such disadvantage as men usually are that stand where you now do. You have been educated in the study of the law, and understand it very well. I have several times seen how you have managed your clients causes to their advantage. As for this matter of challenge, Mr. Jones, I think, you should shew your cause of challenge,* though the law allows the prisoner liberty to challenge twenty peremptorily.

Mr. Jones. I do not know, in all my practice of this nature, that it was ever put upon the king to shew cause; and I believe some of the king's counsel will say they have not known it done.

Mr. Cowper. In my lord chief justice Hales's Pleas of the Crown, p. 259, it is expressly so; and in the statute of 33 Edw. 1. it is said, the king shall not challenge without cause, and that must be legal.

Cl. of Arr. Call Daniel Clarke.

Baron Hatsell, Mr. Jones, if you can say

* See the Case of Peter Cook, in the present volume, p. 311.

any juryman hath said any thing concerning this cause, and given his verdict by way of discourse, or shewed his affection one way or other, that would be good cause of challenge.

Mr. Jones. My lord, then we should keep you here while to-morrow morning.

Baron Hatsell. If there hath been any great friendship between any juryman and the party, it will look ill if he be insisted upon.

Mr. Cowper. My lord, I do not insist upon it, but I profess I know of no friendship, only that Mr. Clarke in elections hath taken our interest in town; I know I have a just cause, and I am ready to be tried before your lordship and any fair jury of the county; therefore I do not insist upon it.

Then the Jury sworn was as followeth:

Evan Lloyd, William Watson, John Prior, John Harrow, George Holgate, John Stracey, Thomas Parrot, Sam. Wallingham, Francis Cole, Rich. Crouch, John Cock, Richard Dickinson.

Mr. Cowper. My lord, I humbly move that I may have pen, ink and paper.

Baron Hatsell. Ay, by all means.

Cl. of Arr. Hold up your hand. (Which he did.) And so of the rest. You of the jury, look upon the prisoners, and hearken to their charge. They stand indicted by the names of, &c. (*Prout* in the indictment, *mutatis mutandis*.)

Jury. My lord, we desire we may have pen, ink and paper.

Cl. of the Assize. There are three of the jury desire pen, ink and paper.

Baron Hatsell. Let as many have it as will.

Mr. Jones. May it please your lordship, and you gentlemen that are sworn, I am of counsel for the king in this cause, and it is upon an indictment by which the gentlemen at the bar stand accused for one of the foulest and most wicked crimes almost that any age can remember: I believe in your county you never knew a fact of this nature; for here is a young gentlewoman of this county strangled and murdered in the night time. The thing was done in the dark, therefore the evidence cannot be so plain as otherwise might be.

After she was strangled and murdered, she was carried down into a river to stifle the fact, and to make it supposed she had murdered herself: so that it was indeed, if it prove otherwise, a double murder, a murder accompanied with all the circumstances of wickedness and villainy that I remember in all my practice, or ever read of.

This fact, as it was committed in the night time, so it was carried very secret, and it is very well we have had so much light as we have to give so much satisfaction; for we have here, in a manner, two trials; one to acquit the party that is dead, and to satisfy the world, and vindicate her reputation, that she did not murder herself, but was murdered by other hands. For my part, I shall never, as counsel in the case of blood, aggravate; I will not improve or

enlarge the evidence at all; it shall be only my business to set the fact as it is, and to give the evidence, and state it as it stands here in my instructions.

My lord, for that purpose, to lead to the fact, it will be necessary to inform you, that upon Monday the 13th of March, the first day of the last assizes here, Mr. Cowper, one of the gentlemen at the bar, came to this town, and lighted at Mr. Barefoote's house, and staid there some time, I suppose to dry himself, the weather being dirty, but sent his horse to Mrs. Stout's, the mother of this gentlewoman. Some time after he came thither himself, and dined there, and staid till four in the afternoon; and at four, when he went away, he told them he would come and lodge there that night, and sup.

According to his word he came there, and had the supper he desired; after supper Mrs. Stout, the young gentlewoman, and he sat together till near eleven o'clock. At eleven o'clock there was orders given to warm his bed, openly to warm his bed, in his hearing. The maid of the house, gentlemen, upon this went up stairs to warm his bed, expecting the gentleman would have come up and followed her before she had done; but it seems, while she was warming his bed, she heard the door clap together; and the nature of that door is such, that it makes a great noise at the clapping of it to, that any body in the house may be sensible of any one's going out. The maid upon this was concerned, and wondered at the meaning of it, he promising to lie there that night; she came down, but there was neither Mr. Cowper nor Mrs. Stout; so that we suppose, and for all that we can find and learn, they must go out together. After their going out, the maid and mother came into the room; and the young gentlewoman not returning, nor Mr. Cowper, they sat up all night in the house, expecting what time the young gentlewoman would return. The next morning, after they had sat up all night, the first news of this lady was, that she lay floating and swimming in water by the mill dam. Upon that there was several persons called; for it was a surprize how this should come to pass. There she lay floating with her petticoats and apron, but her night rail and morning gown were off, and one of them not found till some time after; and the maid will give you an account how it came to be found.

This made a great noise in the country; for it was very extraordinary, it happening that from the time the maid left Mr. Cowper and this young gentlewoman together, she was not seen or heard of till next morning, when she was found in this condition, with her eyes broad open, floating upon the water.

When her body came to be viewed, it was very much wondered at; for in the first place, it is contrary to nature, that any persons that drown themselves should float upon the water. We have sufficient evidence, that it is a thing

that never was ; if persons come alive into the water, then they sink ; if dead, then they swim ; that made some more curious to look into this matter. At first, it was thought that such an accident might happen, though they could not imagine any cause for this woman to do so, who had so great prosperity, had so good an estate, and had no occasion to do an action upon herself so wicked and so barbarous, nor cannot learn what reason she had to induce her to such a thing. Upon view of the body, it did appear there had been violence used to the woman ; there was a crease round her neck, she was bruised about her ear ; so that it did seem as if she had been strangled either by hands or a rope.

Gentlemen, upon the examination of this matter, it was wondered how this matter came about, it was dark and blind. The coroner at that time, nor these people, had no evidence given, but the ordinary evidence, and it passed in a day. We must call our witnesses to this fact, that of necessity you must conclude she was strangled, and did not drown herself. If we give you as strong a proof as can be upon the nature of the fact, that she was strangled, then the second matter under that enquiry will be, to know who, or what persons should be the men that did the fact. I told you before, it was, as all wicked actions are, a matter of darkness, and done in secret, to be kept as much from the knowledge of men as was possible.

Truly, gentlemen, as to the persons at the bar, the evidence of the fact will be very short, and will be to this purpose.

Mr. Cowper was the last man unfortunately in her company ; I could wish he had not been so with all my heart ; it is a very unfortunate thing, that his name should upon this occasion be brought upon the stage ; but then, my lord, it was a strange thing, here happens to be three gentlemen. Mr. Marson, Mr. Rogers, and Mr. Stephens. As to these three men, my lord, I do not hear of any business they had here, unless it was to do this matter, to serve some interest or friend that sent them upon this message ; for, my lord, they came to town, (and in things of this nature it is well we have this evidence ; but if we had not been straightened in time, it would have brought out more ; these things come out slowly) these persons, Mr. Stephens, Mr. Rogers, and Mr. Marson, came to town here on the thirteenth of March last, the assize day. My lord, when they came to town, they came to an house, and took lodgings at one Gurrey's ; they took a bed for two, and went out of their lodging, having taken a room with a large bed in it ; and afterwards they went to the Glove and Dolphin, and then about 8 a-clock one Marson came to them there ; in what company they came, your lordship and the jury will know by and by ; they staid there, my lord, at the Glove from 8 to 11, as they say. At 11 these three gentlemen came all into their lodging together to this Gurrey's. My lord, when they came in, it was very observable amongst

them, unless there had been a sort of fate in it, first, That they should happen to be in the condition they were in ; and, secondly, fall upon the discourse they did at that time ; for, my lord, they called for fire, and the fire was made them ; and while the people of the house were going about, they observed and heard these gentlemen talk of Mrs. Sarah Stout ; that happened to be their discourse ; one said to the other, Marson, she was an old sweetheart of yours : Ay, saith he, but she cast me off, but I reckon by this time a friend of mine has done her business. Another piece of discourse was, I believe a friend of mine is even with her by this time. They had a bundle of linen with them, but what it was is not known, and one takes the bundle and throws it upon the bed ; well, saith he, her business is done, Mrs. Sarah Stout's courting days are over ; and they sent for wine, my lord ; so after they had drank of the wine they talked of it, and one pulled out a great deal of money ; saith one to another, what money have you spent to day ? Saith the other, thou hast had 40 or 50*l.* for thy share : Saith the other, I will spend all the money I have, for joy the business is done.

My lord, this discourse happened to be among them ; which made people of the house consider and bethink themselves ; when the next day they heard of this Mrs. Stout's being found in the water, this made them recollect and call to mind all these discourses.

My lord, after these gentlemen had staid there all night, next morning, truly, it was observed (and I suppose some account will be given of it) that Mr. Cowper and they did meet together, and had several discourses, and that very day went out of town ; and I think as soon as they came to Hoddesden, made it all their discourse and business to talk of Mrs. Stout. My lord, we will call our witnesses, and prove all these facts that I have opened to your lordship ; and then I hope they will be put to give you some account how all these matters came about.

Call Sarah Walker (who was sworn.)

Mr. Jones. Mrs. Walker, pray give an account to my lord and the jury, of Mr. Cowper's coming to your house the 13th of March, and what was done from his coming there at night to his going out ?

Walker. May it please you, my lord, on Friday before the last assizes, Mr. Cowper's wife sent a letter to Mrs. Stout, that she might expect Mr. Cowper at the assize time ; and therefore we expected Mr. Cowper at that time, and accordingly provided ; and as he came in with the judges, she asked him if he would alight ? He said no ; by reason I come in later than usual, I will go into the town and show myself, but he would send his horse presently. She asked him, how long it would be before he would come, because they would stay for him ? He said, he could not tell, but he would send her word ; and she thought he had forgot, and sent me down to know, whether he would please to

come? He said, he had business, and he could not come just then; but he came in less than a quarter of an hour after, and dined there, and he went away at four a-clock: and then my mistress asked him, if he would lie there? And he answered yes, and he came at night about 9; and he sat talking about half an hour, and then called for pen, ink and paper, for that, as he said, he was to write to his wife; which was brought him, and he wrote a letter; and then my mistress went and asked him, what he would have for supper? He said milk, by reason he had made a good dinner; and I got him his supper, and he eat it; after she called me in again, and they were talking together, and then she bid me make a fire in his chamber; and when I had done so, I came and told him of it, and he looked at me, and made me no answer: then she bid me warm the bed, which accordingly I went up to do as the clock struck eleven, and in about a quarter of an hour, I heard the door shut, and I thought he was gone to carry the letter, and staid about a quarter of an hour longer, and came down, and he was gone and she; and Mrs. Stout the mother asked me the reason why he went out when I was warming his bed? And she asked me for my mistress, and I told her I left her with Mr. Cowper, and I never saw her after that, nor did Mr. Cowper return to the house.

Mr. Jones. How long did you sit up?

Walker. All night.

Mr. Jones. What time next morning did you see her?—Walker. About seven a-clock.

Mr. Jones. In the water, or out?

Walker. Out of the water.

Mr. Cowper. Pray will you recollect a little, and be very particular as to the time when I went out at night?

Walker. Sir, it was a quarter after eleven by our clock; the difference between the town clock and ours was half an hour.

Mr. Cowper. But you say by your clock it was a quarter after eleven?—Walker. Yes, Sir.

Mr. Cowper. Pray, what account did you give as to the time to the coroner's inquest?

Walker. I said then it was eleven, or a quarter after eleven, when I heard the door shut.

Mr. Cowper. Pray, was Mrs. Stout present with the coroner's inquest when you gave that account?—Walker. Yes, she was.

Mr. Cowper. Pray, what account did you give as to the time before my lord chief justice Holt?

Walker. I gave the account that it was eleven, or a quarter of an hour after.

Mr. Cowper. In her depositions there is half an hour's difference; for then she said it was half an hour after ten.

Baron Hatsell. Which clock was earliest, yours or the town clock?

Walker. Ours was half an hour faster than theirs.

Mr. Cowper. How came you to know this?

Walker. By reason that dinner was dressed at the cook's, and it was ordered to be ready

by two a-clock, and it was ready at two by the town clock, and half an hour after two by ours.

Mr. Cowper. When you came down, and missed your mistress, did you enquire after her all that night?

Walker. No, Sir, I did not go out of the doors; I thought you were with her, and so I thought she would come to no harm.

Mr. Cowper. Here is a whole night she gives no account of. Pray, mistress, why did not you go after her?

Walker. My mistress would not let me.

Mr. Cowper. Why would she not let you?

Walker. I said I would see for her: No, saith she, by reason if you go and see for her, and do not find her, it will make an alarm over the town, and there may be no occasion.

Mr. Cowper. Did your mistress use to stay out all night?—Walker. No, never.

Mr. Cowper. Have not you said so?

Walker. I never said so in my life.

Mr. Cowper. Pray, Mrs. Walker, did you never take notice that your mistress was under melancholy?

Walker. I do not say but she was melancholy; she was ill for some time; and I imputed it to her illness, and I know no other cause.

Mr. Cowper. Have you not often told people that your mistress was a melancholy person, upon your oath?

Walker. I have said she hath been ill, and that made her melancholy.

Mr. Cowper. I will ask you this question; pray, did you ever purchase any poison more or less, within these twelve months?

Walker. Yes, Sir, I did so, and can tell what it was for.

Mr. Cowper. By whose order?

Walker. By my own order.

Mr. Cowper. Did you buy poison but once, upon your oath?

Walker. I believe I might buy twice.

Mr. Cowper. Where?

Walker. Of Mr. Ludman.

Mr. Cowper. Both times there?

Walker. Yes.

Mr. Cowper. Of him?

Walker. No, of the young man.

Mr. Cowper. Did you ever buy any poison at Luton?—Walker. No.

Mr. Cowper. Did you ever buy any by your mistress's order, or of one Mrs. Crooke, upon your oath?—Walker. No, I never did.

Mr. Cowper. Pray, at what time was it that you bought this poison you speak of?

Walker. I cannot remember.

Mr. Cowper. Pray recollect yourself.

Walker. It was within this half year, to be sure.

Mr. Cowper. What was the name of the poison you asked for?

Walker. I asked for white mercury.

Mr. Cowper. She saith, I passed by her mistress's house, and went directly to Mr. Barefoot's; pray, did not you come to Mr. Barefoot's after me?—Walker. Yes, sir.

Mr. Cowper. Pray did you give the same account before the coroner, when this matter was enquired into, that you have now done?

Walker. Yes, I did as near as I can tell.

Mr. Cowper. Did you give this account in substance?

Walker. Yes, I did.

Baron Hatsell. Mr. Cowper, I suppose you do not mean in relation to the poison.

Mr. Cowper. My lord, I mean in relation to so much of the evidence which she now gives, and particularly respects me. For what end or purpose did you buy it?

Walker. I bought it to poison a dog.

Mr. Cowper. Why should you poison the dog?

Walker. It was a dog that used to haunt our house, that did us a great deal of mischief; but that did not do, so I bought it a second time.

Mr. Cowper. Who gave it to the dog?

Walker. It was another maid did give it the dog.

Mr. Cowper. Why did you then swear it was given the dog?

Walker. Sir, I saw it given.

Mr. Cowper. Did your mistress know of it?

Walker. Yes, she did know of it afterwards.

Mr. Cowper. How did you give it?

Walker. In warm milk.

Mr. Cowper. How did the milk look?

Walker. It did not look discoloured in the least.

Baron Hatsell. You said just now your mistress was ill, and that made her melancholy; what illness was it?

Walker. My lord, she had a great pain in her head.

Baron Hatsell. How long had she been troubled with it?

Walker. Ever since last May was twelve months was the beginning of it.

Mr. Jones. Did you ever find her in the least inclined to do herself a mischief?

Walker. No, I never did.

Mr. Cowper. You bought poison twice, did you give all the poison you bought to the dog?

Walker. Yes.

Mr. Cowper. The first and the last?

Walker. Yes, the whole.

Mr. Cowper. How much did you buy?

Walker. I am not certain how much I bought.

Mr. Cowper. Pray, what mischief did it do the dog?

Walker. I cannot tell, he may be alive till now for aught I know.

Mr. Cowper. What mischief did the dog do?

Walker. A great deal, he threw down several things and broke them.

Mr. Jones. Did Mr. Cowper, upon your oath, hear Mistress Stout give you order to make his fire, and warm his bed?

Walker. He knows best, whether he heard it or no; but he sat by her when she spake it.

Mr. Jones. Did she speak of it so as he might hear?

Walker. Yes, she did; for he was nearer than I.

Mr. Jones. And did not he contradict it?

Walker. Not in the least.

Mr. Jones. Was it the old or young woman that gave you the order?

Walker. The young woman.

Mr. Cowper. Pray did the dog lap it, or did you put it down his throat, upon your oath?

Walker. No, he lapt it, upon my oath.

Mr. Jones. Did Mr. Cowper send for his horse from your house the next day?

Walker. I cannot say that; I was not in the way.

Mr. Jones. Did he come to your house afterwards?

Walker. No, I am sure he did not.

Mr. Jones. Was the horse in your stable when it was sent for?—Walker. Yes, sir.

Mr. Jones. And he did not come to your House again, before he went out of town?

Walker. No, Sir.

Mr. Jones. Do you know which way he went out of town?—Walker. No, Sir.

Baron Hatsell. Did Mr. Cowper use to lodge at your house at the assizes?

Walker. No, my lord, not since I came there; the sessions before he did.

Mr. Cowper. Where did you come to invite me to dinner?

Walker. At Mr. Barefoot's.

Mr. Cowper. Then you knew I was to lodge there?

Baron Hatsell. Who wrote the letter on Friday, that Mr. Cowper would lodge there?

Walker. I know not who wrote it, his wife sent it.

Mr. Jones. Did he tell you he would lodge there that night before he went away?

Walker. When he went from dinner he said so.

Mr. Jones. Call James Berry. (Who was sworn.) Now, my lord, we will give evidence of the manner how she was found. Mr. Berry, Do you remember when Mrs. Stout was found by your mill?

Berry. No, indeed, I do not know just what day it was.

Mr. Jones. When you found her, do you remember, how, in what manner she was found?

Berry. Yes; I went out in the morning to shoot a flush of water by six o'clock, and I saw something floating in the water, so I went out to see what it was, and I saw part of her cloaths.

Mr. Jones. Did you see her face?

Berry. No, not then.

Mr. Jones. Was her face under water, or above?

Berry. No part of her body was above water, only some part of her cloaths.

Mr. Jones. How many foot deep might the water be?—Berry. Five foot deep.

Mr. Jones. And how much was she under water, do you conceive?

Berry. She might be under water about five or six inches.

Mr. Jones. Then the whole body was not under water, was it?—Berry. Yes.

Mr. Jones. Was her face under water?

Berry. Yes.

Baron Hatsell. Did she lie upon her face, or her back?

Berry. She lay upon her side.

Mr. Jones. When she was taken out, were her eyes open or shut?

Berry. Her eyes were open.

Mr. Jones. Was she swelled with water?

Berry. I did not perceive her swelled: I was amazed at it, and did not so much mind it as I should.

Mr. Jones. But you remember her eyes were staring open?—Berry. Yes.

Mr. Jones. Did you see any marks or bruises about her?—Berry. No.

Mr. Cowper. Did you see her legs?

Berry. No, I did not.

Mr. Cowper. They were not above water?

Berry. No.

Mr. Cowper. Could you see them under water?—Berry. I did not so much mind it.

Mr. Cowper. Did she lie straight or double, driven together by the stream?

Berry. I did not observe.

Mr. Cowper. Did you not observe the weeds and trumpery under her?

Berry. There was no weeds at that time thereabouts.

Mr. Jones. Was the water clear?

Berry. No, it was thick water.

Mr. Jones. Was there any thing under her, in the water, to prevent her sinking?

Berry. No, I do not know there was; she lay on her right side, and her right arm was driven between the stakes, which are within a foot of one another.

Mr. Jones. Did any thing hinder her from sinking?—Berry. Not that I saw.

Mr. Jones. Did you help to take her out from the stakes?—Berry. No.

Mr. Jones. Call John Venables.

Mr. Cowper. Mr. Berry, if I understand you right, you say, her right arm was driven between the stakes, and her head between the stakes; could you perceive her right arm, and where was her left arm?

Berry. Within a small matter upon the water.

Baron Hatsell. Did you see her head and arm between the stakes?

Berry. Yes, her arm by one stake, and her head by another.

Mr. Jones. Did her arm hang down, or how?

Berry. I did not mind so much as I might have done.

[Then John Venables was sworn.]

Mr. Jones. Did you see Mrs. Stout, when she was taken out of the water, as she lay in it?

Venables. Yes.

Mr. Jones. Give an account how you found her.

Venables. She was floating upon the water.

Mr. Jones. How? was all her body, or what part in the water?

Venables. She lay upon her right side, and this arm upon the water, rather above the water, her ruffles were upon the water.

Mr. Jones. Did you help to take her out?

Venables. No, Sir.

Mr. Jones. Were her eyes open then?

Venables. Her eyes were open when I saw her, but I did not see her when she was taken out.

Mr. Jones. Did any thing hinder her from sinking?

Venables. I saw nothing to hinder her if she would have sunk.

Mr. Jones. Call Leonard Dell. (Who was sworn.) Did you see this Mrs. Stout in the water?—Dell. Yes.

Mr. Jones. Pray, tell us in what posture she was found?

Dell. I saw her floating in the river; I saw her face and her cloaths.

Mr. Jones. Were her cloaths all above the water?

Dell. Her stays and her coat that she had next her.

Mr. Jones. Were these plainly above the water?—Dell. Some part of them.

Mr. Jones. Did you see her face, was that above the water?

Dell. No, Sir, it was between the piles; she lay on her right side, and her head was between the stakes, and her right arm.

Mr. Jones. Did you help to take her out of the water?—Dell. Yes.

Mr. Jones. Did any thing hinder her from sinking?

Dell. Neither stakes, nor any thing there.

Mr. Jones. Did her arms or neck stick to the stakes?

Dell. Not to my thinking.

Mr. Jones. Was the water clear, or weedy?

Dell. It was very clear.

Mr. Jones. How many foot deep was it?

Dell. I know not but it might be five foot deep.

Mr. Jones. Did you help to take her out of the water?

Dell. Yes, Sir, and we took her and carried her into the meadow just by, and laid her on the bank.

Mr. Jones. Did you observe her face, neck, or arms, to be bruised?

Dell. I saw no bruise at all.

Mr. Cowper. How did you know but her right arm did reach to the ground, since you did not see it?

Dell. We could see her arm lie in this manner between the piles, the right arm was downwards, for she lay on one side.

Juryman. Did you see any arm above in the water?—Dell. No.

Baron Hatsell. You should propose your questions to the court.

Juryman. My lord, I desire to know where was her left arm?

Baron Hatsell. Where was her left arm?

Dell. I cannot tell how it did lie; I did not observe it.

Baron *Hatsell*. When you took her out of the water, did you observe her body swelled?

Dell. We carried her into the meadow, and laid her on the bank-side, and there she lay about an hour, and then was ordered to be carried into the miller's.

Baron *Hatsell*. Did you observe that any water was in her body?

Dell. None at all that I could see; but there was some small matter of froth came from her mouth and nostrils.

Juryman. My lord, I desire to know whether her stays were laced?

Dell. Yes, she was laced.

Mr. *Cowper*. If I take you right, you say she was strait-laced?

Dell. Her stays were laced.

Mr. *Cowper*. And you say there was froth and foam came out of her mouth and nostrils?

Dell. Yes, Sir.

Mr. *Jones*. Pray what quantity?

Dell. I could hold it all in the palm of my hand.

Mr. *Cowper*. How was she taken out of the water?

Dell. My lord, we stood upon the bridge, I and another man, where she lay, and he laid hold of her and took her out.

Mr. *Jones*. And did you not perceive she was hung?—*Dell*. No, my lord.

Mr. *Cowper*. Pray, where was she laid when she was taken out?

Dell. In the place called the Hoppers, just by.

Mr. *Cowper*. How long did she lie there?

Dell. About an hour.

Mr. *Cowper*. Did you stay there all that time?—*Dell*. Yes.

Mr. *Cowper*. And did the froth continue to issue from her mouth and nostrils?

Baron *Hatsell*. He told you, Mr. *Cowper*, he could hold it all in the palm of his hand.

Mr. *Jones*. Call John Ulfe. (Who was sworn.) John Ulfe, did you see Mrs. Stout when she was taken out of the water?

Ulfe. Yes.

Mr. *Jones*. Give an account of the condition she was in.

Ulfe. She lay on one side; I helped to take her out.

Mr. *Jones*. Did she hang or stick to any thing?

Ulfe. There was nothing at all to hold her up; she lay between a couple of stakes, but the stakes could not hold her up.

Mr. *Jones*. Did you see her after she was taken out?—*Ulfe*. Yes.

Mr. *Jones*. Did any water come out of her?

Ulfe. Nothing at all, only a little froth came out of her nostrils.

Mr. *Jones*. Call Katherine Dew. (Who was sworn.) Did you see Mrs. Stout taken out of the river?—*Dew*. Yes.

Mr. *Jones*. Did you see her in the river before?—*Dew*. Yes, Sir.

Mr. *Jones*. How did she lie in the river?

Dew. She lay side-way with her eyes open,

and her teeth clenched in her head, with water flowing a little from her face, some part of her and her petticoats were above water.

Mr. *Jones*. Did nothing hold her from sinking?

Dew. Her right arm lay against the stake.

Mr. *Jones*. Did you see her after she was taken out of the river?—*Dew*. Yes, Sir.

Mr. *Jones*. Was she swelled?

Dew. I did not perceive she was swelled at all.

Mr. *Jones*. Did you handle her?

Dew. No, I touched nothing but her petticoat.

Mr. *Jones*. Did you observe her legs were in the water?—*Dew*. No, I did not.

Mr. *Cowper*. Did you see where her right arm was?

Dew. I could not see her right arm, the water flowed over it.

Mr. *Cowper*. Did you see her after this time?

Dew. No, Sir, I saw her taken out, but not afterward.

Baron *Hatsell*. Did you see her after she lay on the ground?—*Dew*. Yes, my lord.

Baron *Hatsell*. How was she then?

Dew. She purged at the nose and one of her eyes; I did not take particular notice after she was out; the notice I took was when she was in the water.

Baron *Hatsell*. What did you see at her eye?

Dew. Froth, my lord.

Mr. *Jones*. Did you see her after she was stripped naked?—*Dew*. No, my lord.

Mr. *Jones*. Was it a settled frothing, or a purging?—*Dew*. A purging froth.

Baron *Hatsell*. Did any body wipe it off?

Dew. No, my lord, I did not see any body do it.

Baron *Hatsell*. Then there was no new froth came?

Dew. No, my lord, I saw her froth at the nose and one of the eyes as soon as she was taken out, but I did not stay long.

Mr. *Cowper*. Was she in her stays?

Dew. Yes, Sir.

Mr. *Cowper*. Was she not laced?

Dew. Yes, she was laced before and behind.

Mr. *Jones*. Call Thomas Dew. (Who was sworn.) Did you see this Mrs. Stout in the water? Pray give my lord and the jury an account what posture she was in.

Dew. I saw her lying in the water floating, above the water I will not say, but the water ran some small matter over her; her right arm was within the stake, and her left arm without; she lay just upon her side, and I saw her when she was first taken up, and her shoes and stockings were as clean as when they were put on, no mud nor dirt upon them, and I saw her shoes and her stockings, as high as her knee almost; but I saw no dirt.

Mr. *Jones*. Do you believe she had been sunk to the bottom?

Dew. She did not look as if she had, nor I see no water come from her.

Mr. Jones. Did you observe that she was swelled at all?

Dew. No, nor swelled that I perceived a bit; there was a little froth that came out of her nose, and about her (I cannot say from her eye), in that it was a small quantity.

Mr. Jones. Call Mr. Edward Blackno. (Who was sworn.) Did you see Mrs. Stout when she lay in the water?

Blackno. Yes, I did see her lie in the water floating; I was so near, that I saw the miller's man lift her up by one of her arms out of the water.

Mr. Jones. Was the arm bent or straight?

Blackno. It hung in this manner. (Shewing the court how with his own arm.)

Baron Hatsell. The other witnesses said, she lay on her right side.

Blackno. Yes, she lay on her right side, and her arm in this manner.

Baron Hatsell. Did you observe her to be swelled?

Blackno. I did not see her taken out.

Baron Hatsell. Did you observe any thing to hinder her from sinking?

Blackno. No, I did not, nothing but the water.

Mr. Cowper. I think, Sir, if I heard you right, you say, that this taking her by the arm and stirring her, was before she was taken out of the water; then I would know, after she was stirred, was she let go again? Was you by at the taking of her up?

Blackno. No, I was not.

Baron Hatsell. He told you she was floating when he saw her, and that nothing hindered her from sinking.

[Then William Edmunds and William Page were sworn.]

Mr. Jones. Edmunds, did you see Mrs. Stout when she was in the water?

Edmunds. Yes, Sir.

Mr. Jones. Give an account what posture she was in?

Edmunds. She lay against the stake, her head lay against the stake in the river; we were coming up in a barge, and called to a miller to draw the water, but he said he could not, for then she would swim through; and then we came on, and see her lie in the water.

Mr. Jones. Did any thing hinder her from sinking?—Edmunds. Not that I see.

Mr. Jones. Did no part of her legs or arms stick? Did you see her taken out?

Edmunds. No, I did not, I was gone; I did not know whether they would take her out, or no.

Mr. Jones. Page, did you see Mrs. Stout upon the water?—Page. Yes, Sir.

Mr. Jones. Tell us how she lay.

Page. She lay floating on the water, on her right side, with her head between the stakes.

Mr. Jones. Did her arms or cloaths, or any thing stick?—Page. Not that I saw.

Mr. Jones. Did any thing hinder her from sinking?—Page. I saw nothing.

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Mr. Cowper. Did you see her legs or knees?

Page. No, I could not, they were not out of the water.

Mr. Jones. Swear Mrs. Anne Ulse. (Which was done.) Did you see Mrs. Stout in the water?

Ulse. Yes, I helped to pull her out; she lay on one side in the water floating, and the water came over her face.

Mr. Jones. Did she stick by any thing?

Ulse. One of her arms was about the post.

Mr. Jones. How?

Ulse. It got through the grate.

Mr. Jones. But it did not hang?—Ulse. No.

Mr. Jones. Did you take her out?

Ulse. Yes, sir.

Mr. Jones. Did you mind her cloaths?

Ulse. Yes, I turned up her petticoats in the water.

Mr. Jones. Had she gloves on?

Ulse. No, Sir.

Mr. Jones. How were her shoes and stockings?

Ulse. They were not muddy, her stockings were rolled down, she had no garters on.

Mr. Cowper. You say one arm lay through the grate, where lay the other?

Ulse. The other was down in the water.

[William How was sworn.]

Mr. Jones. Did you see Mrs. Stout in the water?

How. Yes, sir, I see her lie upon the water; she lay a-float, she might lie three or four inches deep in the water.

Mr. Jones. Did any of her cloaths lie above the water?

How. Some part of her coats lay above the water.

Mr. Jones. Did any thing hinder her from sinking?

How. I saw nothing; I saw them take her out, and did not perceive she hung any way; she lay with one arm, and her head in the grate, but I did not perceive she hung.

[John Meager was sworn.]

Mr. Jones. Well, do you give an account of what you know of Mrs. Stout being in the water.

Meager. I see Mrs. Sarah Stout floating in the water, her right arm in the grate, and her left arm with the stream.

Mr. Jones. Did she hang or stick by any thing?

Meager. No, neither hang nor stick, she floated.

Mr. Cowper. Did you see some body go through the Blue-coat building about eleven o'clock.

Mr. Meager. No, Sir, I was in bed before nine.

Mr. Jones. Now, my lord, we will give an account how she was when she was stript, and they came to view the body. Call John Dimsdale junior. (Who was sworn.)

Dimsd. My lord, I was sent for at night on Tuesday the last assizes.

Mr. Cowper. My lord, if your lordship pleases, I have some physicians of note and eminency that are come down from London; I desire they may be called into court to hear what the surgeons say?

Baron Hatsell. Ay, by all means.

Mr. Cowper. My lord, there is Dr. Sloane, Dr. Garth, Dr. Morley, Dr. Gilstrop, Dr. Harriot, Dr. Wollaston, Dr. Crell, Mr. William Cowper, Mr. Bartlett, and Mr. Camlin.—[Who respectively appeared in court.]

Mr. Jones. Give an account how you found Mrs. Stout.

Baron Hatsell. You are a physician, I suppose, Sir?

Dimsdale. A surgeon, my lord. When I was sent for to Mrs. Stout's, I was sent for two or three times before I would go; for I was unwilling after I heard Mrs. Stout was drowned; for I thought with myself, what need could there be of me when the person was dead? But she still sent; and then I went with Mr. Camlin, and found a little swelling on the side of her neck, and she was black on both sides, and more particularly on the left side, and between her breasts up towards the collar-bone; that was all I saw at that time, only a little mark upon one of her arms, and I think upon her left arm.

Mr. Jones. How were her ears?

Dimsdale. There was a settling of blood on both sides the neck, that was all I saw at that time.

Mr. Jones. How do you think she came by it?

Dimsdale. Truly I only gave an account just as I say now to the gentlemen at that time, I saw no more of it at that time, but about six weeks after the body was opened by Dr. Phillips—

Mr. Cowper. My lord, he is going to another piece of evidence, and I would ask him—

Mr. Jones. Let us have done first; how was her ears?

Dimsdale. There was a blackness on both ears, a settling of blood.

Mr. Jones. Call Sarah Kimpson.

Baron Hatsell. Mr. Cowper, now you may ask him any thing, they have done with him.

Mr. Cowper. I would ask him, whether he was not employed to view these particular spots he mentions at the coroner's inquest?

Dimsdale. I was desired to look upon the face and arms, and breast, because they said there was a settling of blood there.

Mr. Cowper. When you returned to the coroner's inquest, what did you certify as your opinion?

Dimsdale. I did certify there was a settling of blood; but how it came I could not tell.

Mr. Cowper. I ask you, Sir, did not you say it was no more than a common stagnation usual in dead bodies?

Dimsdale. I do not remember a word of it.

Mr. Cowper. Sir, I would ask you; you say the spot was about the collar bone; was it above or below?

Dimsdale. From the collar bone downwards.

Mr. Cowper. Had she any circle about her neck?—Dimsdale. No; not, upon my oath.

Mr. Jones. Swear Sarah Kimpson. Did you observe this Mrs. Sarah Stout, when she was stripped, how her body was?—Kimpson. Yes.

Mr. Jones. Pray, give an account of it.

Kimpson. She had a great settlement of blood behind her ear, as much as my hand will cover, and more; and she had a settlement of blood under her collar bone.

Mr. Jones. Did you see nothing about her neck?

Kimpson. Nothing round her neck; on the side of her neck there was a mark.

Mr. Jones. Was there any other part bruised?

Kimpson. Only her left wrist, and her body was very flat and lank.

Mr. Cowper. Pray, what day was it that you saw her?

Kimpson. It was the day she was found.

Mr. Cowper. Was she not laced?

Kimpson. She was laced.

Mr. Cowper. Did you help to stir her?

Kimpson. Yes, Sir.

Mr. Jones. Did her body seem to be swelled, or was there any water come from her?

Kimpson. I did not observe the least drop of water that appeared any way.

Mr. Jones. Did you know what did purge from her?—Kimpson. Nothing that I saw.

Mr. Jones. Had not you a child drowned there lately?

Kimpson. Yes, about ten weeks ago.

Mr. Jones. And you found her?

Kimpson. She was drowned at night, and we found her next morning.

Mr. Jones. Where did you find her, at the top, or at the bottom of the water?

Kimpson. At the bottom.

Mr. Jones. How was she?

Kimpson. She was swelled as much as she could hold.

Mr. Jones. Were her eyes shut or open?

Kimpson. Her eyes were shut, and the child was laced as tight as the coat could be.

Mr. Jones. Was the child opened?

Kimpson. Yes.

Mr. Jones. And what was in the body of the child?

Kimpson. It was very full of water.

Mr. Jones. Call Sarah Peppercorn.

Mr. Cowper. You say you viewed the child; had it any settlement of blood?

Kimpson. I saw none.

Mr. Cowper. And you viewed the body?

Kimpson. Yes.

(Then Sarah Peppercorn was sworn.)

Mr. Jones. Did you see the body of Mrs. Sarah Stout, after it was stript and laid out?

Peppercorn. I did, Sir.

Mr. Jones. In what condition did you find her?

Peppercorn. I did not see her till she was brought home to her mother's, and there was a rumour in the town that she was with child,

and I was sent for to give an account whether she was or not, and I found she was not; and I helped to pull off her cloaths, and she was very clear as any I ever knew, only had a black place on the side of her head, and in another place about her ear; but how it came I know not.

Mr. Jones. Did you observe how her body was?

Peppercorn. Her body was very well as any woman's could be.

Mr. Jones. Did you observe any water, or any such thing from her?—Peppercorn. No.

Mr. Jones. Was there any purging at her mouth or nostrils?

Peppercorn. A little froth as any body might have.

Mr. Cowper. At what hour did you see her?

Peppercorn. I believe it might be nine or ten a-clock.

Baron Hatsell. In the morning?

Peppercorn. Yes, Sir; but I cannot give a just account of the time.

Baron Hatsell. What was you sent to for?

Peppercorn. To know if she was with child; for it was reported she had drowned herself because she was with child; and so her mother desired me to come to give an account that it was not so; and I found that it was not so.

Baron Hatsell. You are a midwife, are you not?—Peppercorn. Yes, my lord.

(Then Elizabeth Husler was sworn.)

Mr. Jones. Had you the view of the body of Mrs. Sarah Stout the day you heard she was drowned?

Husler. She was not drowned, my lord; I went thither and helped to pull off her cloaths.

Mr. Jones. In what condition was her body?

Husler. Her body was very lank and thin, and no water appeared to be in it.

Mr. Jones. Was there any water about her mouth and nose?

Husler. Not when I saw her.

Mr. Jones. Did you mind her about her neck and head?

Husler. Yes, yes, there was a settling of blood at the top of the collar bone, just here, and there was a settling of blood upon both her ears, most about her left ear.

Mr. Jones. Swear Ann Pilkington. (Which was done.) Did you see the body of Mrs. Stout after she was drowned?

Pilkington. Yes, Sir.

Mr. Jones. Pray, in what condition was she when she was stript?

Pilkington. I was in the house when she was brought in dead; and old Mrs. Stout desired me to help to lay her out; and taking a view of her, I did not at all perceive her body to be swelled.

Mr. Jones. Was there any water came out upon the moving of it?

Pilkington. No, I did not perceive any; and by a further view, I saw a redness on the left side of her head, and her ear was black, and there was a little mark upon her breast on the left side.

Mr. Jones. What colour was it of?

Pilkington. It seemed reddish and blackish: as to colour, it was like a settling of blood; I cannot tell how to make it out very well.

Mr. Cowper. Had she any circle round about her neck?—Pilkington. No, not that I see.

Mr. Cowper. Pray, did not you make some deposition to that purpose, that you know of?

Pilkington. Sir, I never did, and dare not do it.

Mr. Cowper. It was read against me in the King's-bench, and I will prove it; was not Mr. Mead with you at the time of your examination?—Pilkington. Yes.

Mr. Cowper. Did not he put in some words, and what were they?

Pilkington. Not that I know of.

Mr. Cowper. But you never swore so, upon your oath?

Pilkington. No, I do not believe I did; if I did, it was ignorantly.

Mr. Jones. Here is her examination, it is 'cross her neck.'

Mr. Cowper. Was Mr. Young of Hertford, the constable, present when you were examined?

Pilkington. Yes, he was so. The next day Mrs. Stout sent for me again to put on her daughter's shroud, and I was one that helped to draw the sheet away, and there was not one drop of water come from her; and I laid a cloth under her chin, when I helped her into the coffin, but I did not see the least moisture come from her.

Mr. Cowper. What day was it, that you put her into the coffin?

Pilkington. The next day after she was dead.

Mr. Cowper. Do you know nothing of her being conveyed into the barn?

Pilkington. I happened to be in the barn, Mrs. Stout desired me to go with her, and she was brought up in an indecent manner, and I put a sheet about her. I was in Mrs. Stout's house before her daughter was brought thither.

Mr. Jones. Call Dr. Coatsworth, Dr. Nailor, Dr. Woodhouse, Dr. Bide.

(Mr. Coatsworth was sworn.)

Mr. Jones. Pray, doctor, had you a view of the body of Mrs. Stout?

Coatsworth. Yes, I had, Sir: I am a surgeon.

Mr. Jones. Pray, give an account of it, and what your opinion was how she came by her death?

Coatsworth. My lord, in April last I was sent for by Dr. Philips, to come to Hertford to see the body of Mrs. Stout opened, who had been six weeks buried; and he told me, that there was a suspicion she was murdered, and that her relations were willing to have her taken up and opened. I came down, I think, on the 27th of April, and lay at Mrs. Stout's house that night; and by her discourse, I understood she wanted to be satisfied, whether her daughter was with child? I told her, it was my opinion we should find the parts contained in the abdomen so rotten, that it would be impossible to

discover the uterus from the other parts; however, if she would have her opened, I could not discover whether she was with child, unless the infant was become bony. Her face and neck, to her shoulders, appeared black, and so much corrupted, that we were unwilling to proceed any further: but, however, her mother would have it done, and so we did open her; and as soon as she was opened, we perceived the stomach and guts were as full of wind as if they had been blown with a pair of bellows; we put her guts aside, and came to the uterus, and Dr. Philips shewed it us in his hand, and afterwards cut it out and laid it on the table, and opened it, and we saw into the cavity of it, and if there had been any thing there as minute as a hair, we might have seen it, but it was perfectly free and empty; and after that, we put the intestines into their places; and we bid him open the stomach, and it was opened with an incision-knife, and it sunk flat, and let out wind, but no water; afterwards we opened the breast and lobes of the lungs, and there was no water: then we looked on each side, and took up the lobes of the lungs too, to see if there was no water in the diaphragm, and there was none, but all dry. Then I remember I said, this woman could not be drowned, for if she had taken in water, the water must have rotted all the guts: that was the construction I made of it then; but for any marks about her head and neck, it was impossible for us to discover it, because they were so rotten.

Mr. Cowper. You say, this inspection was made about six weeks after she was dead?

Coatsworth. It was made on the 28th of April.

Mr. Cowper. She was drowned on the 13th of March.

Mr. Jones. Did you make an incision into those parts of the neck and head?

Coatsworth. No: I told Mrs. Stout and her son, if you imagine the skull to be injured, I will open the head; for if the scalp be never so rotten, yet if the skull has suffered any impression I shall discover it; they said, they did not suspect a broken skull in the case, and so we did not examine it.

Mr. Jones. But all her other parts were sound?

Coatsworth. Yes, sound to a miracle; for I did not imagine we could find them so.

Mr. Jones. Call John Dimsdale.

Mr. Cowper. My lord, I would know, and I desire to be heard to this point: I think where the coroner's inquest have viewed the body, and the relations have been heard, and the body buried, that it is not to be stirred afterwards for any private inspection of parties, that intend to make themselves prosecutors; but if it is to be taken up, it is to be done by some legal authority; for if it should be otherwise, any gentleman may be easily trepanned: for instance, if they should have thought fit, after the coroner's view, to have broken the skull into a hundred pieces, this was a private view altogether among themselves. Certainly, if they intended to

have prosecuted me, or any other gentleman upon this evidence, they ought to have given us notice, that we might have had some surgeons among them, to superintend their proceedings. My lord, with submission, this ought not to be given in evidence.

Baron Hatsell. Mr. Cowper, I think you are not in earnest; there is no colour for this objection: if they did take up the body without notice, why should not that be evidence? unless you think they had a design to forswear themselves.

Mr. Cowper. Had you a *Melius Inquirendum*, or any lawful warrant for making this inspection?—Coatsworth. No, there was not.

Baron Hatsell. Suppose they did an ill thing in taking up the body without some order, though I do not know any more ill in taking up that body than any other; but, however, is that any reason why we should not hear this evidence?

Coatsworth. Mr. Camblin, sir Wm. Cowper's surgeon, was there by.

Mr. Jones. Call Mr. Dimsdale, senior. (Who was sworn.) Had you a view of the body after it was taken up?—Dimsdale. Yes.

Mr. Jones. Pray, give your opinion of it.

Dimsdale. On the 28th of April, as I remember, I was sent for down by Mrs. Stout to view the body of her daughter. Her daughter was just taken out of the ground, but not opened; they had just touched the body, but not opened the skin when I came there—

Baron Hatsell. Are you a surgeon?

Dimsdale. Yes, my lord. Finding her head so much mortified, down to her neck, we thought all the parts were seized, and had a consultation, whether we should open her or not; but Mrs. Stout was very much enraged, because a great scandal had been raised, that her daughter was with child; and she said, she would have her opened to clear her reputation. With that we opened her, and found her body as sound as any flesh could be; no manner of putrefication in her lungs or any other part, but she was very full of wind. We searched the stomach and the thorax, and found not one drop of water about it. I was more curious than the rest, and turned away her legs, to see if the coffin was soiled, and the coffin and shroud were not wet. Her uterus was taken out, and I saw no manner of sign of conception. After this we had a consultation to consider, whether she was drowned or not drowned; and we were all of opinion, that she was not drowned; only Mr. Camblin desired he might be excused from giving his opinion, whether she was drowned or not; but all the rest of us did give our opinions, that she was not drowned.

Mr. Jones. Give your reasons, why you believed she was not drowned.

Dimsdale. My reason was this: Because we found no water in her; her intestines were not putrified; for if there had been water in her, that would have caused a fermentation, and that would have rotted the lungs and guts.

Baron *Hatsell*. Could you tell, so many weeks after, whether she was drowned or no?

Dimsdale. Yes, my lord, for this reason: for if she had been drowned, there had been some sign of water; and if there had been a pint of water, it would have rotted her lights and her guts; and that is done in a week's time by fermentation.

Mr. *Cowper*. Sir, I desire to know, whether according to reason and your skill, after six weeks time, it is possible there should be water in the thorax?

Dimsdale. I do believe there may be some; for it cannot come out after the body is dead, but by putrifaction; and there was no putrifaction, but it was firm and sound.

Baron *Hatsell*. What parts would have been putrified by the water?

Dimsdale. The lungs and bowels.

Baron *Hatsell*. And they were firm?

Dimsdale. They were: and if there had been water, they would have been putrified.

Mr. *Jones*. Call John *Dimsdale*, junior.

Juryman. Was her navel started?

Dimsdale sen. No: I never saw such a body in my life.

Mr. *Cowper*. Did you ever see a body that was drowned, opened six weeks after?

Dimsdale sen. No, never. If a body be drowned a fortnight, the bowels will be so rotten, there will be no coming near it; and I took particular notice, and I did not see one drop of water.

Baron *Hatsell*. Was the coffin close?

Dimsdale sen. Yes; it was close and dry as any board whatsoever; and all the parts sound, but the head and neck, and left arm.

Mr. *Jones*. What do you think could be the reason of that?

Dimsdale sen. The left arm was rottener than the other, the neck was rotten before.

Mr. *Jones*. What did you take to be the cause of it?

Dimsdale sen. I cannot judge of that.

(Call John *Dimsdale* junior, Who was sworn.)

Dimsdale jun. My lord, the body was opened before I came to see it, and they were drawing up an affidavit, that there was no water in the body, and they desired me to sign it; but I desired first to look into the body; and I did look into it, and turned the intestines aside, and there was no water in it; but the head from the neck was very much putrified.

Mr. *Jones*. Do you believe she was drowned?

Dimsdale jun. No, I believe not.

Mr. *Jones*. Did you open the child that was drowned? What difference was there between the body of that child and this?

Dimsdale jun. The child was extremely swelled in the belly and stomach, and had abundance of water in it.

Mr. *Jones*. Was the child laced that you opened?

Dimsdale jun. It was laid upon the table before I came.

Mr. *Cowper*. How long was it before the child was opened?

Dimsdale jun. It was drowned in the afternoon, and opened the next morning.

Mr. *Cowper*. You said, Sir, you was asked to sign the affidavit before you saw the body, and you were honest, and would see the body first; pray, who asked you?

Dimsdale jun. All of them did.

Mr. *Cowper*. Who in particular? If you please, name them.

Dimsdale jun. Mr. Coatsworth, Mr. Philips, Mr. Camblin, &c. they asked me to set my hand to it, because they thought I had seen it before.

(Then Dr. *Dimsdale* was sworn.)

Mr. *Jones*. Mr. Robert *Dimsdale*, was you at the opening of the body?

Dr. *Dimsdale*. I came after it was opened; my brother and I came together.

Mr. *Jones*. What profession are you of, a physician?

Dr. *Dimsdale*. Yes: when the body was taken up, they desired us to be there, to inspect the body; but before we came, it happened they had opened the body, and were setting their hands to a paper, a sort of affidavit; and when I came in, they would have had us set our hands; but we would not, till we had looked upon the body, and went and laid it open again, and we did not find the least drop of water neither in the thorax nor abdomen.

Mr. *Cowper*. Is it possible there should be water in the thorax, according to your skill?

Dr. *Dimsdale*. Yes, we did think there would have been, if she had been drowned.

Baron *Hatsell*. Could you expect to find it, so long as six weeks after?

Dr. *Dimsdale*. We should have expected that or a putrifaction; but we found no putrifaction, neither in the bowels nor intestines, but only upon her head and shoulders, and one arm.

Mr. *Cowper*. Pray, by what passage does the water go into the thorax?

Dr. *Dimsdale*. It will be very difficult for me to describe the manner here; but we should have found some in the stomach and intestines.

Mr. *Cowper*. Pray, Sir, how should it go into the thorax?

Dr. *Dimsdale*. By the lymphæduct if carried by any means.

Mr. *Cowper*. When the party is dead, can any water pass into any part of the body?

Dr. *Dimsdale*. We opened the abdomen of the child that was drowned, and found in the several cavities abundance of water.

Mr. *Jones*. When a person is dead, can they receive any water after?

Dr. *Dimsdale*. No, for all the parts are closed and contracted.

Mr. *Cowper*. Pray, if a dead body be put into the water, will not the water come into the wind-pipe?

Dr. *Dimsdale*. I question whether it will or no.

Mr. *Jones*. Was her mouth shut?

Dr. *Dimsdale*. She was putrified about the head and shoulders, and one arm that I saw was putrified; it was the left arm, as I take it.

Mr. Jones. What is your opinion, as to her death?

Dr. Dimsdale. I believe if she had been drowned, there would have been a putrefaction of the abdomen first; and it was her extreme parts, her arm, her head, and her breast, that was putrified, but her bowels seemed firm and sound.

Mr. Jones. Then you don't think her death was by drowning?—Dr. Dimsdale. No.

Mr. Cowper. Pray, did not you give some certificate or paper, declaring the death of this gentlewoman, before you saw the body at all?

Dr. Dimsdale. No, I did not.

Mr. Cowper. Sir, I would ask you, was not you angry that Mr. Camblin would not join with you in opinion?—Dr. Dimsdale. No.

Mr. Cowper. Did not you tell him that you were a graduate physician, and was angry he would not join with you?

Dr. Dimsdale. Suppose I did.

Baron Hatsell. But did you so or no?

Dr. Dimsdale. Yes, my lord, we had some words about it.

Mr. Jones. Swear Dr. Coatsworth. (Which was done.) Now, my lord, we call these gentlemen that are doctors of skill, to know their opinions of them that are found floating without water in them, how they came by their death.

Dr. Coatsworth. I have not seen many drowned bodies to make observation upon; but it is my opinion, that every body that is drowned, is suffocated by water passing down the wind-pipe into the lungs upon respiration; and at the same time, the water pressing upon the gullet, there will be a necessity of swallowing a great part of it into the stomach: I have been in danger of being drowned myself, and I was forced to swallow a great quantity of water. If a person was drowned, and taken out immediately, as soon as the suffocation was effected, I should not wonder if there were but little water in the stomach and guts; but if it lay in the water several hours, it must be very strange if the belly should not be full of water; but I will not say, it is impossible it should be otherwise.

Mr. Cowper. I desire to know, whether this gentleman attempted to drown himself, or was in danger of being drowned by accident.

Dr. Coatsworth. It was by accident: I was passing up the ship side, and took hold of a loose rope instead of the entering rope, which failing me, I fell into the water.

Mr. Cowper. But you struggled to save yourself from drowning?

Dr. Coatsworth. I did so; I have seen several persons that have been drowned, and they have lain several days, until by fermentation they have been raised; but I never made my observations of any persons that have been drowned above six hours.

Mr. Jones. Did you ever hear of any persons that, as soon as they were drowned, had swam above water?

Dr. Coatsworth. I have not known such a case.

Mr. Cowper. Did you ever know, Sir, a body that was otherwise killed, to float upon the water?

Dr. Coatsworth. I never made any observation of that.

Baron Hatsell. Dr. Browne has a learned discourse, in his *Vulgar Errors*, upon this subject, concerning the floating of dead bodies; I do not understand it myself, but he hath a whole chapter about it.

[Then Dr. Nailor was sworn.]

Mr. Jones. We ask you the same question that Dr. Coatsworth was asked, What is your opinion of dead-bodies? If a body be drowned, will it have water in it or no?

Dr. Nailor. My lord, I am of opinion, that it will have a quantity if it be drowned; but if there be no water in the body, I believe that the person was dead before it was put into the water.

Mr. Cowper. I would ask the doctor one question, my lord, Whether he was not a constant voter against the interest of our family in this corporation?

Dr. Nailor. I never did come to give a vote, but sir William Cowper, or his son opposed me, and said I had no right to vote.

Mr. Cowper. I would have asked the same question of the Dimsdales, if I had remembered it; they are of another party, as this gentleman is.

Baron Hatsell. It is not at all material, as they are witnesses.—Then call Mr. Babington. (Who was sworn.)

Mr. Jones. Pray, what is your opinion of this matter?

Mr. Babington. I am of opinion, that all bodies that go into the water alive, and are drowned, have water in them, and sink as soon as they are drowned, and do not rise so soon as this gentlewoman did.

Mr. Cowper. Pray, what is your profession, Sir?—Mr. Babington. I am a surgeon.

Mr. Cowper. Because Mr. Jones called you doctor.

Baron Hatsell. Did you ever see any drowned bodies?

Mr. Babington. Yes, my lord, once I had a gentlewoman a patient that was half an hour under water, and she lived several hours after, and in all that time she discharged a great quantity of water: I never heard of any that went alive into the water, and were drowned, that floated so soon as this gentlewoman did; I have heard so from physicians.

Baron Hatsell. I have heard so too, and that they are forced to tye a bullet to dead bodies thrown into the sea, that they might not rise again.

Mr. Cowper. The reason of that is, that they should not rise again, not that they will not sink without it. But I would ask Mr. Babington, whether the gentlewoman he speaks of went into the water voluntarily, or fell in by accident?

Mr. Babington. By accident, but I believe that does not alter the case.

Mr. Jones. Swear Dr. Burnet. (Which was done.) Dr. Burnet, you hear what is the matter in question; what is your opinion of it?

Dr. Burnet. My lord, I think that if any person fall into the water by accident, or throws himself in, the body will receive water as long as it is alive, and there are endeavours for respiration, and after these endeavours are over, there is no water will come in, for all the parts are closed; so consequently there must be water in all probability found in her.

Mr. Jones. What, do they swim or sink?

Dr. Burnet. They sink; I never saw a person drowned taken up without water in my life; but I have seen several full of water.

Mr. Cowper. I think you say when the faculty of respiration ceases, no water comes in.

Dr. Burnet. Yes, that is my opinion.

Mr. Cowper. But the water does pass into them while there are endeavours for respiration?—Dr. Burnet. Yes, that is my opinion.

[Then Dr. Woodhouse was sworn.]

Mr. Jones. Doctor, what is your opinion of this matter?

Dr. Woodhouse. My opinion is, that no person is suffocated by water, but he must have a great deal of water within him, a great deal of water in the stomach, and some in the lungs.

Mr. Cowper. Pray, Sir, did you ever open any of these bodies?

Dr. Woodhouse. Yes, I have opened a child myself that had a great quantity of water in it.

Mr. Cowper. Did you find any quantity of water in the throat?

Dr. Woodhouse. There was some, but a little, but a great deal in the stomach.

Mr. Cowper. Pray, which way can it pass into the thorax?

Dr. Woodhouse. While the person is struggling for respiration, there may be a relaxation of and the person must suck in water as well as air, and some water may get into the wind-pipe, and so enter into the lungs.

Mr. Cowper. Is there a passage from the lungs to the thorax?

Dr. Woodhouse. The thorax is the vessel wherein the lungs lie, the lungs in the thorax, the breast is the cavity where the lungs lie, the wind-pipe is the conveyance to the lungs, and a person in respiration takes down some water there, but no doubt the greater quantity will be in the stomach.

Baron Hatsell. Pray let me ask you a question: some of the witnesses said, that if a person be drowned, and lies dead a great while, the inwards will be putrified; what is your opinion of it?

Dr. Woodhouse. No doubt, my lord, where water gets into the stomach, or wherever it is, it will putrify very soon.

Mr. Jones. Call Edward Clement. (Who was sworn.) Are not you a seaman?

Clement. Yes, Sir.

Mr. Jones. How long have you been so?

Clement. Man I have writ myself but six years, but I have used the sea nine or ten years.

Mr. Jones. Have you known of any men that have been killed, and thrown into the sea, or who have fallen in and been drowned? Pray tell us the difference as to their swimming and sinking.

Clement. In the year 89, or 90, in Beachy fight, I saw several thrown over-board during the engagement, but one particularly I took notice of, that was my friend, and killed by my side; I saw him swim for a considerable distance from the ship; and a ship coming under our stern, caused me to lose sight of him, but I saw several dead bodies floating at the same time; likewise in another engagement, where a man had both his legs shot off, and died instantly, they threw over his legs; though they sunk, I saw his body float: likewise I have seen several men who have died natural deaths at sea, they have when they have been dead had a considerable weight of ballast and shot made fast to them, and so were thrown over-board; because we hold it for a general rule, that all men swim if they be dead before they come into the water; and on the contrary, I have seen men when they have been drowned, that they have sunk as soon as the breath was out of their bodies, and I could see no more of them. For instance, a man fell out of the Cornwall, and sunk down to rights, and seven days afterwards we weighed anchor, and he was brought up grasping his arm about the cable: and we have observed in several cases, that where men fall over-board, as soon as their breath is out of their bodies they sink downright; and on the contrary, where a dead body is thrown over-board without weight, it will swim.

Mr. Jones. You have been in a fight; how do bodies float after a battle?

Clement. Men float with their heads just down, and the small of their back and buttocks upwards: I have seen a great number of them, some hundreds in Beachy-head fight, when we engaged the French. I was in the old Cambridge at that time. I saw several (what number I will not be positive, but there were a great number, I cannot guess to a score) that did really swim, and I could see them float for a considerable distance.

Mr. Jones. Have you seen a shipwreck?

Clement. Yes; the Coronation, in September 1691. I was then belonging to the Dutchess, under the command of captain Clement; we looked out and see them taking down their masts; we saw the men walking up and down on the right side, and the ship sink down, and they swam up and down like a shoal of fish one after another; and I see them hover one upon another, and see them drop away by scores at a time; and there was an account of about nineteen that saved themselves, some by boats, and others by swimming; but there were no more saved out of the ship's complement, which was between five and six hundred, and the rest I saw sinking downright, some twenty at a time. There was a fisherman brought our captain word, that in laying in of his nets

he drew up some men close under the rocks that were drowned belonging to the Coronation. We generally throw in bags of ballast with them.

Mr. Jones. I suppose all men that are drowned, you sink them with weights?

Clement. Formerly shot was allowed for that purpose; there used to be threescore weight of iron, but now it is a bag or ballast that is made fast to them.

Mr. Jones. Then you take it for a certain rule, that those that are drowned sink, but those that are thrown over-board do not?

Clement. Yes; otherwise why should the government be at that vast charge to allow threescore or fourscore weight of iron to sink every man, but only that their swimming about should not be a discouragement to others?

[Then Richard Gin was sworn.]

Mr. Jones. You hear the question; pray what do you say to it?

Gin. I was at sea a great while, and all the men that I see turned over-board had a great weight at their heels to sink them.

Mr. Jones. Then will they swim otherwise?

Gin. So they say.

Mr. Jones. Are you a seaman?

Gin. I went against my will in two fights.

Mr. Jones. Then, gentlemen of the jury, I hope we have given you satisfaction that Mrs. Stout did not drown herself, but was carried into the water after she was killed. That was the first question; for if it be true that all dead bodies when they are put into the water do swim, and the bodies that go alive into the water and are drowned do sink, this is sufficient evidence that she came by her death not by drowning, but some other way. Now, my lord, as to the second matter, and that is to give such evidence as we have against these gentlemen at the bar. Mr. Cowper, it appears, was the last man that any one can give an account of was in her company. What became of her afterwards, or where they went, nobody can tell; but the other witnesses have given you evidence that he was the last man that was with her. I shall only give this further evidence as to Mr. Cowper, that notwithstanding all the civility and kindnesses that passed between him and this family, when the bruit and noise of this fact was spread abroad, Mr. Cowper did not come to consider and consult with old Mrs. Stout what was to be done; but he took no manner of notice of it, and the next day he rode out of town, without further taking notice of it.

Call George Aldridge and John Archer.

[John Archer was sworn.]

Mr. Jones. Do you know any thing of Mr. Cowper's going out of town about this business of Mrs. Stout's being drowned?

Archer. Yes, I did see him go out of town afterwards.

Mr. Jones. Which way did he go?

Archer. He went the back way from the Glove; I suppose he came that way.

Mr. Cowper. What day was it I went? Is it not the way that I used to go when I go the circuit into Essex?

Archer. Yes, I believe so.

Mr. Cowper. I lodged at Mr. Barefoot's, and he has a back-door to the Glove, where my horse was, and I went the direct way into Essex, and it was Wednesday morning: What day was it you see me go?

Archer. It was on the Wednesday morning.

Mr. Cowper. That was the very day I went into Essex.

[Then George Aldridge was sworn.]

Mr. Jones. When did Mr. Cowper go out of town the last assizes?

Aldridge. On Wednesday.

Mr. Jones. Which way did he go?

Aldridge. He went the way to Chelmsford.

Mr. Jones. Did you not fetch his horse from Stout's?—Aldridge. Yes, Sir.

Mr. Jones. How often did you go for it?

Aldridge. Three times.

Mr. Jones. When?

Aldridge. On Tuesday night I sent once, and went twice myself; the first time there was nobody at home to deliver the horse; so I went to Mr. Stout's, and asked him about the horse, and he said he could not deliver him till the maid went home, and then I went about 11 o'clock and had the horse.

Baron Hatsell. Was it eleven at night?

Aldridge. Yes, my lord.

Mr. Cowper. When I sent you to fetch my horse, what directions did I give you?

Aldridge. You gave me directions to fetch your horse, because you said you should have occasion to go out next morning betimes with the judge.

Mr. Cowper. The reason I sent for my horse was this; when I heard she had drowned herself, I think it concerned me in prudence to send a common hostler for him, for fear the lord of the manor should seize all that was there as forfeited.

Baron Hatsell. There was no danger of that, for she was found 'Non compos mentis.'

Mr. Cowper. No, my lord, I sent before the verdict.

Mr. Jones. It seems you did not think fit to go and take horse there yourself, though you put your horse there.

Now, my lord, we will go on, and give the other evidence that we opened concerning these three other gentlemen that came to town; two of them took lodgings at Gurrey's at five in the afternoon, but did not come in till between eleven and twelve, and then they brought another in with them; and though he had been in town five or six hours, his feet were wet in his shoes, and his head was of a reeky sweat; he had been at some hard labour I believe, and not drinking himself into such a sweat.

Call John Gurrey, Matthew Gurrey, and Elizabeth Gurrey.

[John Gurrey was sworn.]

Mr. Jones. Do you know any of the gentlemen at the bar?—*J. Gurrey.* Yes.

Mr. Jones. Name who you know.

J. Gurrey. There is Mr. Stephens, Mr. Rogers, and Mr. Marson.

Mr. Jones. Pray do you remember when they took lodging at your house?

J. Gurrey. The last assizes; when they first came, there was only Mr. Stephens and Mr. Rogers.

Mr. Jones. At what time did they take it?

J. Gurrey. I was at church, and cannot tell that, they hired the lodgings of my wife.

Mr. Jones. What can you say more?

J. Gurrey. I was in at night when they came; there came three of them at eleven at night, whereof Mr. Marson was the third person, and he said he was destitute of a lodging, and he asked for a spare bed; my wife told him she had one, but had let it; whereupon Mr. Stevens and Mr. Rogers said he should lodge with them; so they went up all together, and they called for a fire to be kindled, and asked for the landlord, which was I, and they asked me to fetch a bottle of wine; and I told them I would fetch a quart, which I did; and then they asked me to sit down and drink with them, which I did; and then they asked me if one Mrs. Sarah Stout did not live in town, and whether she was a fortune? I said Yes. Then they said they did not know how to come to the sight of her; and I said I would shew them her to-morrow morning, not questioning but I might see her sometime as she was coming down the street; so they said they would go to see her. Mr. Rogers and Mr. Stephens charged Mr. Marson with being her old sweetheart; saith Mr. Marson, she hath thrown me off, but a friend of mine will be even with her by this time.

Baron Hatsell. What o'clock was it then?

J. Gurrey. I reckon eleven of the clock when they came in.

Baron Hatsell. Did you observe in what condition Mr. Marson was in?

J. Gurrey. I did not observe, only that he was hot, and put by his wig; I see his head was wet, and he said he was just come from London, and that made him in such a heat.

Mr. Jones. Had he shoes or boots on?

J. Gurrey. I did not observe that.

Mr. Jones. What did they do the next day?

J. Gurrey. The next morning I heard this party was in the water; I sat up all night, and was fain to wait till my daughter came down to look after the shop; and then I went to see her, and she was removed into the barn, and they were wiping her face, closing her eyes, and putting up her jaws; and as I came back these persons were walking, and I met Mr. Marson and Mr. Stephens, and told them the news; said I, this person has come to a sad accident: say they, so we hear; but nevertheless we will be as good as our word, and go and see her. I went with them and overtook Mr. Rogers; and Marson said, we are going to see Mrs. Stout. O land-

lord! said Rogers, you may take up that rogue (pointing at Mr. Marson), for what he said last night; but I did not think, they speaking so jocularly, that there was any suspicion of their being concerned in the murder. A second time I went, the barn-door was locked; I knocked, and they opened it, and let us in, and they uncovered her face to let me see her, and I touched her; and looking about for them they were gone, and I cannot say they see her or touched her: Then Mr. Marson and they were consulting how to send a great coat to London, and I directed them to a coachman at the Bell-inn; but I did not hear he went to enquire after the coachman; then they went to your lordship's chamber, and I went home; and about eleven o'clock I saw Mr. Marson and Mr. Stephens coming down with Mr. Spencer Cowper.

Mr. Marson. I did not go out that night after I came in.

Mr. Jones. No; we agree that. Did you see Mr. Cowper and these gentlemen together?

J. Gur. Only at eleven o'clock on Tuesday noon, Mr. Cowper, Mr. Marson, and Mr. Stephens were coming down to the market-place.

Mr. Jones. Did not they take their leave of you when they went away from you that forenoon?

J. Gur. No; only in the morning they told me they would send me word at noon if they intended to lodge there.

Mr. Marson. I desire to know of Mr. Gurrey, if his sister was not in the room when we came in?

J. Gur. She was in our house that day; but whether when they came in I cannot tell.

Mr. Cowper. Pray, have you not had some discourse with your sister, the widow Davis, concerning some suspicion that you had of Sarah Walker, that hath been produced as a witness?

J. Gur. I do not remember any such.

Mr. Cowper. Then did not you say these words, We must not concern ourselves with Sarah Walker, for she is the only witness against the Cowpers?

J. Gur. I cannot remember any such thing.

Baron Hatsell. You may answer according to the best of what you remember; if you say you have forgot when you have not, you are forsworn.

Mr. Cowper. If your lordship pleases to give leave to Mr. Gurrey to recollect himself. I ask him, Whether he did not talk with his sister Davis about some suspicion his wife and he had about Sarah Walker, the maid-servant of the deceased?

J. Gur. I believe there might be some talk of a person that was seen to go into the church-yard at some distance with Sarah Walker.

Mr. Cowper. Did your wife say that she did suspect that person?—*J. Gur.* Yes.

Mr. Cowper. Did your wife say they behaved themselves strangely, and that she would have persuaded the widow Blewit to have watched her?—*J. Gur.* There was something of that.

Mr. Cowper. Was there not some such

words, that they must not meddle with Sarah Walker, for she is the witness against the Cowpers?

J. Gur. I said, Do not concern yourself with Sarah Walker, for fear of taking off her evidence.

Mr. Cowper. Pray did not the widow Davis warm the sheets for these gentlemen?

J. Gur. She was with my wife, but I cannot say whether she warmed the sheets.

Mr. Cowper. When they came home, had you any lodgers that wanted to come home? Had not you one Gape?

J. Gur. I cannot say whether he was in before or after them.

Mr. Cowper. Did not you say to your sister Davis, Now these gentlemen are in bed, if Mr. Gape would come home, our family would be quiet?—*J. Gur.* I do not remember that.

Mr. Cowper. Pray, did not you go to look for Mr. Gape?

J. Gur. Yes, I went to Hockley's.

Mr. Cowper. Who did you employ to speak to Mr. Gape?—*J. Gur.* Mrs. Hockley.

Mr. Cowper. When you came home to your own house, and after you had been at Hockley's to speak with Mr. Gape, what account did you give of the time of night, and other particulars?

J. Gur. I gave no account of the time.

Mr. Cowper. Not to Mrs. Davis?

J. Gur. I cannot tell whether I did or no.

Mr. Cowper. Did not you say, Mr. Gape asked Mrs. Hockley what a-clock it was?

J. Gur. No, I do not remember that; but Mrs. Hockley went in, and told him what time of night it was; it was eleven or twelve of the clock, whether I cannot say.

Mr. Jones. Call Martha Gurrey. (Who was sworn.) Which of these gentlemen do you know?

Mrs. Gur. Mr. Marson, Mr. Rogers, and Mr. Stephens.

Mr. Jones. What time of the night was it when they came to your house? give an account of it, and what you heard them say.

Mrs. Gur. It was a little after five, or thereabouts, that they came—

Mr. Jones. Who came?

Mrs. Gur. Mr. Stephens, and Mr. Rogers, and there was one Mr. Gilbert, that married a first cousin of mine; he came and asked me for my husband; and I asked him his business, and he said he wanted to speak with him.

Mr. Jones. Pray, come to these men; when did they come to your house?

Mrs. Gur. They hired the lodging at five of the clock. When they first came to see them I was not at home: Mr. Gilbert brought them, and as I was coming along the street I saw Mr. Gilbert walking off, and would not look at me.

Mr. Jones. When did they go out?

Mrs. Gur. They never staid there.

Mr. Jones. When did they come in again?

Mrs. Gur. Between eleven and twelve.

Baron Hatsell. What did they do when they came in again?

Mrs. Gur. I was laying on some sheets two pair of stairs when they came, and then there was three of them; so they saw me a little after, and begged my excuse for bringing in another, for they said it was so late that they could not get a lodging any where else: and said, if I thought fit, the gentleman should lie with them: And I told them I liked it very well.

Mr. Jones. What firing had they?

Mrs. Gur. The firing I laid on in the morning, and they sent for my husband to fetch them some wine.

Mr. Jones. What did you hear them talk on?

Mrs. Gur. They discoursed with my husband, and asked him if he knew Mrs. Sarah Stout; and one of them said to Mr. Marson, I think she was an old sweetheart of yours; Ay, said he, but she turned me off, but a friend of mine is even with her: And Mr. Rogers said he was in with her; and afterwards said, her business was done. They had a bundle, that was wrapt up in a pure white cloth, like to an apron, but I cannot say it was an apron; and there was a parcel hanging loose by it; and when he laid it down he said, he would pass his word Mrs. Sarah Stout's courting days were over; and I said, I hoped it was no hurt to the gentlewoman; and then I looking upon Mr. Marson, saw him put his peruke aside, and his head reeked, and he told them he was but just come from London that night, which made him disappointed of a lodging.

Mr. Jones. What did you hear them say about any money?

Mrs. Gur. I asked them how they would have their bed warmed? And Mr. Marson answered, very hot: With that I went down to send my daughter up, and she could not go presently; I told her then she must go as soon as she could.

Baron Hatsell. Pray, do not tell us what passed between you and your daughter: What do you know of these gentlemen?

Mrs. Gur. I went to the next room, to see if every thing was as it should be; I hearkened, and they had some discourse about money, and I heard somebody (I do not know who it should be except it were Mr. Stephens) answer and say, the use money was paid to night; but what money they meant, I cannot tell.

Mr. Jones. What did you find when they were gone?

Mrs. Gur. Sir, I found a cord at the end of the trunk.

Mr. Jones. Was it there in the morning, or before they came?

Mrs. Gur. No, it could not, for I swept my room, and wiped down the dust.

Mr. Jones. Was the cord white?

Mrs. Gur. No, it was more dirty than it is now, for my husband and I have worn it in our pockets.

Mr. Cowper. Pray, who brought the cord down from above stairs?

Mrs. Gur. My daughter that lived with me, and she laid it upon the shelf.

Mr. Cowper. Did not you hear there was a coroner's inquest sitting?

Mrs. Gur. The next day at night I did hear of it.

Mr. Cowper. Why did not you go to the coroner's inquest and give an account of it there?

Mrs. Gur. I told my husband of it, and I asked my husband if he did not hear what they said concerning Mrs. Sarah Stout? And he answered, yes, they ought to be taken up for the words they said last night: Why, saith I, do not you take notice of it? I think you ought to take them up. But he went out of doors, and I saw no more of him till the afternoon. When I heard the words, I thought somebody had stole away and got to bed to her.

Mr. Cowper. Pray, if your husband heard these words, why did not he go to the coroner's inquest?

Mrs. Gur. I did speak to him to have them taken up.

Mr. Cowper. Why did he not do it?

Mrs. Gur. He said he would not do it; he did not know but it might cost him his life.

Mr. Jones. How came you after this to discover it?

Mrs. Gur. Because I was so troubled in mind I could not rest night nor day; and I told him if he would not tell of it, I would tell of it myself, for I was not able to live.

Elizabeth Gurrey was sworn.

Mr. Jones. Pray, do you know Mr. Rogers, Mr. Stephens, and Mr. Marson?

E. Gur. I know Mr. Marson, and these are the other gentlemen, I reckon.

Mr. Jones. What discourse did you hear from them?

E. Gur. Mr. Marson asked the other gentlemen how much money they had spent? the other answered, what was that to him; you have had forty or fifty pounds to your share. Then the other asked him, whether the business was done? And he answered, he believed it was; but if it was not done, it would be done to night. Then, my lord, he pulled a handful of money out of his pocket, and swore he would spend it all for joy the business was done.

Mr. Jones. Was Mr. Cowper's name mentioned?

E. Gur. I heard them mention Mr. Cowper's name, but not Mrs. Sarah Stout's.

Mr. Jones. What condition was the gentleman's shoes in?

E. Gur. I think it was Mr. Marson, his shoes were very wet and dirty; one of them was very hot, and he wiped his head with his handkerchief.

Mr. Jones. Now, my lord, we have done as to our evidence. Mr. Marson pretended he was just then alighted and come from London, and was in a great heat, and his shoes were wet: I wonder what Mr. Marson had been doing; for when he was examined, he said, he came to town about eight of the clock, and went to the Glove and Dolphin inn, and stayed there

till he came to his lodging. Now it was a wonderful thing that he should come wetshod from a tavern, where he had been sitting four or five hours together.

Then the Examination of Mr. John Marson was read:

The EXAMINATION of JOHN MARSON, taken before me, this 27th day of April, 1699.

"Who being examined where he was on Monday the 13th of March last, saith, That he was at the borough of Southwark (he being an attorney of the said court) till past 4 of the clock in the afternoon; and saith, that he set out from Southwark for Hertford soon after, and came to Hertford about 8 the same afternoon, and put up his horse at the sign of ———, an inn there, and then went to the Hand and Glove, together with Godfrey Gimbart, esq. Ellis Stephens, William Rogers, and some others, where they stayed till about eleven of the clock at night, and then this examinant went thence directly to the house of John Gurrey, with the said Stephens and Rogers, who lay altogether in the said Gurrey's house all that night. And being asked what he said concerning the said Mrs. Sarah Stout, deceased, this examinant saith, that on Sunday the 12th of March last, this examinant being in company with one Thomas Marshall, and telling him that this examinant intended the next day for Hertford, with the marshal of the King's Bench, the said Thomas Marshall desired this examinant and the said Stephens, who was then also in company, that they would go and see the said Sarah Stout (his sweetheart.) He confesseth, that he did ask the said Gurrey, if he would shew this examinant where the said Stout lived; telling the said Gurrey that his name was Marshall, and asked him if he never heard of him before; and jocularly said, that he would go to see her the next morning, but doth not believe that he said any thing that any friend was even with the said Sarah Stout, or to such like effect. And doth confess, that he did the next day, upon the said Gurrey's telling him that the said Stout was drowned, say, that he would keep his word, and would see her. And saith, that meeting with Mr. Cowper (who is this examinant's acquaintance) he believes he did talk with him concerning the said Stout's being drowned, this examinant having seen her body that morning.

"JOHN MARSON."

Cogn. Die et Anno antedict.

Coram J. HOLT.

Mr. Jones. All that I observe from it, is this: That he had been five hours in town, and when he came to his lodging, he came in wet and hot, and said he was just come from London.

Marson. I had rid forty miles that day, and could not be soon cold.

Baron Hatsell. They have done now for the king; come, Mr. Cowper, what do you say to it?

words, that they must not meddle with Sarah Walker, for she is the witness against the Cowpers?

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E. Gur. I know Mr. Marson, and these are the other gentlemen, I reckon.

Mr. Jones. What discourse did you hear from them?

E. Gur. Mr. Marson asked the other gentlemen how much money they had spent? the other answered, what was that to him; you have had forty or fifty pounds to your share. Then the other asked him, whether the business was done? And he answered, he believed it was; but if it was not done, it would be done to night. Then, my lord, he pulled a handful of money out of his pocket, and swore he would spend it all for joy the business was done.

Mr. Jones. Was Mr. Cowper's name mentioned?

E. Gur. I heard them mention Mr. Cowper's name, but not Mrs. Sarah Stout's.

Mr. Jones. What condition was the gentleman's shoes in?

E. Gur. I think it was Mr. Marson, his shoes were very wet and dirty; one of them was very hot, and he wiped his head with his handkerchief.

Mr. Jones. Now, my lord, we have done as to our evidence. Mr. Marson pretended he was just then alighted and come from London, and was in a great heat, and his shoes were wet: I wonder what Mr. Marson had been doing; for when he was examined, he said, he came to town about eight of the clock, and went to the Glove and Dolphin inn, and stayed there

till he came to his lodging. Now it was a wonderful thing that he should come wetshod from a tavern, where he had been sitting four or five hours together.

Then the Examination of Mr. John Marson was read:

The EXAMINATION of JOHN MARSON, taken before me, this 27th day of April, 1699.

"Who being examined where he was on Monday the 13th of March last, saith, That he was at the borough of Southwark (he being an attorney of the said court) till past 4 of the clock in the afternoon; and saith, that he set out from Southwark for Hertford soon after, and came to Hertford about 8 the same afternoon, and put up his horse at the sign of ———, an inn there, and then went to the Hand and Glove, together with Godfrey Gimbart, esq. Ellis Stephens, William Rogers, and some others, where they stayed till about eleven of the clock at night, and then this examinant went thence directly to the house of John Gurrey, with the said Stephens and Rogers, who lay altogether in the said Gurrey's house all that night. And being asked what he said concerning the said Mrs. Sarah Stout, deceased, this examinant saith, that on Sunday the 12th of March last, this examinant being in company with one Thomas Marshall, and telling him that this examinant intended the next day for Hertford, with the marshal of the King's Bench, the said Thomas Marshall desired this examinant and the said Stephens, who was then also in company, that they would go and see the said Sarah Stout (his sweetheart.) He confesseth, that he did ask the said Gurrey, if he would shew this examinant where the said Stout lived; telling the said Gurrey that his name was Marshall, and asked him if he never heard of him before; and jocularly said, that he would go to see her the next morning, but doth not believe that he said any thing that any friend was even with the said Sarah Stout, or to such like effect. And doth confess, that he did the next day, upon the said Gurrey's telling him that the said Stout was drowned, say, that he would keep his word, and would see her. And saith, that meeting with Mr. Cowper (who is this examinant's acquaintance) he believes he did talk with him concerning the said Stout's being drowned, this examinant having seen her body that morning.

"JOHN MARSON."

Cogn. Die et Anno antedict.

Coram J. HOLT.

Mr. Jones. All that I observe from it, is this: That he had been five hours in town, and when he came to his lodging, he came in wet and hot, and said he was just come from London.

Marson. I had rid forty miles that day, and could not be soon cold.

Baron Hatsell. They have done now for the king; come, Mr. Cowper, what do you say to it?

Mr. Jones. If your lordship please, we will call one witness more, Mary Richardson. Mrs. Richardson, do you know Mr. Marson, or any of these gentlemen?

Mrs. Richardson. They came on Tuesday night to the Bell at Hoddesdon, and lay there, and one of the gentlemen, when I was warming the sheets, asked me if I knew Mrs. Sarah Stout? And I said, Yes. He asked me if I knew which way she came to her end? And I told him, I could not tell.

Mr. Jones. Is that all? What did they say more?

Mrs. Richardson. They did desire and wish it might be found out how it came about; and one gentleman took no notice of her at all. They had a little bundle, but what was in it I cannot tell, but there I saw it bound up in some coloured stuff or other, but what it was I cannot tell.

Mr. Jones. Is that all you can say?

Mrs. Richardson. Yes, that is all.

Mr. Jones. Then we have done.

Baron Hatsell. Come, Mr. Cowper, what do you say to it?

Mr. Cowper. Now they have done on the part of the king, my lord, and you gentlemen of the jury, I must beg your patience for my defence. I confess it was an unfortunate accident for me (as Mr. Jones calls it) that I happened to be the last person (for aught appears) in the company of a melancholy woman. The discourse occasioned by this accident had been a sufficient misfortune to me, without any thing else to aggravate it; but I did not in the least imagine that so little, so trivial an evidence as here is, could possibly have affected me to so great a degree, as to bring me to this place to answer for the worst fact that the worst of men can be guilty of.

My lord, your lordship did just now observe, that I have appeared at the bar for my clients; but I must say too, that I never appeared for myself under this, or the like circumstances, as a criminal, for any offence whatsoever.

Mr. Jones very well said, when he spoke on the part of the king, That if this gentlewoman was murdered, the crime was villainous, base, barbarous, and cruel; and for my part I think so too; the crime would be so great, that it could never be sufficiently condemned: but at the same time I may aver, that to suppose a murder without good grounds for it, and afterwards to charge innocent men with it knowingly and maliciously, is to a trifle as base and barbarous as the murder itself could be. My lord, I speak for my own part; I know not at what price other men may value their lives; but I had much rather myself was murdered than my reputation; which yet I am sensible hath suffered greatly hitherto by the malice and artifice of some men, who have gone pretty far in making this fact, as barbarous as it is, to be credited of me. And therefore I must beg your lordship's and the jury's patience, while I not only defend my life, but justify myself also from these things that have unjustly

aspersed me, by the conspiracy and artifice of my accusers.

My lord, in all the evidence that hath been given, I must observe, that there is no positive evidence, with submission, to induce the jury or any one to believe the general, that this gentlewoman was murdered; but they go upon suppositions and inferences, which are contradicted by other circumstances, in the very evidence of the prosecutor, that make full as strong to prove she was not murdered, as that she was; so that, as it stands, it can amount only to a bare supposition that she was murdered by any body.

Then, as to the evidence that particularly relates to myself, or the gentlemen who stand with me at the bar, that they or I were concerned in it (if she was murdered) there is not one syllable of proof; at most, it amounts but to make us suspect a murder, not proved, but only suspected: this I observe upon the evidence, as it now stands without answer, as it has been given on the king's part: and how far, in the case of life, men shall be affected with evidence of this nature, which neither proves the murder in general, nor that they did it in particular; though no defence was made, or any further answer given, I must submit to your lordship's and the jury's judgment.

But, my lord, I do not doubt but I shall be able to wipe away even that remote suspicion by my defence: they have been long in their evidence for the king, and therefore I must beg your patience while I give a particular answer to every part of it, in as good a method as I am able: and I will waste as little time as may consist with the justifying my reputation; for which I know your lordship will have as tender a regard, to see it doth not suffer unjustly, as for my life itself.

And I promise your lordship, I shall trouble you with no evidence which is not express and plain; no innuendoes or suspicions; but I shall prove fully and clearly, in the first place, that there was no ground at all, in this case, to suppose she was murdered by any one but herself.

The first fact that they insisted upon to infer a murder from it, was, that the body was found floating: now, my lord, that fact, I am able by the evidence I have, as well as from that of the prosecutor, to deny; for the fact was directly otherwise, that is, she was not found floating.

And whereas the prosecutor's witnesses, who have been produced to this point, are obscure and poor men, and your lordship observes, have been taught to say generally that she floated; which, when they are required to explain, and describe how she lay, they contradict themselves in, by shewing she lay sideways between the stakes, and almost all under water. Now I shall give your lordship and the jury a full and particular account and description from the parish officers, men employed by the coroner to take the body out of the water, of the very manner and posture in which it was first found; which they are much better able to do than the prosecutor's witnesses, having

seen her before all or most of those people; and these officers clearly agree, that her body was under water when found, except some small appearance of her petticoats, near or on the surface of the water; which may be very easily accounted for, because the stakes the witnesses mention, and which are driven into the ground cross the river, to prevent weeds and trumpery from running into the mill-stand, as the witnesses have already said, about a foot distance from one another, and are set with their feet from the mill, and their heads inclining toward the mill with the stream. Now, my lord, every one knows, that though a drowned body will at first sink, yet it is buoyant, and does not go downright and rest in one place like lead; for a human body is seldom or never in a stream found to lie where it was drowned: a body drowned at Chelsea has been often found by fishermen at London, and that before it came to float above water. Now, if a body is so buoyant, as that it is driven down by the impellent force of the current (though it do not float above water) it seems a consequence, that when it comes to be stopped and resisted by the stakes, which lie with their heads downward, inclining with the stream, the stream bearing the body against the stakes, must needs raise it upwards to find another passage if possible, when the ordinary and natural is obstructed. I have seen, I remember, that where weeds have been driven down a river, and have been rouled along at the bottom, when they have come down to a board or stakes of a wyer, or turnpike, they have been by the force of the water raised up against those boards or stakes, and forced over them, though without such obstruction they had undoubtedly continued to roul under the water. I do not know of any other symptom they pretend to, of her not being drowned, from any thing observed of her in the water. Then, as to the flatness of her belly, when she was put into her coffin, I shall shew it is a common and natural accident; sometimes drowned bodies are swelled more, sometimes less, sometimes not at all: I think it hardly deserves a physician to prove that a body may be drowned with very little water; that a man may be drowned by strangling or suffocation, caused by a little water in the lungs, without any great quantity of water received in the body, is a certain and established truth; for I am told that when respiration ceases, the party dies, and can receive no more water after that: so that nothing is to be inferred from a body's having more or less water found in it, especially if your lordship will give me leave to observe this distinction, where a body is voluntarily drowned, and where it is drowned by accident; for people that fall in by accident do struggle and strive as long as they can; every time they rise they drink some water into the stomach, to prevent its passing into the lungs, and are drowned no sooner than needs must; but persons that voluntarily drown themselves, to be sure desperately plunge into the water, to dispatch a miserable life as soon as they

can; and so that little quantity in the lungs which causes death may be the sooner taken in; after which no more is received: and I hope by physicians it will appear there is good ground for this difference.

The next is the evidence that the surgeons have given on the other part, relating to the taking this gentlewoman out of her grave after she had been buried six weeks. Whether this ought to have been given in evidence, for the reasons I hinted at, in a criminal case, I submit to your lordship; but as it is, I have no reason to apprehend it, being able to make appear, that the gentlemen who spoke to this point have delivered themselves in that manner, either out of extreme malice, or a most profound ignorance; this will be so very plain upon my evidence, that I must take the liberty to impute one or both of those causes to the gentlemen that have argued from their observations upon that matter.

And now, if your lordship will but please to consider the circumstances under which they would accuse me of this horrid action, I do not think they will pretend to say, that in the whole course of my life I have been guilty of any mean or indirect action; and I will put it upon the worst enemy I have in the world to say it. Now, for a man in the condition I was in, of some fortune in possession, related to a better, in a good employment, thriving in my profession, living within my income, never in debt (I may truly say not five pounds at any one time these years past), having no possibility of making any advantage by her death, void of all malice, and, as appears by her own evidence, in perfect amity and friendship with this gentlewoman, to be guilty of the murdering her, to begin at the top of all baseness and wickedness, certainly is incredible.

My lord, in this prosecution my enemies, seeing the necessity of assigning some cause, have been so malicious to suggest before (though not now, when I have this opportunity of vindicating myself publicly), that I have been concerned in the receipt of money for this gentlewoman, had her securities by me; and sometimes that I had been her guardian, or her trustee, and I know not what. I now see the contrivers and promoters of that scandal, and they know it to be base, false, and malicious; I never was concerned in interest with her, directly or indirectly, and so I told them when I was before my lord chief justice: it is true, it was then just suggested by the prosecutors, I then denied it, and I deny it still. I thank God, I have not been used, nor have I need, to deny the truth.

My lord, you find the prosecutors have nothing to say to me upon this head, after all the slanders and stories they have published against me, of my having money in my hands which belonged to the deceased: But though they do not stir it, I will, and give your lordship a full account of all that ever was in that matter. When I lodged at Hertford, some time since, she desired me to recommend to her a security

for 200*l.* if it came in my way ; my lord, when I came to town, I understood that one Mrs. Puller, a client of mine, had a mortgage formerly made to her by one Mr. Loftus, of Lambeth in Surrey, for the like sum, and that she was willing to have in her money : I wrote to this gentlewoman, the deceased, to acquaint her of the security ; she thereupon did send up 200 and some odd pounds for interest (the account of which I produced to my lord chief justice ;) this money was sent to me by Mr. Cramfield, as I have been informed, and by him given to Mr. Toller's clerk, and by him brought publicly to me : my lord, this mortgage I immediately transferred by assignment, endorsed on the back of it, and Mrs. Habberfield, a trustee for Mrs. Puller, signed and sealed it, and that very 100*l.* and interest due, was at one and the same time paid to Mrs. Puller, and by her the principal was paid to her daughter, in part of her portion. All this was transacted the beginning of December last, and she was not drowned till the 13th of March following : and my lord, these people that are now the prosecutors, did own before my lord chief justice that they had found this mortgage among the deceased's writings in her cabinet at the time of her death. Now, my lord, I say, that saving this one service I did her, as I said in December last, I never was otherwise concerned with her in the receiving or disposing of any of her money ; nor had I ever any of her securities for money in my keeping ; and I defy any adversary I have to shew the contrary.

My lord, as there appears no malice, no interest, so they have proved for me that there was no concealment of shame, to induce me to commit so barbarous an action ; otherwise, perhaps, now they find they can assign no other cause, they would content themselves to give that reason, and fling that scandal at me : and though I take it by the experience I have had of them, they did not design to do me any favour, yet I thank them, in endeavouring to vindicate her honour, they have secured my reputation against that calumny ; and though I am satisfied, as I said, they did not intend me kindness, yet I thank God, they have given me a just opportunity to take advantage of their cunning for the clearing of my innocence in that particular.

Then, my lord, not to rest it here, but to satisfy the jury and the world how this gentlewoman came to destroy herself : I shall give the clearest evidence that was ever given in any court, that she murdered herself. When I enter upon this proof, I must of necessity trespass upon the character of this gentlewoman that is dead. I confess this is a tender point, it is a thing I would willingly be excused from, and it is not without a great deal of reluctance and compulsion forced from me. That she was melancholy the prosecutors themselves have proved ; but I must of necessity shew you the occasions and reasons of it, and the witnesses will tell your lordship what desperate resolutions she had been under formerly, and that

will lead me to near the time of her death, to shew why, and upon what accidents, she made away herself. I will not enumerate particulars by way of opening ; only I must tell your lordship, that some letters of her's must of necessity be produced, which truly, as I said, I should not meddle with, if I had not these innocent gentlemen here to defend as well as myself. Perhaps it may be said, that in honour I ought to conceal the weakness of this gentlewoman ; but then, in honour and justice to these gentlemen that are falsely accused with me, I cannot do it : I hope this one reason will excuse me to the world, for I have no other that could have obliged me to bring these letters upon the stage. I solemnly protest, if I stood here singly in the case of my own life, upon the evidence given against me, I take it to be so inconsiderable, I would not do it ; but I must do it, to shew that these gentlemen also are innocent, and to preserve them, because I am satisfied in my own mind they are so. My lord, when I have done that, I shall shew your lordship in the next place, that it is utterly impossible I could be concerned in this fact, if I had had all the motives and provocations in the world to have done it ; I shall shew your lordship, in point of time it could not be.

The maid Sarah Walker, who is the single witness, I take it, that says any thing in the least relating to me, said but now the clock had struck eleven before she carried up the coals, and about a quarter of an hour after, while she was warming the bed above stairs, she heard the door clap, and some time after that she came down and found that I and her mistress were gone. Now in point of time I shall prove it utterly impossible I could be guilty of the fact I am accused of, being seen to come into the Glove-inn, as the town-clock struck eleven, and staying there more than a quarter of an hour, was, after several things done at my lodging, in bed before twelve o'clock, and went no more out that night, as I shall prove. As for that little circumstance of sending for my horse, which they have made use of all along to back this prosecution, their very telling me of that matter, shews how much they are put to their shifts to justify their accusing me ; I say in prudence I ought to have done what I did : I sent for him on the Tuesday ; but, as their witness saith, I told him at the time I bid him fetch my horse, not to use then, nor till by the course of the circuit I was to go into Essex with the judges the next morning ; and until then the prosecutor's witness, who is the hostler of the Glove-inn, was ordered to set him up there, to litter him down, and to take care of him and feed him, and that he should be ready for me to go to Chelmsford on the morrow, whither I went with the other counsel the next morning, being Wednesday : and this, my lord, is the whole of that matter.

My lord, this business slept near two months after the coroner's inquest before I heard of it, or imagined myself to be concerned in it, and was never stirred till two parties, differing on

all other occasions, had laid their heads together : I beg leave to let your lordship a little into that matter, to shew you how this prosecution came to be managed with so much noise and violence as it hath been. I can make it appear, that one of the greatest of the Quakers, Mr. Mead by name, has very much, and indirectly too, concerned himself in this matter : it seems they fancy the reputation of their sect is concerned in it : for they think it a wonderful thing, nay, absolutely impossible (however other people may be liable to such resolutions,) that one who was by her education entitled to the 'light within her,' should run headlong into the water, as if she had been possessed with the devil; of this they think their sect is to be cleared, though by spilling the blood of four innocent men. The other sort of people that concur with the Quakers in this prosecution, I shall mention, now I come to observe what the witnesses are that have been produced against me ; some of them I have nothing to object to, but that they are extreme indigent and poor, and have been helped by the prosecutor ; those that are so, say nothing as to me ; others, who live in this town, and give their opinions of the manner of her death, are possessed with much prejudice against me, upon feuds that have risen at the elections of my father and brother in this town ; and these, with the Quakers, have wholly drest up this matter for several ends ; the Quakers to maintain the reputation of their sect ; and the others, to destroy, or break at least, the interest of my family in this place : but however effectual these designs may have been to have made a great noise in the world out of nothing, I am satisfied now that I am in a court of justice, where no person's reputation, much less his life, will be sacrificed to the policy or malice of a party without proof ; and therefore I have taken up so much of your time, to set the true rise of this prosecution before you in a clear light.

My lord, as to my coming to this town on Monday, it was the first day of the assizes, and that was the reason that brought me hither : before I came out of town, I confess, I had a design to take a lodging at this gentlewoman's house, having been invited by letter so to do ; and the reason why I did not was this : my brother, when he went the circuit, always favoured me with the offer of a part of his lodging, which out of good husbandry I always accepted : The last circuit was in parliament time, and my brother being in the Money-chair, could not attend the circuit as he used to do ; he had very good lodgings, I think one of the best in this town, where I used to be with him ; these were always kept for him, unless notice was given to the contrary. The Friday before I came down to the assizes, I happened to be in company with my brother and another gentleman, and then I shewed them the letter by which I was earnestly invited down to lie at the house of this gentlewoman during the assizes (it is dated the 9th of March last) ; and designing to comply with the invitation, I thereupon

desired my brother to write to Mr. Barefoot, our landlord, and get him, if he could, to dispose of the lodgings ; for, said I, if he keeps them they must be paid for, and then I cannot well avoid lying there : my brother did say he would write, if he could think on it ; and thus, if Mr. Barefoot disposed of the lodgings, I own I intended to lie at the deceased's house ; but if not, I looked on myself obliged to lie at Mr. Barefoot's. Accordingly I shall prove, as soon as ever I came to this town, in the morning of the first day of the assizes, I went directly to Mr. Barefoot's (the maid and all agree in this), and the reason was, I had not seen my brother after he said he would write, before I went out of London ; and therefore it was proper for me to go first to Mr. Barefoot's, to know whether my brother had wrote to him, and whether he had disposed of his lodgings or not. As soon as I came to Mr. Barefoot's, there was one Mr. Taylor, of this town, came to me, and I in his hearing asked Mr. Barefoot, his wife, and maid-servant, one after another, if they had received a letter from my brother to unbespeak the lodgings ; they told me no, that the room was kept for us ; and I think they had made a fire, and that the sheets were airing. I was a little concerned he had not writ ; but being satisfied that no letter had been received, I said immediately, as I shall prove by several witnesses, If it be so, I must stay with you, I will take up my lodging here : Thereupon I alighted, and sent for my bag from the coffee-house, and lodged all my things at Barefoot's, and thus I took up my lodging there as usual. I had no sooner done this, but Sarah Walker came to me from her mistress to invite me to dinner, and accordingly I went and dined there ; and when I went away, it may be true, that being asked, I said I would come again at night ; but that I said I would lie there, I do positively deny ; and knowing I could not lie there, it is unlikely I should say so. My lord, at night I did come again, and paid her some money that I received from Mr. Loftus, who is the mortgager, for interest of the 200*l.* I before mentioned (it was 6*l.* odd money, in guineas and half-guineas) : I writ a receipt, but she declined the signing of it, pressing me to stay there that night ; which I refused, as engaged to lie at Mr. Barefoot's, and took my leave of her ; and that very money which I paid her was found in her pocket, as I have heard, after she was drowned.

Now, my lord, the reason that I went to her house at night was, first, as I said, to pay her the interest money ; in the next place, it was but fitting, when I found myself under a necessity of disappointing her, and lying at Barefoot's, to go to excuse my not lying there, which I had not an opportunity at dinner-time to do. My lord, I open my defence shortly, referring the particulars to the witnesses themselves, in calling those who will fully refute the suppositions and inferences made by the prosecutor, whom first, my lord, I shall begin with, to shew there is no evidence of any murder at all committed ; and this, I say again,

ought to be indisputably made manifest and proved, before any man can be so much as suspected for it.

Baron *Hatsell*. Do not flourish too much, Mr. Cowper; if you have opened all your evidence, call your witnesses, and when they have ended, then make your observations.

Mr. Cowper. Then, my lord, I will take up no more of your time in opening this matter. Call Robert Dew. (Who appeared.) When Mrs. Sarah Stout drowned herself, was not you a parish officer?

Dew. I was. I was next house to the Coach and Horses; and about six o'clock came a little boy (Thomas Parker's boy), and said there was a woman fallen into the river. I considered it was not my business, but the coroner's, and I sent the boy to the coroner, to acquaint him with it, and the coroner sent word by the boy, and desired she might be taken out; so I went to the river and saw her taken out: she lay in the river (as near as I could guess) half a foot in the water; she was covered with water; she had a striped petticoat on, but nothing could be seen of it above water. I heaved her up, and several sticks were underneath her, and flags; and when they took her out, she frothed at the nose and mouth.

Mr. Cowper. How was she? Was she driven between the stakes?

Dew. She lay on the right side, her head leaning rather downwards; and as they pulled her up, I cried, 'Hold, hold, hold, you hurt her arm;' and so they kneeled down and took her arm from the stakes.

Mr. Cowper. Did you see any spot upon her arm?—Dew. Yes, Sir.

Mr. Cowper. What sort of spot was it?

Dew. It was reddish: I believe the stakes did it; for her arm hit upon the stake where she lay.

Mr. Cowper. Pray, how do these stakes stand about the bridge of the mill?

Dew. I suppose they stand about a foot asunder; they stand slanting, leaning down the stream a little.

Mr. Cowper. Could you discern her feet?

Dew. No, nothing like it, nor the striped petticoat she had on.

Mr. Cowper. Might not her knees and legs be upon the ground, for what you could see?

Dew. Truly, if I were put upon my oath, whether they were so, or not, I durst not swear it; sometimes the water there is four feet, sometimes three and a half; I believe her feet were very near the bottom.

Mr. Cowper. Are not the stakes nailed with their head against the bridge?

Dew. They are nailed to the side of the bridge.

Mr. Cowper. Pray, describe the manner in which they took her up.

Dew. They stooped down, and took her up.

Mr. Cowper. Did they take her up at once?

Dew. They had two heavings, or more.

Mr. Cowper. What was the reason they did not take her up at once?

Dew. Because I cried out, 'They hurt her arm.'

Mr. Cowper. Was she not within the stakes?

Dew. No, this shoulder kept her out.

Mr. Cowper. When you complained they hurt her arm, what answer did they make you?

Dew. They stooped down and took her arm out from between the stakes; they could not have got her out else.

Mr. Cowper. After she was taken out, did you observe any froth or foam come from her mouth or nose?

Dew. There was a white froth came from her, and as they wiped it away, it was on again presently.

Mr. Cowper. What was the appearance of her face and upper parts at that time?

Dew. She was so much disfigured, I believe that scarce any of her neighbours knew her, the slime of the water being upon her.

Mr. Cowper. Did you see her maid Sarah Walker at that time?—Dew. No.

Baron *Hatsell*. Mr. Cowper, do you intend to spend so much time with every witness? I do not see to what purpose many of these questions are asked.

Mr. Cowper. I have done with him; call Young.

Baron *Hatsell*. Mr. Cowper, I would not have you straiten yourself, but only ask those questions that are pertinent.

Mr. Cowper. Pray, give an account of what you know of the matter.

Young. On Tuesday morning, between 5 and 6 o'clock, last assizes—

Mr. Cowper. What officer was you?

Young. I was constable.

Mr. Cowper. Was you employed by the coroner?

Young. Not by him in person. Between five and 6 o'clock some of the men that came into my yard to work, told me a woman was drowned at the mill; I staid a little and went down to see, and when I came there I saw a woman, as they had told me, and I saw part of her coat lie on the top of the water to be seen, and I looked strictly and nicely within the bridge, and saw the face of a woman, and her left arm was on the outside the stakes, which I believe kept her from going through; so I looked upon her very wishfully, and was going back again; and as I came back I met with R. Dew and two of my neighbours, and they asked me to go back with them, and said they were going to take her up; and being constable, I told them I thought it was not proper to do it, and they said they had orders for it; so I being constable went back with them, and when I came there I found her in the same posture as before; we viewed her very wishfully; her coat that was driven near the stakes was seen, but none of her other coats, or her legs; and after we had looked a little while upon her, we spake to Dell and Ulse to take her up, and one of them took hold of her coat till he brought her above water; and as her arm drew up, I saw a black place, and

she laid sideways, that he could not take her up till they had let her down again, and so they twisted her out sideways; for the stakes were so near together that she could not lie upon her belly, or upon her back; and when they had taken her up, they laid her down upon a green place, and after she was laid down, a great quantity of froth (like the froth of new beer) worked out of her nostrils.

Baron *Hatsell*. How much do you call a great quantity?

Young. It rose up in bladders, and run down on the sides of her face, and so rose again; and seeing her look like a gentlewoman, we desired one Ulse to search her pockets, to see if there were any letters, that we might know who she was; so the woman did, and I believe there was twenty or more of us that knew her very well when she was alive, and not one of us knew her then; and the woman searched her pockets, and took out six guineas, ten shillings, three pence halfpenny, and some other things; and after that I desired some of my neighbours to go with me and tell the money; for when it came to be known who she was, I knew we must give an account on it, and I laid it upon a block and told it, and they tyed it up in a handkerchief, and I said I would keep the money, and they should seal it up to prevent any question about it; and during all this while of discourse, and sealing up the money, the froth still worked out of her mouth.

Mr. *Cowper*. Have you measured the depth of the water? What depth is it there?

Young. I measured the water this morning, and it was so high that it ran over the floodgate, and the height of it was about four foot two inches; but sometimes it is pent up to a greater height than it is to day.

Mr. *Cowper*. Was it higher to day than when the body was found?

Young. To the best of my remembrance, it was as high to day as it was then.

Mr. *Cowper*. Was any part of the body above water?

Young. No, nor nothing like the body could be seen.

Mr. *Cowper*. Could you see where her legs lay?

Young. No, nor nothing but her upper coats, which were driven against the stakes.

Mr. *Cowper*. Pray give an account how long she lay there, and when she was conveyed away?

Young. I stayed a quarter of an hour, and then I went and sealed up the money at my own house, so that I did not see her removed.

Mr. *Jones*. Was any body there besides yourself at this time?

Young. Yes; twenty people at the least.

Mr. *Jones*. Now here is ten of them that have sworn that the body was above the surface of the water.

Baron *Hatsell*. No, her cloaths, they say, were, but the body was something under the water.

Mr. *Cowper*. Now I will trouble your lord-

ship no more with that fact, but I will give you an account of the coroner's inquest, how diligent they were in their proceedings, and produce a copy of the inquisition itself, that she was found to have drowned herself.

Baron *Hatsell*. Mr. *Cowper*, that is no evidence, if it be produced in order to contradict what these witnesses have said, that have been examined for the king; but if you will prove, that they have sworn otherwise before the coroner than they now do, then you say something, otherwise the coroner's inquest signifies nothing as to the present question.

Mr. *Cowper*. Call Thomas Wall. I am loth to be troublesome; but if you please to favour me, I desire to know of them, whether they do admit there was an inquisition, and that she was found 'non compos mentis,' and did kill herself.

Mr. *Jones*. We do admit it.

Juryman. We desire it may be read.

Baron *Hatsell*. Why, will not you believe what they agree to on both sides?

Juryman. If they do agree so, I am satisfied.

Mr. *Cowper*. Thomas Wall, pray, do you give an account of what you know of Mrs. Stout's being taken up.

Wall. My lord, I was one of the jury, that viewed her at the place where she was laid when she was taken up, and there was no marks upon her, only a little mark about her ear, and something near her collar bone; that was all I see upon her.

Mr. *Cowper*. Do you know any thing of any surgeons being employed to view those marks?

Wall. My lord, we had several persons that came before us that we examined; we had a dispute concerning these marks what might effect them, and we desired Mr. Dimsdale and Mr. Camlin to see them, that we might be the better satisfied; and they both went down and viewed the body after it was brought down to Mrs. Stout's; and they came back, both of them, and Mr. John Dimsdale told us, that these marks were no more than were usual in such cases, and it was only the stagnation of blood.

Mr. *Cowper*. Was it the old man or the young man?

Wall. It was the young man.

Mr. *Cowper*. Usual did he say?

Wall. I can tell the very words, I have them writ down.

Mr. *Cowper*. Pray do so, for he has denied it here.

Wall. (Looks on his paper.) Here it is. Mr. Dimsdale and Mr. Camlin came to us, and Mr. Dimsdale spake, and said these marks are usual, or might be usual; or if they were marks, it was no more than was usual in such cases; and that it was the stagnation of blood.

Mr. *Cowper*. Now you have your notes in your hand, pray, what did Sarah Walker say to you as to the time I went from Mrs. Stout's?

Wall. Sarah Walker said, it was about eleven o'clock when she took up coals to warm the bed, but she said she could not nor did not know when Mr. Cowper went out, for she warmed the bed, and Mr. Cowper not coming up, she took up some more coals, and tarried a little longer, and nobody coming up, she went down, and found Mr. Cowper was gone, and she looked into the parlour, and her mistress was gone.

Baron Hatsell. The woman said the same thing.

Mr. Cowper. It is necessary in this particular as to the time.

Baron Hatsell. She told you the clocks did differ.

(Then Mr. Bowden was called.)

Mr. Cowper. Well, what do you know of the taking up of Mrs. Stout?

Bowden. I went with the rest of the neighbours to view her, and I did perceive it was Mrs. Sarah Stout's body, though some questioned it: I do believe I was the second person that discovered it was she; and, my lord, I did see a great deal of froth that came out of her mouth and nostrils.

Mr. Cowper. Did you go about to wipe it away?

Bowden. No, but some other persons did; it came out in a great quantity.

Mr. Jones. How much do you call a great quantity?

Bowden. Her mouth and nostrils were very full of it.

Mr. Jones. Was not her mouth shut?

Bowden. I did not observe that.

Mr. Cowper. How long had she lain there before you came?

Bowden. I believe I was there in half an hour; as soon as I heard the report of it I went down.

Mr. Cowper. Call Mr. Shute.

Baron Hatsell. Well, what can you say to this matter?

Shute. Sir, I was summoned upon the jury upon the coroner's inquest; and I perceived when I was there, that the same stuff worked out of Mrs. Stout's nostrils as worked out of the child's.

Baron Hatsell. What child is that you speak of? Is it the child that was drowned in the same place as Mrs. Stout was?—*Shute.* Yes.

Mr. Cowper. My lord, I am very tender how I take up your lordship's time; and therefore I will not trouble you with any more witnesses upon this head; but, with your lordship's leave, I will proceed to call some physicians of note and eminence, to confront the learning of the gentlemen on the other side.—*Dr. Sloane,* you were in court when these gentlemen delivered their opinion concerning Mrs. Stout's having no water in her; I desire you would give your opinion in that matter.

Dr. Sloane. I have not heard them very particularly or distinctly, because of the great crowd; some of them I have; cases of this

kind are very uncommon, and none of them have fallen directly under my own knowledge. As to my opinion of drowning, it is plain, that if a great quantity of water be swallowed by the gullet into the stomach, it will not suffocate or drown the person: Drunkards, who swallow freely a great deal of liquor, and those who are forced by the civil law to drink a great quantity of water, which in giving the question (as it is called) is poured into them by way of torture to make them confess crimes, have no suffocation or drowning happen to them: But on the other hand, when any quantity comes into the windpipe, so as it does hinder or intercept the inspiration, or coming in of the air, which is necessary for respiration or breathing, the person is suffocated. Such a small quantity will do, as sometimes in prescriptions, when people have been very weak, or forced to take medicines, I have observed some spoonfuls in that condition (if it went the wrong way) to have choaked or suffocated the person. I take drowning in a great measure to be thus; and though it is very likely when one struggles he may (to save himself from being choaked) swallow some quantity of water, yet that is not the cause of his death, but that which goes into the windpipe and lungs. Whether a person comes dead or alive into the water, I believe some quantity will go into the windpipe; and I believe, without force after death, little will get into the stomach, because that it should, swallowing is necessary, which after death cannot be done.

Baron Hatsell. Pray, doctor, I understand you say this; that in case a person is drowned, that there may be but little water in the stomach?

Dr. Sloane. That it is accidental, my lord.

Baron Hatsell. But what do you say to this? If there had been water in the body, would it not have putrified the parts after it had lain six weeks?

Dr. Sloane. My lord, I am apt to think it would have putrified the stomach less than the lungs, because the stomach is a part of the body that is contrived by nature partly to receive liquids; but the contrivance of the lungs is only for the receiving of air; they being of a spongy nature, the water might sink more into them than the stomach; but I believe it might putrify there too after some time. I am apt to think, that when a body is buried under ground, according to the depth of the grave, and difference of the weather and soil, the fermentation may be greater or lesser, and that according to the several kinds of meats or liquids in the stomach, the putrefaction will likewise vary; so that it seems to me to be very uncertain.

Baron Hatsell. But when they are in a coffin, how is it then?

Dr. Sloane. No doubt there will be a fermentation more or less, according as the air comes more or less to the body. Indeed it may be otherwise, where the air is wholly shut out, which is supposed to be the way of embalming, or preserving of dead bodies of late, with-

out the use of any spices, which is thought in a great measure to be brought about by the closeness of the coffin, and hindering of the air from coming into the body.

Mr. Cowper. Is it possible, in your judgment, for any water to pass into the thorax?

Dr. Sloane. I believe it is hardly possible that any should go from the windpipe into the cavity of the thorax, without great violence and force; for there is a membrane that covers the outside of the lungs, that will hinder the water from passing through it into any part without them.

Mr. Cowper. Now, do you think it possible to find water in a drowned body after six weeks time?

Dr. Sloane. I am apt to think if there was any quantity in the lungs, the sponginess of the part would suck up some part of it. As to the stomach, I have not known it tried; but it is like, if there was a great fermentation, a great deal of it would rise up in vapours or steams, and go off that way.

Mr. Cowper. Dr. Garth, I cannot tell whether you were in court when the surgeons who are witnesses for the king gave their evidence.

Dr. Garth. Yes, I was.

Mr. Cowper. Then I desire you, Sir, to give your opinion as to those particulars.

Dr. Garth. I observed in this trial, the first gentleman called for the king that spoke to this matter was Mr. Coatsworth: He saith he was sent for to open her, upon an aspersion of her being said to be with child. I agree with him in what he speaks to that point, but must differ with him where he infers she was murdered, because he found no great quantity of water in her, as also her head extremely mortified, but not her lungs (lungs and bowels I think were used promiscuously.) Now, my lord, as to the matter of putrifaction, I think it is not much material whether there be any water or no in the cavities of the body; if water would hasten putrifaction, it would do it as well in the lungs as otherwise; there is always some water in the lympheducts there, the breaking of which may be one occasion of catarrhs. As to what relates to the putrifaction of the head, it may happen from a stoppage of the reflux blood, which is staid there in a great quantity, through the suffocation in the water, or from the nearness of the brain, which is observed often to mortify first.

The next was Mr. Dimsdale (I would speak to them all in order if my memory would permit); I think he was of the same opinion as Mr. Coatsworth; he laid the stress of his suspicion upon the mortification of the head, which I think is not at all material, no more than what they infer from her floating; it being impossible the body should have floated, unless it had rested, or had been entangled among the stakes, because all dead bodies (I believe) fall to the bottom, unless they be prevented by some extraordinary tumour. My lord we have not only philosophy, but experiments for this. The witnesses all agree she was found upon her

side, which to suppose her to float in this posture, is as hard to be conceived, as to imagine a shilling should fall down and rest upon its edge rather than its broad side; or that a deal board should rather float edgeways than otherwise; therefore it is plain she was entangled, or else the posture had been otherwise.

As to the quantity of water, I do not think it necessary it should be very great. I must own, the water will force itself into all cavities where there is no resistance. I believe when she threw herself in, she might not struggle to save herself, and by consequence not sup up much water. Now there is no direct passage into the stomach but by the gullet, which is contracted or pursed up by a muscle in nature of a sphincter: for if this passage was always open like that of the wind-pipe, the weight of the air would force itself into the stomach, and we should be sensible of the greatest inconveniences. I doubt not, but that some water fell into her lungs, because the weight of it would force itself down; but if we consider the wind-pipe with its ramifications as one cylinder, the calculation of its contents will not amount to above twenty-three or twenty four solid inches of water, which is not a pint, and which might imperceptibly work and fall out. I remember I offered a wager at Garraway's coffee-house to a gentleman here in court.

Baron Hatsell. Pray, doctor, tell us your opinion as to what the seaman said, and also as to what Dr. Sloane said, whether water in the body will putrify it?

Dr. Garth. I say not; for in some places they keep flesh-meat from corrupting by preserving it in water, and it is well known it will putrify less so, than when exposed to air.

Baron Hatsell. But what do you say as to the sinking of dead bodies in water?

Dr. Garth. If a strangled body be thrown into the water, the lungs being filled with air, and a cord left about the neck, it is possible it may float because of the included air, as a bladder would; but here is neither cord, nor any mark of it, nor nothing but a common stagnation.

Baron Hatsell. But you do not observe my question; the seaman said, that those that die at sea, and are thrown overboard, if you do not tye a weight to them, they will not sink what say you to that?

Dr. Garth. My lord, no doubt in this they are mistaken. The seamen are a superstitious people, they fancy that whistling at sea will occasion a tempest: I must confess I never saw any body thrown over-board, but I have tried some experiments on other dead animals, and they will certainly sink; we have tried this since we came hither. Now, my lord, I think, we have reason to suspect the seaman's evidence; for he saith, that threescore pound of iron is allowed to sink the dead bodies, whereas six or seven pounds would do as well. I cannot think the commissioners of the navy guilty of so ill husbandry; but the design of tying weights to their bodies, is to prevent their

floating at all, which otherwise would happen in some few days: therefore what I say is this, that if these gentlemen had found a cord, or the print of it, about the neck of this unfortunate gentlewoman, or any wound that had occasioned her death, they might then have said something.

Mr. Cowper. Do you apprehend that any quantity of water can enter into the cavity of the thorax?

Dr. Garth. It is impossible there should till the lungs be quite rotten; there is no way but by the lungs, which are invested with so strong a membrane, that we cannot force breath with our blow-pipes through it; and there is a great providence in such a texture; for if there were any large pores in the membrane, the air would pass through it into the cavity of the thorax, and prevent the dilatation of the lungs, and by consequence there would be an end of breathing.

Mr. Cowper. Dr. Morley, pray, be pleased to give your opinion of these matters.

Dr. Morley. Those which seem to be questions of greatest moment, are whether there was a necessity for this body (if drowned) to have a great quantity of water in it, and whether bodies thrown dead into the water float. To the first I answer positively, that there is no absolute necessity that she should have a great quantity of water in her; and I think the question Mr. Cowper asked Dr. Coatsworth, whether he had like to have been drowned by accident or design, suits with my assertion; for if this gentlewoman did voluntarily drown herself, she then, in all likelihood, threw herself into the water, with a resolution of keeping her breath for a speedy suffocation; and then if upon the first endeavours for respiration (which naturally must be) she drew into her lungs two ounces of water, it was the same thing to drowning of her, as if there had been two tun. We see the same thing done by divers in order to save themselves, as it happened to this unfortunate gentlewoman, in her design of destroying herself: if a diver, before he comes to the surface of water, should so far mistake his power of holding his breath, that he should be forced to endeavour respiration, the little water he drew into his lungs by his attempt to respire, may drown him. We last night drowned a dog, and afterwards dissected him, and found not a spoonful of water in his stomach, and, I believe, about two ounces in his lungs; while we were doing this, we drowned another, and he lay at the bottom and did not float: no more would he have done, if he had been hanged before thrown into the water: we took him up, and opening him, we found much about the same quantity of water in his lungs, and little or none in his stomach. They both froth'd at nose and mouth, because the water coming into the little bladders of the lungs, and there meeting with air, a commotion arose between the water and air, which caused the froth. To the second question, I think if bodies new killed swim, it is by accident; for the reason that bodies swim, is

because by putrifaction they rarify, by rarification they grow lighter, which brings them to the top of the water.

Mr. Cowper. I desire to know if any man of skill in prudence would give his opinion?

Baron Hatsell. This is not a proper question.

Mr. Cowper. Then I will ask it thus: do you think, doctor, it is to be known six weeks after, if a person was drowned?

Dr. Morley. I think it is morally impossible.

Mr. Cowper. Can there be any water in the thorax?

Dr. Morley. By an imposthume or some violence to nature, possibly; but I think no otherwise.

Mr. Cowper. Dr. Woollaston, what is your opinion, if a person be drowned, whether it can be discovered six weeks after?

Dr. Woollaston. My lord, I think it is impossible to be known; for if there had been never so much water in the body at first, it could not lie there so long, but must of necessity have forced its way out. We see in persons that die of dropsies, that the water will work itself out (and sometimes burst the body) before it is buried; and I am sure, if it do so in dropsies, where there are no visible passages for it to get out at, it must do so much more in drowned persons, where the water lies only in the stomach and guts, and has nothing to hinder its working out when it ferments, as it always doth.

Mr. Cowper. Have you ever made any experiments in that nature, doctor?

Dr. Woollaston. I have made no experiments, but I have seen a very particular instance.

Baron Hatsell. That is very well; pray let us hear it, doctor.

Dr. Woollaston. My lord, about three years since, I saw two men that were drowned out of the same boat. They were taken up the next day after they were drowned: one of them was indeed prodigiously swelled, so much that his cloaths were burst in several places of his sides and arms, and his stockings in the seams; his hands and fingers were strangely extended; his face was almost all over black; but the other was not in the least swelled in any part, nor discoloured; he was as lank, I believe, as ever he was in his life-time; and there was not the least sign of any water in him, except the watery froth at his mouth and nostrils. My lord, this I saw myself, and took very particular notice of it.

Mr. Jones. Did you see these bodies taken out of the water yourself, doctor?

Dr. Woollaston. No, Sir.

Mr. Jones. How long had they been taken out when you saw them?

Dr. Woollaston. I enquired, and to the best of my memory, it was that same day.

Baron Hatsell. But what do you think, doctor, of a person's being drowned without taking in any water?

Dr. Woollaston. My lord, what is taken in is, I believe, chiefly at the surface of the water,

when they open their mouths for breath, and the water that rushes in they are forced to drink down, to keep it from the lungs: but when the head is quite under water, I don't think it is possible for any quantity to get down into the stomach; because it being breath they open for, the very first water they take in would of necessity fill the lungs; and, when the breath is stopped, I don't see how they can swallow.

Mr. Cowper. Dr. Gelstrop, what is your opinion of this matter?

Dr. Gelstrop. I don't think they can make any judgment of persons being drowned after six weeks time.

Mr. Cowper. Can any water get into the thorax?

Dr. Gelstrop. No, not unless the lungs be putrified.

Mr. Cowper. Is a great quantity of water necessary to persons dying by drowning?

Dr. Gelstrop. No; only so much as may hinder respiration,

Mr. Cowper. Now, my lord, I would call Mr. William Cowper; and because of his name, I must acquaint your lordship, that he is not at all related to me, though I should be proud to own him if he were so: he is a man of great learning, and, I believe, most people admit him the best anatomist in Europe. Mr. Cowper, pray will you give your opinion of this matter.

Mr. W. Cowper. My lord, I hope what I shall say will not be suspected because I am of the same name, for this gentleman is an utter stranger to me.

Baron Hatsell. Pray, Mr. Cowper, without any apology, give your opinion concerning persons drowned, and how it is with them in their inward parts.

Mr. W. Cowper. I will give you a short account, I hope to your satisfaction too, my lord. I will not only speak from reason, but give you the testimony of the experiments I have made upon this occasion. My lord, I heard it made a mighty argument, that this person had no water that seemed to flow out; but the witnesses agree that there was a froth. Now, my lord, it was not reasonable to expect any thing but froth. My lord, had she been thrown into the water, and made her utmost efforts, which she would then have done to have saved herself, and been often buoyed up to the top of the water, no doubt but she would have swallowed a considerable quantity of water before she had been drowned; and it may be expected to flow from her, if her head had been inclined downwards.

This is a truth that no man can deny, who is acquainted with any thing of this nature, that when the head of an animal is under water, the first time it is obliged to inspire (or draw in air) the water will necessarily flow into its lungs, as the air would do if it were out of the water; which quantity of water (if the dimensions of the windpipe, and its branches in the lungs, be considered) will not amount to three inches square, which is about three ounces of water. Nor is a greater quantity of water in the wind-

pipe necessary to choak any person, if we do but reflect what an ebullition is caused by its meeting with the air which remained in the lungs, whereby a small quantity of water is converted into froth, and the channel of the windpipe, and those of the bronchia, are filled with it, insomuch that no air can enter the lungs for the office of respiration. After a suffocation is thus commenced (I am apt to think) all regular animal actions are perverted, and particularly that of swallowing (or deglutition); and what water flows into the lungs at the instant, or after this suffocation, is from its own weight, which is more or less as the body is farther under, or nearer the surface of the water. My lord, I do not speak this by way of conjecture or hypothesis, but I have made experiments, which have suggested what I here offer. I shall by the bye tell you how fallacious the first experiment was, when I proposed to satisfy myself, whether a dead body would float in water? it happened that a spaniel, that had a great deal of long hair, was hanged for this purpose, which I found to swim on the surface of the water; but when I considered that his hair might buoy him up, I caused another dog, which had shorter and less hair, to be hanged and put into the water, which (agreeable to what I had always conceived of a human body) sunk directly to the bottom. In order to satisfy myself what quantity of water was necessary to enter the body of an animal, and cause a suffocation in water, I caused three dogs, when alive, to be suddenly plunged under water till they were stifled; one was before I left London; the other two I made the experiment on last night, in the presence of Dr. Sloane and Dr. Morley, and we could not compute there was more than three ounces of water in their lungs, and none that we could perceive in their stomachs.

Dead bodies necessarily sink in water, if no distention of their parts buoy them up; this distention sometimes happens before death, at other times soon after, and in bodies that are drowned after they lie under water: This enlargement of them is caused by a rarefaction of the humours within the cavities, and the bodies necessarily rise to the surface of the water. Your lordship may infer this from what the seaman told you; and the great weight they use to fasten to their bodies that die of diseases, was not of such use to sink them, as it was to prevent their floating afterwards; so that the weight was necessary for those that were killed, as well as those that died of diseases.

It is so commonly known, that the contents in the stomach of a dead body are discharged by the mouth and nostrils, so soon as it begins to ferment, and the belly becomes distended, that it is no wonder that water, if the greatest quantity of that had been in the stomach, or any thing else that was fluid, must be forced from them six weeks after death.

My lord, I cannot but think it ridiculous to expect water in the cavity of the thorax; it is such a conceit as nothing in nature can account

for, unless the lungs had suffered some apostumation, or the like, whereby the water may pass their outward membranes into that cavity.

Mr. *Cowper*. With your lordship's favour, I now think it a proper time to make this observation. The witnesses that have given evidence for the king do say, they believe she was not drowned; but they have not pretended to say how she died otherwise.

Baron *Hatsell*. That is very true.

Mr. *Cowper*. Dr. *Crell*, I desire you will be pleased to give an account of this matter.

Dr. *Crell*. My lord, I have little to say in this affair, the physicians that have been examined already having made it out, that persons who are drowned may have but little water in their bodies; but I have taken what pains I could, upon so short warning, and I will tell you the opinion of several eminent authors. My own opinion is, that a very small quantity of water, not exceeding three ounces, is sufficient to drown any body; and I believe that the reason of the suffocation, or of any person's being stifled under water, is from the intercepting of the air, that the person cannot breathe, without which he cannot live. Now, my lord, I will give you the opinion of several ancient authors.

Baron *Hatsell*. Pray, doctor, tell us your own observations.

Dr. *Crell*. My lord, it must be reading, as well as a man's own experience, that will make any one a physician; for without the reading of books of that art, the art itself cannot be attained to: besides, my lord, I humbly conceive, that in such a difficult case as this, we ought to have a great deference for the reports and opinions of learned men: Neither do I see any reason why I should not quote the fathers of my profession in this case, as well as you gentlemen of the long robe quote Coke upon Littleton in others: But I shall not trouble the court long; I shall only insist upon what Ambrose Parey relates in his chapter of Renunciations. He was chief surgeon to Francis the 1st, employed by him in most of his sieges and battles against the emperor Charles the 5th, and consequently must observe, and could not be ignorant of such like casualties in such great bodies of men. He tells us, that the certain sign of a man's being drowned, is an appearance of froth about his nostrils and mouth. Now, my lord, I think that every one of the king's evidences observed it in the present case, and a woman swore, that she saw her purge at the nose; which could not be, as he declares, if the person had been strangled, or otherwise killed before. As to the quantity of water requisite to drown a person, I believe that three ounces, or less, is enough; to wit, as much as will fill the windpipe, and so stop the breathing of the person drowning. I am not now to descant upon matter of fact, whether she drowned herself; but my firm opinion is, that she was drowned; for though sometimes, not always, there is water found in the bodies of such persons; yet wherever it be, besides the lungs, it

is superfluous as to this end, and accidental upon violent strugglings.

Mr. *Cowper*. I desire Mr. Harriot may be asked what observations he hath made concerning this matter.

Mr. *Harriot*. My lord, when I was a surgeon in the fleet, I made it always my observation, when we threw men overboard that were killed, some of them swam, and some sunk; and I remember particularly, when the Sandwich was burnt, we saw abundance leap off from on board, and they sunk directly, but in a little time I observed some swim again.

Baron *Hatsell*. When a dead body is thrown overboard, does it sink or swim?

Mr. *Harriot*. I always observed that it did sink: When we were in the channel, and in time of peace, we never threw any overboard but we put some weight to them; but it was not to make them sink, but for decency sake, that they might not be driven to shore when they began to float.

Mr. *Cowper*. I desire that Mr. Bartlet may be asked to the same purpose.

Mr. *Bartlet*. I have been in several of the king's ships of war that have been disabled and forced to lie by, in several engagements between the French and English, and I never saw any bodies float, either of the men that were killed in our ship, or in the ships that have been near us; I have not seen a body upon the surface of the water.

Baron *Hatsell*. Another witness said, that after an engagement he saw them swimming.

Mr. *Bartlet*. I cannot tell what he saw, my lord; but what I say I am ready to make oath of.

Mr. *Cowper*. Dr. *Camlin*, will you please to give my lord and the jury an account whether you were employed by the coroner's inquest to view the body of Mrs. Stout after she was drowned, and the marks upon it, and tell my lord your opinion of it?

Mr. *Camlin*. I was sent for by the coroner and the jury that sat upon the body of Mrs. Sarah Stout, the coroner being then at her mother's house, and the coroner desired Mr. Dimsdale and me to go and take notice of the marks upon her neck, and upon her breast: We viewed all about, and perceived a mark under her left ear; we looked to see if there was any contusion, and we perceived a settlement of blood upon her breast, and another upon her arm; and when we came back, Mr. Dimsdale made a report, I stood by him at that time, that it was only a common settlement.

Mr. *Cowper*. Pray, Mr. *Camlin*, was the spot above or below the collar bone?

Mr. *Camlin*. Below the collar bone.

Mr. *Cowper*. What did Mr. John Dimsdale say then concerning this matter?

Mr. *Camlin*. I understood that he was of opinion, that it was only a common stagnation of blood, that happens in the case of drowned people.

Baron *Hatsell*. Did he say so to the jury?

Mr. *Camlin*. Mr. Dimsdale spake for us

both, and I understood him, that it was a stagnation that did commonly happen to drowned people; and that was my opinion of it too.

Mr. Cowper. And that you agreed to be your report?—Mr. Camlin. Yes.

Mr. Cowper. Pray, Mr. Camlin, was you present when the child that was drowned in the same place was taken up?

Mr. Camlin. Yes; it was taken up some time after, near the same place, as I was told, and there was more and greater signs of the stagnation of blood on the body of this child, than on the body of Mrs. Stout; the child's face was black and discoloured.

Baron Hatsell. How old was the child?

Mr. Camlin. Between ten and eleven, as near as I could guess.

Baron Hatsell. Had Mrs. Stout any signs of being strangled when you saw her first?

Mr. Camlin. Nothing at all, that I could discern.

Mr. Cowper. My lord, I will give you no more trouble upon this head; I shall go now to the next thing I opened, and shall prove substantially, that this gentlewoman is not only more to be suspected to have murdered herself than to be murdered by any body; but it is almost a certainty that she was the cause of her own death. Mr. Firmin I would begin withal, if he be here. (But he not presently appearing.) Then, my lord, if you please, I will desire Mr. Bowd in the mean time to give your lordship an account of what he knows of the melancholy of this gentlewoman.

Mr. Bowd. It was much about this time twelve-month I had some business in London, and she sent to me, to know when I should go to London; and I waited upon her before I went, and she desired me to do some business for her; and when I returned, I acquainted her with what I had done; and sitting together in the hall, I asked her, what is the matter with you? Said I, there is something more than ordinary; you seem to be melancholy. Saith she, you are come from London, and you have heard something or other: said I, I believe you are in love. In love! said she. Yes, said I, Cupid, that little boy, hath struck you home: she took me by the hand; Truly, said she, I must confess it; but I did think I should never be guilty of such a folly: and I answered again, I admire that should make you uneasy; if the person be not of that fortune as you are, you may, if you love him, make him happy, and yourself easy. That cannot be, saith she: the world shall not say I change my religion for a husband. And some time after I had been in London, having bought some India goods, she came to my shop and bought some of me for a gown, and afterwards she came to pay me for it; and I asked her, How do you like it? have you made it up? No, said she, and I believe I shall never live to wear it.

Mr. Cowper. Pray how long is it since?

Bowd. It was about February or January

before her death. I asked her, why she did not come to my house oftener? She said, she had left off all company, and applied herself to reading; and company was indifferent to her.

Mr. Cowper. Mr. Firmin, will you please to inform my lord and the jury what you know of Mrs. Sarah Stout's being melancholy?

Firmin. I did observe about three quarters of a year ago, that she was melancholy; I cannot say that she acknowledged herself to be so, but I have charged her with it.

Mr. Cowper. Did you believe she was melancholy when you charged her with it?

Firmin. Yes, I did.

Mr. Cowper. Mrs. Bendy, if you please to inform the court what you know of this gentlewoman's being melancholy.

Mrs. Bendy. Sir, I can say she always acknowledged herself extremely melancholy; and when I have asked her how she did, she has said, pretty well in health, but so much troubled with melancholy she could not tell what to do with herself.

Mr. Cowper. Did she tell you any thing particularly?

Mrs. Bendy. It disordered her so, she said, that she had rather have chosen sickness than so much disorder in her mind.

Mr. Cowper. Have you any thing more to recollect?

Mrs. Bendy. Nothing but what I heard from Mrs. Cowper.

Baron Hatsell. How old was this gentlewoman?

Mrs. Bendy. About six-and-twenty.

Mr. Cowper. Call Mrs. Jane Low, Martha Grub and Mrs. Cowper. Mrs. Low, pray do you inform my lord and the jury what you know concerning the melancholy of Mrs. Sarah Stout, and when you first observed it?

Mrs. Low. It was a week before Whitsuntide was twelve-month.

Mr. Cowper. What did she say then?

Mrs. Low. She often complained to me, that she was very melancholy and uneasy; one time particularly, as we were walking together in the fields, I asked her the occasion of it; and she told me, that was a secret; but she said, she led a very melancholy life: said I, I am apt to believe you are in love; she did not disown it, and with a little more speaking she owned she was. I asked her who the person was; she said, that should be a secret, but it would end her days: said I, a woman of your fortune may command any body: she shook her head and said, no: perhaps, said I, he may not be a Quaker, and you may be afraid of disobliging your mother; but if you tell your mother that your life depends upon it, your mother (rather than lose her only child) will consent to it: she said, no; it was a person she could not marry; and shook her head, and looked very melancholy.

Mr. Cowper. When was this?

Mrs. Low. This was the week before Whitsuntide; and in Whitsun-week she saw me often, and said, she would take her full swing

of melancholy when her mother was away; and she used to lie a-bed that week.

Mr. Cowper. Have you observed any melancholy in her since?

Mrs. Low. Yes, at several times.

Mr. Cowper. Do you remember any thing of an intermitting fever?

Mrs. Low. Yes; she told me her melancholy had occasioned an intermitting fever; and I mentioned Dr. Eales to her, and she said her distemper lay in her mind, and not in her body, and she would take nothing, and the sooner it did kill her the better.

Mr. Cowper. Did she say any thing of her disposition to reading?

Mrs. Low. She said, nothing delighted her now, neither reading nor any thing else.

Mr. Cowper. My lord, Sarah Walker, when I asked her if she did not observe the melancholy of her mistress, and whether she had not said that her mistress had been melancholy? denied that she had said so: pray have you heard her say any thing to that purpose?

Mrs. Low. I have often asked her how her mistress did, and she would answer, very much indisposed, but not otherwise.

Mr. Cowper. Mrs. Cowper, what do you know of Mrs. Stout's melancholy?

Mr. Cowper. My lord, this is my brother's wife.

Mrs. Cowper. About spring was twelve month she came up to London, and I believe it was not less than once or twice a week I saw her; and I never had an opportunity to be an hour alone with her at any time, but I perceived something of her melancholy. I have asked her the reason of it several times, and sometimes she seemed to dislike her profession, being a Quaker; and sometimes she would say, that she was uneasy at something that lay upon her spirits, which she should never outlive; and that she should never be well while she was in this world. Sometimes I have endeavoured to persuade her out of it seriously, and sometimes by raillery, and have said, are you sure you shall be better in another world? And particularly I remember I have said to her, I believe you have Mr. Marshall in your head; either have him, or do not trouble yourself about him; make yourself easy either one way or another; and she hath said no, in an indifferent way, I cannot make myself easy: Then I have said, marry him; no, saith she, I cannot. Sometimes with company she would be diverted, and had frequently a way of throwing her hands, and shewed great disturbance and uneasiness. This time twelvemonth, at the summer assizes, I was here six days, and I saw her every day; and one time, among other discourse, she told me she had received great disturbance from one Theophilus, a waterman and a Quaker, who coming down to old Mrs. Stout, that was then lame, she had gathered about 20 or 30 people together to hear him preach; and she said he directed his discourse to her, and exasperated her at that rate, that she had thoughts of seeing nobody again,

and said, she took it heinously ill to be so used, and particularly, that he told her that her mother's falling outwardly in the flesh should be a warning that she did not fall inwardly; and such 'canting stuff,' as she called it; and she said, that Theophilus had so used her, that she was ashamed to shew her head. Another time, the same week, she had a fever, and she said, she was in great hopes it would end her days; and that she neglected herself in doing those things that were necessary for her health, in hopes it would carry her off, and often wished herself dead. Another time, which I think was the last time I saw her, it was at my sister's lodgings, and I sent for her to drink a dish of tea with us, and she came in a great toss and melancholy: Said I, what is the matter you are always in this humour? Saith she, I cannot help it, I shall never be otherwise. Saith my sister, for God's sake keep such thoughts out of your head as you have had, do not talk any more of throwing yourself out of window: Saith she, I may thank God that ever I saw your face, otherwise I had done it, but I cannot promise I shall not do it.

Baron Hatsell. What is your name, madam?

Mr. Cowper. It is my brother's wife, my lord. I desire Mrs. Toller may give an account of what she knows as to her being melancholy.

Mrs. Toller. My lord, she was once to see me, and she looked very melancholy, and I asked her what was the matter? and she said, something had vexed her that day; and I asked her the cause of it, and she stopped a little while, and then said, she would drown herself out of the way.

Baron Hatsell. How long ago was this?

Mrs. Toller. About three quarters of a year ago.

John Stout. I desire to know whether she has always said so, or not told another story.

Mrs. Toller. I told you no story; it may be I did not say so much to you, but I said she talked something of drowning. I have been with her when Mr. Cowper's conversation and name has been mentioned, and she said she kept but little company; that sometimes she went to Mrs. Low's, and that she kept none but civil modest company, and that Mr. Cowper was a civil modest gentleman, and that she had nothing to say against him.

Mr. Cowper. This is Mrs. Eliz. Toller, my lord.

Eliz. Toller. My lord, she came to see me some time after Christmas, and seemed not so cheerful as she used to be; said I, what is the matter? Why are you not so merry as you used to be? Why do you not come often to see me? Saith she, I do not think to go abroad so much as I used to do, and said, it would be as much a rarity to see her go abroad, as to see the sun shine by night.

Mr. Cowper. Mrs. Grub, what do you know concerning Mrs. Stout's pulling out a letter at her brother, Mr. John Stout's? Give an account of it, and what she said upon that occasion.

Mrs. Grub. I have a daughter that lives at

Guernsey, and she sent me a letter, and I prayed Mrs. Sarah Stout to read the letter; and while she was reading it I cried; saith she, why do you cry? said I, because my child is so far off. Said she, if I live till winter is over, I will go over sea as far as I can for the land.

Baron Hatsell. What was the occasion of her saying so?

Mrs. Grub. I was washing my master's study, Mrs. Sarah Stout came in, and I had a letter from my daughter at Guernsey, and I prayed Mrs. Sarah Stout to read it, and she read my letter, and I cried, and she asked me, why I cried? Said I, because my child is so far off: Saith she, if I live to winter, or till winter is over, I will go over sea as far as I can for the land.

Mr. Cowper. Now, my lord, to bring this matter of melancholy to the point of time, I will call one witness more, who will speak of a remarkable instance that happened on Saturday before the Monday when she did destroy herself.

Call Mr. Joseph Taylor. Pray, will you inform the court and jury of what you observed on Saturday before the Monday on which Mrs. Stout destroyed herself.

J. Taylor. I happened to go in at Mr. Firmin's shop, and there she sat the Saturday before this accident happened, the former assizes, and I was saying to her, Madam, I think you look strangely discontented; I never saw you dressed so in my life: Saith she, the dress will serve me as long as I shall have occasion for a dress.

Mr. Cowper. In what posture did she appear in the shop?

J. Taylor. She appeared to be very melancholy.

Mr. Cowper. What part of her dress did you find fault with?

J. Taylor. It was her head cloaths.

Mr. Cowper. What was the matter with them?

J. Taylor. I thought her head was dawbed with some kind of grease or charcoal.

Mr. Cowper. What answer did she make?

J. Taylor. She said, they would serve her time.

Mr. Cowper. As to this piece of evidence, if your lordship pleases, I desire it may be particularly taken notice of; it was her head-dress that she said would serve her time.

Pray, Mr. Taylor, was you at Mr. Barefoot's when I came there on Monday morning?

J. Taylor. Yes; I went up stairs with you into your chamber.

Mr. Cowper. Pray, what did I say to Mr. Barefoot?

J. Taylor. You asked him if they had received a letter from your brother, and he said, No, not that he knew of, but he would call his wife, and he did call his wife, and asked her if she had received a letter, and she said, No; then said you, I will take up this lodging for mine; and accordingly you went up

stairs, and I went with you, and staid there about four times as long as I have been here.

Mr. Cowper. Are you very sure that I said, I would take up my lodgings there?

J. Taylor. Yes, I am very sure of it.

Baron Hatsell. What time of the day was it?

J. Taylor. It was the fore part of the day: while I was there, my lord, Mrs. Sarah Stout's maid came to invite Mr. Cowper to her house to dinner.

Mr. Cowper. Did you know any thing of my sending to the coffee-house?

J. Taylor. You sent to the coffee-house for your things.

Baron Hatsell. Did Mr. Cowper use to lie at Mrs. Barefoot's?

J. Taylor. His brother did, but I do not know whether this gentleman did, but at that time he took up that place for his lodging; and said, it was all one, my brother must pay for it, and therefore I will take it up for myself.

Mr. Cowper. Call Mrs. Barefoot and her maid.

[But they not presently appearing.]

Mr. Cowper. My lord, in the mean time I will go on to the other part of my evidence, in opening of which I shall be very short.

My lord, my wife lodging at Hertford, occasioned me frequently to come down. Mrs. Stout became well acquainted with her: When business was over in the long vacation, I resided pretty much at Hertford, and Mr. Marshall came down to pay me a visit, and this introduced his knowledge of Mrs. Stout. When she was first acquainted with him she received him with a great deal of civility and kindness, which induced him to make his addresses to her, as he did, by way of courtship. It happened one evening that she and one Mrs. Crook, Mr. Marshall and myself, were walking together, and Mr. Marshall and Mrs. Crook going some little way before us, she took this opportunity to speak to me in such terms, I must confess, as surprized me. Says she, Mr. Cowper, I did not think you had been so dull. I was inquisitive to know in what my dulness did consist. Why, says she, do you imagine I intend to marry Mr. Marshall? I said I thought she did, and that if she did not, she was much to blame in what she had done: No, says she, I thought it might serve to divert the censure of the world, and favour our acquaintance. My lord, I have some original letters under her own hand which will make this fully manifest; I will produce the letters after I have called Mr. Marshall. Mr. Marshall.

Mr. Marshall. If your lordship pleases, it was in the long vacation I came down to spend a little of my leisure time at Hertford; the reason of my going thither was, because Mr. Cowper was there at that time. The first night when I came down I found Mrs. Sarah Stout visiting at Mr. Cowper's lodgings, and there I first came acquainted with her; and she afterwards gave me frequent opportunities

of improving that acquaintance; and by the manner of my reception by her, I had no reason to suspect the use it seems I was designed for. When I came to town, my lord, I was generally told of my courting Mrs. Stout, which I confess was not then in my head; but it being represented to me as a thing easy to be got over, and believing the report of the world as to her fortune, I did afterwards make my application to her; but upon very little trial of that sort, I received a very fair denial, and there ended my suit; Mr. Cowper having been so friendly to me, as to give me notice of some things, that convinced me I ought to be thankful I had no more to do with her.

Baron *Hatsell*. When did she cast you off?

Mr. *Marshall*. I cannot be positive as to the time, my lord, but it was in answer to the only serious letter I ever writ to her; as I remember, I was not over importunate in this affair, for I never was a very violent lover.

Baron *Hatsell*. Well, but tell the time as near as you can.

Mr. *Marshall*. I believe it was a second or third time I came down to Hertford, which is about a year and a half since; and, during the whole of my acquaintance with her, I never till then found her averse to any proposal of mine; but she then telling me her resolution was not to comply with what I desired, I took her at her word, having partly by my own observation, but more by Mr. Cowper's friendship, been pretty well able to guess at her meaning.

Mr. *Cowper*. Because what you say may stand confirmed beyond contradiction, I desire you to say whether you have any letters from her to yourself?

Mr. *Marshall*. Yes, I have a letter in my hand which she sent me, upon occasion of some songs I sent her when I came to town, which she had before desired of me; and this is a letter in answer to mine; it is her hand-writing, and directed to me.

Baron *Hatsell*. How do you know it is her hand-writing?

Mr. *Marshall*. I have seen her write, and seen and received several letters from her.

Mr. *Cowper*. Pray, shew it Mr. Beale.

Mr. *Beale*. I believe it to be her hand; I have seen her write, and have a receipt of hers.

Clerk of Arr. It is directed to Mr. Thomas Marshall at Lyons-inn, and dated Sept. 26, 1697.

"Sir,

Sept. 26, 1697.

"Yours came very safe; but I wish you had explained your meaning a little more about the accident you speak of; for I have been puzzling my brains ever since; and without I shall set myself to conjuring, I cannot imagine what it should be, for I know of nothing that happened after you went away, nor no discourse about you, only when we were together, the company would sometimes drink your health, or wish you had been there, or the like; so that I fancy it must be something Mr. ——— has invented for diversion; though I must confess

we have a sort of people here, that are inspired with the gift of foreknowledge, who will tell one as much for nothing as any astrologer will have a good piece of money for. But to leave jesting, I cannot tell when I shall come to London, unless it be for a night and away, about some business with my brother, that I must be obliged to attend his motions; but when I do, I shall remember my promise, although I do not suppose you are any more in earnest than myself in this matter. I give you thanks for your songs and your good wishes, and rest

Your Loving Duck."

Mr. *Cowper*. Have you any more letters?

Mr. *Marshall*. Yes, I have another letter here; but before it is read, I think it will be proper to give the court an account of the occasion of its being writ. I waited on Mrs. Stout one evening at her lodgings in Houndsditch, and at our parting she appointed to meet me the next day; and to excuse her not coming according to that appointment, she sent me this letter.

Cl. of Arr. It is directed to Mr. Thomas Marshall; it is without date.

"Mr. Marshall,

"I met unexpected with one that came from H——d last night, who detained me so long with relating the most notorious inventions and lyes that are now extant amongst those people, that I could not possibly come till it was late; and this day was appointed for business, that I am uncertain when it will be finished; so that I believe I cannot see you whilst I am in town. I have no more at present, but that I am

Your obliged Friend."

Mr. *Cowper*. Now, my lord, if your lordship please, I proceed to shew you, that I went not so much voluntarily as pressed by her to come to this house, and for that I will produce one letter from her to myself; and, my lord, I must a little inform you of the nature of this letter. It is on the outside directed to Mrs. Jane Ellen, to be left for her at Mr. Hargrave's coffee-house. For her to direct for me at a coffee-house, might make the servants wonder and the post-man might suspect, and for that reason she directed it in that manner. There was Mr. Marshall by when I received it, and I can prove the hand by Mr. Beale.

Mr. *Marshall*. My lord, I verily believe I was by, and that Mr. Cowper shewed me this letter immediately on receipt of it, as he had done several others from the same hand.

Cl. of Arr. This is directed for Mrs. Jane Ellen. It is dated March the 5th, without any year.

"Sir,

March the 5th.

"I am glad you have not quite forgot that there is such a person as I in being; but I am willing to shut my eyes, and not see any thing that looks like unkindness in you, and rather content myself with what excuses you are pleased to make, than be inquisitive into what I must not know. I should very readily comply

with your proposition of changing the season, if it were in my power to do it, but you know that lies altogether in your own breast: I am sure the winter has been too unpleasant for me to desire the continuance of it; and I wish you were to endure the sharpness of it but for one hour, as I have done for many long nights and days; and then I believe it would move that rocky heart of yours, that can be so thoughtless of me as you are: But if it were designed for that end, to make the summer the more delightful, I wish it may have the effect so far, as to continue it to be so too, that the weather may never overcast again; the which if I could be assured of, it would recompense me for all that I have ever suffered, and make me as easy a creature as I was the first moment I received breath. When you come to H——d pray let your steed guide you, and do not do as you did the last time; and be sure order your affairs to be here as soon as you can, which cannot be sooner than you will be heartily welcome to

Your very sincere Friend."

"For Mrs. Jane Ellen at Mr. Hargrave's,
near Temple-bar, London."

Mr. Cowper. Though it is directed to Mrs. Jane Ellen, it begins in the inside, 'Sir,' and it is dated the 5th of March, next before the 13th.

Baron Hatsell. What March was it?

Mr. Marshall. I kept no account of the time, but I am very positive, by the contents, that Mr. Cowper shewed me this letter, and I read it, but by my now remembrance, it should be longer since than March last.

Mr. Cowper. It was March last. That which will set Mr. Marshall's memory to rights is this other letter, which I received at the Rainbow, when he was by, and he read it; and it importuning me to a matter of this kind, I did produce it to my brother and him; they both knew of it, and both read it, and that will refresh his memory concerning the date of the other.

Mr. Marshall. My lord, I was in the coffee-house with Mr. Cowper when he received this letter; and he afterwards shewed it to Mr. William Cowper, at the Covent-garden tavern, when I was by.

Cl. of Arr. This is dated the 9th of March, and directed to Mrs. Jane Ellen, at Mr. Hargrave's.

"Sir;

March 9.

"I writ to you by Sunday's post, which I hope you have received; however, as a confirmation, I will assure you I know of no inconvenience that can attend your cohabiting with me, unless the grand jury should thereupon find a bill against us; but I won't fly for it, for come life, come death, I am resolved never to desert you; therefore according to your appointment I will expect you, and till then I shall only tell you, that I am

Yours, &c."

"For Mrs. Jane Ellen at Mr. Hargrave's,
near Temple-bar, London."

Mr. Cowper. If your lordship please, I will further prove this letter by my brother.

Mr. W. Cowper. I can bear my brother witness, that when he has been advised to make these letters part of his defence he hath expressed great unwillingness, and has said, nothing but the life of these gentlemen could incline him to it.

My lord, all I can say to this matter is this: I do remember, that when she was one time in London, I think it was about a year and a half since, I am not positive as to the time, but when she was in London, my brother came in the morning to my chamber in the Temple, and after some discourse, he told me he had received a letter from Mrs. Stout that day, wherein he said, she intended him a visit at his chamber that afternoon; he told me at the same time, that his friend Mr. Marshall had some thoughts of her, and therefore for that, as well as other reasons, he would decline receiving the visit intended him; and upon consideration, this was the method agreed upon: at that time I lived with my father in Hatton Garden; and this gentlewoman having writ in the same letter I now speak of, that she designed to dine there, and to come from thence in the afternoon; says my brother, you may casually, as it were, take occasion to say at dinner, that my business obliges me to go to Deptford in the afternoon, as in good earnest it did, as he then told me; and from that she may take a hint of my not being at home, and so save herself the disappointment of coming to my chamber. I told him I would find an opportunity of doing it if I could. At dinner my father happened to ask me, as he often did, when I saw my brother? I took this hint, and said I had seen him at my chamber in the morning, and that he was gone to Deptford that afternoon about some law business. My lord, Mrs. Stout was then at the table. I no sooner said it, but I observed she changed colour presently, and rose with her napkin, and went into the back-yard, and we saw her through a sash-window fall into a woman's fit of swooning; and they gave her the assistance that is usual in such cases.

My lord, the next thing I can speak to is this: The parliament sitting late the Friday before the Monday of the last assizes at Hertford, I came late from dinner, I had dined about seven o'clock, as I remember; and having occasion to speak with my brother, I found him out by enquiry at the Covent-garden-tavern, and there was Mr. Marshall of Lion's-inn with him. I had not drunk above a glass or two of wine, but my brother began with me, and said, I seldom trouble you with affairs of mine, but now I do not know well how to avoid it. I have received an importunate letter, which I will shew you; it came from a lady, whose name I believe you will guess; so he pulled it out of his pocket and read it so often, because of the oddness of the expression, that I can say, I am sure this is the very letter he shewed me at the Covent-garden tavern the Friday before the last assizes; saith he, the occasion of my shewing it, is not to expose a woman's weakness, but I would not willingly lie under too many obli-

gations, nor engage too far ; nor on the other hand, would I be at an unnecessary expence for a lodging. Upon this subject there was some discourse, I think, foreign to this purpose, and therefore I would not trouble your lordship with a repetition of it ; that which is material is this ; I did undertake to write to Mr. Barefoot's to dispose of his lodgings, where I used to be at the time of the assizes, and my brother with me. I said I would write the next day, being Saturday ; but when I should have writ, it was very late, and I was weary, being then tied down to the business of parliament ; and partly for that reason, and partly in point of discretion, which I had upon my second thoughts, that it would be better for my brother's business to be at Mr. Barefoot's, which is near the court, and in the market-place, I did neglect writing ; and though I thought of it about eleven o'clock, yet, as I said, partly for one reason, and partly for the other, I did not write that time. My lord, my brother could know nothing of this matter ; for I did not see him from the Friday he shewed me the letter, till he went to the assizes ; so that he could not know before he was at Hertford, that I had not writ. My lord, I say, as to this letter, I am sure he shewed me the Friday next before the last assizes.

Baron Hatsell. Let me see that letter. (Which was shewn his lordship.)

Mr. Cowper. My lord, one or two of the jury seem to question whether the letters are sufficiently proved ; for their satisfaction, I will further prove them. Call Mr. John Beale, William Oaker, and Mrs. Low. My lord, Mr. Beale is one of their own sect.

[The Witnesses proved her hand.]

Jury. My lord, we are satisfied.

Baron Hatsell. I believe you may ask her mother, she will tell you whether it be her daughter's hand.

Mrs. Stout. How should I know ! I know she was no such person, her hand may be counterfeited.

Baron Hatsell. But if it were written in a more sober stile, what would you say then ?

Mrs. Stout. I shan't say it to be her hand, unless I saw her write it.

[Then the Letter was shewn to Mr. Stout.]

Mr. Stout. It is like my sister's hand.

Baron Hatsell. Do you believe it to be her hand ?

Mr. Stout. No, I don't believe it ; because it don't suit her character.

Baron Hatsell. But do you think she might not conceal from you what were her inward thoughts ?

Mr. Stout. Not in such a degree as this.

Mr. Cowper. Call Mrs. Barefoot and her maid. I desire they may be asked what they know about my taking of lodgings at their house.

Baron Hatsell. This is taken for granted.

Mrs. Barefoot. When you came to my house,

you asked me, if I had received a letter from your brother ? And I told you, no.

Mr. Cowper. What did I say to that ?

Mrs. Barefoot. Then you asked me, if I expected you ? And I told you, yes, by reason I had heard nothing from you.

Mr. Cowper. Where did I lodge that night ?

Mrs. Barefoot. I had prepared the lodging before you came, expecting you or Mr. Cowper your brother.

Mr. Cowper. And I did come ?

Mrs. Barefoot. Yes, as you used to do.

Mr. Cowper. Did I send for my things from the coffee-house ?

Mrs. Barefoot. Yes, you did ; and I carried them up in your chamber as I used to do.

Baron Hatsell. Where did Mr. Cowper dine that day ?

Mrs. Barefoot. Mrs. Stout sent her maid to desire him to come to dinner at their house ; whether he went thither or no, I cannot say, but he went out.

Mr. Cowper. What time did I come into my lodging that night ?

Mrs. Barefoot. It was a little after eleven.

Mr. Cowper. You are sure I came in a little after eleven ?—Mrs. Baref. Yes.

Mr. Jones. By what clock ? By the town clock ?—Mrs. Baref. Yes.

Mr. Cowper. Did I go out any more that night ?—Mrs. Baref. No.

Mr. Cowper. Is your maid there ?

Mrs. Barefoot. Yes.

Baron Hatsell. What is your uame ?

Mrs. Hanwell. Mary Hanwell.

Mr. Cowper. Pray, what time was it I came to my lodging ?

Mrs. Hanwell. You came in a little after eleven o'clock.

Mr. Cowper. Are you very positive in that ?

Mrs. Hanwell. Yes, I am very positive.

Mr. Cowper. What was done before I went to bed ?

Mrs. Hanwell. My lord, I went up, and made a fire, and then I came down again, and then I went up and warmed Mr. Cowper's bed, and then he desired another blanket, and I came down for it ; and all this took up a considerable time : and Mr. Cowper was in bed before twelve o'clock.

Mr. Cowper. Did I go out again that night ?

Mrs. Hanwell. No, you went out no more.

Mr. Cowper. Now, if your lordship pleases, I would explain that part of Sarah Walker the maid's evidence, where she says her mistress ordered her to warm the bed, and I never contradicted it. Your lordship observes the words in the last of the two letters, ' No inconvenience can attend your cohabiting with me ;' and afterwards, ' I won't fly for it : For come life, come death, I am resolved,' and so on.—I had rather leave it to be observed, than make the observation myself, what might be the dispute between us at the time the maid speaks of. I think it was not necessary she should be present at the debate ; and therefore I might not interrupt her mistress in the orders she

gave: but as soon as the maid was gone, I made use of these objections; and I told Mrs. Stout, by what accident I was obliged to take up my lodging at Mr. Barefoot's, and that the family was sitting up for me: that my staying at her house under these circumstances, would in probability provoke the censure of the town and country; and that therefore I could not stay, whatever my inclination otherwise might be; but, my lord, my reasons not prevailing, I was forced to decide the controversy by going to my lodging; so that the maid may swear true, when she says I did not contradict her orders.

Baron *Hatsell*. I believe you have done now, Mr. Cowper?

Mr. *Cowper*. No, my lord, I have more evidence to give. Call Elizabeth Spurr. If your lordship pleases to observe, I have already proved by two witnesses, that I was actually at Mr. Barefoot's a little after eleven; so that if I was to rest upon this proof, here is not the least article of time, in which it can be supposed I was employed in this matter: but, says Sarah Walker, the maid, to obviate (I presume) this evidence of mine, our house-clock went faster than the town-clock. Now, to answer this too, I shall further prove to your lordship, that before I came to my lodging, I was at the Glove and Dolphin inn, where I had a little account of about six or seven shillings, as I remember, for horse-keeping, and which I then paid.

Mr. *Cowper*. Do you remember my coming to your house, and at what time?

E. *Spurr*. The clock struck eleven, just as you came into the door.

Mr. *Cowper*. How long did I stay at the Glove?

E. *Spurr*. About a quarter of an hour.

Mr. *Cowper*. How far is it from the Glove and Dolphin to Mrs. Stout's house?

E. *Spurr*. About a quarter of a mile, or not quite so far.

Mr. *Cowper*. Call Mary Kingitt, and George Man, (who not then appearing) in the mean time, I would observe to your lordship, that to go from Mrs. Stout's house to the place where she was drowned, and to return from thence to the Glove and Dolphin, will take up at least half an hour, as I shall prove, and then the matter will stand thus? Says Sarah Walker, you went about a quarter after eleven; but our clock went half an hour too fast: then according to her account, I went three quarters after ten by the town-clock; and if it requires (as I say, I shall prove it does) half an hour to go to the place where she was drowned, and to return from thence to the Glove inn, that would make it a quarter past eleven when I came to the inn by the town clock, which it was not; and if I staid there a quarter of an hour (which is proved I did not), it must be half an hour after eleven when I came to my lodging by the same clock, which it was not; so that I think this matter as to the time is very clear. My lord, to prove the time it requires to go

from Mrs. Stout's to the place where she drowned herself, and to return to the Glove, I desire sir William Ashurst may be called.

Sir *W. Ashurst*. My lord, I cannot say I walked as fast as I could, but I went with a gentleman I see here to satisfy myself about the probability of this matter; I walked as people usually do, and I found it took up half an hour and a minute, when I walked with that gentleman.

Baron *Hatsell*. Who was with you, Sir?

Sir *W. Ashurst*. Mr. Thompson was with me the time I mention. I walked it before with sir Thomas Lane.

Mr. *Thompson*. My lord, indeed it will take a complete half hour.

Mr. *Cowper*. I desire sir Thomas Lane may give you an account of the distance between one place and the other.

Sir *T. Lane*. Sir William Ashurst and I did walk to the place mentioned, and we were careful to take notice of the time, and it took up about three quarters of an hour, according to my observation; and we did not stay at all by the way, except just to look upon the hospital.

Mr. *Cowper*. Now, my lord, Mary Kingitt and George Man, the servants at the Glove, are come: pray, Mrs. Kingitt, do you remember my coming into the Glove and Dolphin?—*M. Kingitt*. Yes.

Mr. *Cowper*. How long did I stay there?

M. Kingitt. About a quarter of an hour.

Mr. *Cowper*. What was my business there?

M. Kingitt. You came and enquired what you owed.

Baron *Hatsell*. What o'clock was it then?

M. Kingitt. I thought it was about eleven; our other maid told it eleven.

Mr. *Jones*. How came you to take notice of the time?

M. Kingitt. She heard the clock go eleven, but I did not.

Mr. *Cowper*. Was there any dispute about the account?

M. Kingitt. You asked the hostler how that came to stand in the book concerning the horse; for you told him, you thought you had paid some part of it; and he told you, you had not.

Mr. *Cowper*. My lord, with your lordship's favour, I would ask George Man a question to the same point. Do you remember my coming into the Glove and Dolphin?

G. *Man*. Yes.

Mr. *Cowper*. How long did I stay there?

G. *Man*. You staid but a quarter of an hour, as near as I can guess.

Mr. *Cowper*. I will now call a witness to prove that this maid, Sarah Walker, is not so cautious and careful how she swears, as I think she ought to be.

[Call Mrs. *Mince*.]

Baron *Hatsell*. Pray, wherein hath Sarah Walker said any thing that is false?

Mr. *Cowper*. In this; I asked her when she gave evidence, whether she went out to see

for her mistress all that night, and whether her mistress did not use to stay out a-nights, and whether she herself had not used to say so? If your lordship pleases to remember, she said no. Pray, Mrs. Mince, what have you heard Mrs. Stout's maid say concerning her mistress, particularly as to her staying out all night?

Mrs. Mince. She hath said, that her mistress did not love to keep company with Quakers; and that she paid for her own board and her maid's; and that, when she entertained any body, it was at her own charge. And she hath said, that Mrs. Stout used to ask, who is with you, child? and she would not tell her; and that she did entertain her friends in the summer-house now and then with a bottle of wine; and when her mother asked who was there? her mistress would say, bring it in here, I suppose there is none but friends: and after the company was gone, she used to make her mother believe that she went to bed; but she used to go out and take the key with her, and sometimes she would go out at the window; and she said particularly, one time she went out at the garden window, when the garden door was locked, and that she bid her not sit up for her, for she would not come in at any time.

Baron Hatsell. Did ever Sarah Walker tell you that Mrs. Stout staid out all night?

Mrs. Mince. She hath said, she could not tell what time she came in, for she went to bed.

Mr. Cowper. Now, if your lordship please, I will prove to you, if it may be thought material, that Gurrey, at whose house these gentlemen lodged, should say, that if I had visited Mrs. Stout, none of all this had been (upon so little an omission it seems did this prosecution depend). To which I give this answer, my lord; I never did once go to visit her in my life, she knows it. Now, for a man officiously to make a new visit in the time of the assizes, one engaged in business as I was, and especially upon so melancholy an occasion; I say, for me to go officiously to see a woman I never had the least knowledge of, would have been thought more strange (and justly might have been so) than the omission of that ceremony. For my part, I cannot conceive what Mr. Gurrey could mean, this being the case, by saying, that if I had visited Mrs. Stout, nothing of this had happened.

Baron Hatsell. Mr. Cowper, he is not the prosecutor, I think it is no matter what he said.

Mr. Cowper. I take it, my lord, with humble submission, it is material, as he is a principal witness against these gentlemen; and the rather, for that he now pretends, that what he did was out of conscience. My lord, I have only one thing more to say, I know not whether it will be requisite for me, or no, to give some account of myself. Sir William Ashurst, if you please.

Sir W. Ashurst. My lord, if I had not had a good opinion of this gentleman, I had not come

on purpose to hear this cause, which has made so great a noise all England over.

Baron Hatsell. But what do you say as to Mr. Cowper's reputation, for which you are called?

Sir W. Ashurst. I always thought Mr. Cowper to be a gentleman of singular humanity and integrity; he is an officer in London, and as to his management of his office, I think no man ever performed it better, or has a better reputation in the place where he lives.

Sir T. Lane. My lord, I came hither on purpose to own this gentleman, and indeed he deserves to be owned by his friends, and those that know him; his character is altogether untainted with us, he has gained a good reputation in the business wherein he is concerned, he has behaved himself in his office which he holds of the city of London very honestly and well; I never knew him discover any ill nature in his temper; I think he cannot be suspected of this or any other act of barbarity.

Mr. Cowper. My lord, in the next place I would call Mr. Cox, who has the honour to serve in parliament for the borough of Southwark, and has been my near neighbour these eight or nine years. If you please, Mr. Cox, give an account what reputation and character I have in that place.

Mr. Cox. My lord, I live in Southwark, where Mr. Cowper lives: I have lived by him eight or nine years; I know him to be a person of integrity and worth, all the neighbours court his company. I take him to have as much honour and honesty as any gentleman whatsoever; and, of all men that I know, he would be the last man that I should suspect of such a fact as this is: I believe nothing in the world could move him to entertain the least thought of so foul an act.

Mr. Cowper. Mr. Thompson, I desire you would be pleased to give an account of what you know of me?

Mr. Thompson. If you please, my lord, the first acquaintance I had with Mr. Cowper was in our childhood, I had the honour to go to Westminster school with him; I did not renew my acquaintance with him till about five years ago; since that time I have been often with him, and have several times had occasion to ask his advice in matters relating to his profession; and I think no man more faithful in the service of his client than he is, and I am sure he is very deserving of the esteem of any man, and I believe he never entertained a thought of so foul and barbarous a fact as this, of which he is accused.

Baron Hatsell. Mr. Marson, you have heard the evidence, what do you say to it?

Mr. Marson. My lord, our business at Hertford was this: Mr. Ellis Stephens and I went down, he is clerk of the papers of the King's-bench, and Mr. Rogers is steward of the King's-bench, and it was their duty to wait upon my lord chief justice, with the marshal of the King's-bench, out of town; and on Monday morning we went to my lord chief justice's

house in Lincoln's-Inn-fields, as we used to do, and there set out; but I, being an attorney of the borough court, could not with any convenience go farther with them than to a place which I think is called Kingsland, and therefore I returned to my business in Southwark, where I attended the court, as was customary and necessary for me to do, and set forth from thence at past four in the afternoon: by the way, as I remember, about Waltham-Cross, I met one Mr. Hanks, a clergyman of my acquaintance, who had been likewise to attend my lord chief justice to Hertford, and was returning from thence; with some persuasion I prevailed with him to go back again with me to Hertford, telling him, I did not know the way; and we galloped every step of it, because night was coming on; it was about eight o'clock when we came in. Mr. Hanks and I found the marshal, Mr. Stephens, Mr. Rogers, Mr. Rutkin, and others of the marshal's acquaintance, at the coffee-house; and truly when I came in, I might, for aught I know, be in a sweat with riding so hard as we did, but even then I was not in such a sweat as the witness would have it. My lord, we went from thence to the Glove and Dolphin, and stayed there till about eleven o'clock. Mr. Rogers and I had a dispute who should lie with Mr. Stephens at the now witness Mr. Gurrey's; at last it was agreed between us to go to Gurrey's to see what convenience he could make for us, and to drink a glass of wine at our lodging; but afterwards it came in Mr. Rutkin's head that he was to lie with the marshal, and for that reason, he said, he would go back again; and accordingly he went, and Mr. Hanks with him, after they had seen us into our lodgings, and Mr. Stephens, Mr. Rogers and I drank three bottles of wine together, Mr. Gurrey, our landlord, was sent to fetch it; and afterwards in jocular conversation, I believe Mr. Stephens might ask Mr. Gurrey if he knew one Mrs. Sarah Stout? And the reason why he asked that question our witness will explain. I believe he might likewise ask, what sort of woman she was? and possibly I might say the words, My friend may be in with her, though I remember not I did say any thing like it; but I say there is a possibility I might, because I had heard she had denied Mr. Marshall's suit, and that might induce me to say, My friend may be in with her, for all that I remember. I confess Mr. Rogers asked me what money I had got that day, meaning at the borough court? I answered, fifty shillings; saith he, we have been here a spending our money, I think you ought to treat us, or to that purpose. As to the bundle mentioned, I had no such, except a pair of sleeves and a neckcloth. As to the evidence which goes to words spoken, the witnesses have fruitful inventions; and as they have wrested and improved the instances I have been particular in, so have they the rest, or otherwise forged them out of their own heads.

Baron Hatsell. Mr. Rogers, what do you say to it?

Mr. Rogers. We came down with the marshal of the King's-bench, it rained every step of the way, so that my spatterdashes and shoes were fain to be dried; and it raining so hard, we did not think Mr. Marson would have come that day, and therefore we provided but one bed, though otherwise we should have provided two, and were to give a crown for our night's lodging. We went from the coffee-house to the tavern, as Mr. Marson has said, and from the tavern the next way to our lodging, where there was some merry and open discourse of this gentlewoman; but I never saw her in my life, nor heard of her name before she was mentioned there.

Mr. Stephens. We never stirred from one another, but went along with the marshal of the King's-bench, to accompany my lord chief justice out of town, as is usual.

Baron Hatsell. I thought it had been as usual for him to go but half the way with my lord chief justice.

Mr. Rogers. They generally return back after they have gone half the way, but some of the head officers go throughout.

Mr. Stephens. It was the first circuit after the marshal came into his office, and that is the reason the marshal went the whole way.

Baron Hatsell. Did not you talk of her courting days being over?

Prisoners. Not one word of it; we absolutely deny it.

Mr. Stephens. I never saw her.

Mr. Jones. Mr. Marson, did you ride in boots?

Mr. Marson. Yes.

Mr. Jones. How came your shoes to be wet?

Mr. Marson. I had none.

Call Mr. Heath, Mr. Hunt, and Mr. Foster.

Mr. Marson. Mr. Hunt, will you please to acquaint my lord and the jury with what discourse we had on Sunday night before the assizes, at the Old Devil tavern at Temple-bar?

Hunt. On Sunday night I happened to be in company with Mr. Marson, and three or four more of Clifford's-inn, and there was a discourse of the marshal's attending my lord chief justice out of town to Hertford, and Mr. Marson said, 'It may be the marshal may require my waiting upon him too;' and the whole company being known to Mr. Marshall, and there being a discourse of Mr. Marshall's courting of Mrs. Stout, saith one of the company, 'If you do go to Hertford, pray enquire after Mr. Marshall's mistress, and bring us an account of her.'

Mr. Jones. Who was in company?

Hunt. There was Mr. Heath, Mr. Foster, Mr. Marson, Mr. Stephens, Mr. Bever, and Mr. Marshall.

Mr. Marson. Now it was this discourse that gave us an occasion to talk of this woman at Gurrey's house, which we did openly and harmlessly. Mr. Foster, do you remember any thing of our talking of this gentlewoman on Sunday night?

Foster. Yes; I and they were talking, that they should go to Hertford the next day, to

wait on the marshal, in compliment to my lord chief justice, and go as far as Hertford; and there being a report, that Mr. Marshall courted this woman, we put it in a jesting way, 'Pray, enquire after Mr. Marshall's mistress, how the match goes on; for there was some wagers between him and the company, who should be married first?' And so, in a jocular way it went about, and Mr. Marson or Mr. Stephens said, 'They would do their endeavour, and they would enquire after the lady, and give as good an account of her as they could.'

Mr. Stephens. If you please, my lord, we will call another to this purpose.

Baron Hatsell. No, I think you need not, for it seems not material.

(Then Mr. Hanks was called.)

Hanks. I came as far as Waltham's-cross to wait upon my lord chief justice; I stayed there till about four or five o'clock, and then set out for London; and I met with Mr. Marson, who importuned me to go back with him to Hertford; and accordingly I did so, and we came in about seven or eight at night, and we enquired after the marshal of the King's-bench, and where he had set up his horses, and we found him in the coffee-house just by the court, and we went and set up our horses, and came again to him; from thence we went to the Glove and Dolphin tavern; these three gentlemen and the marshal, and one Mr. Rutkin came afterwards to us, and we staid till about eleven at the Glove and Dolphin.

Mr. Marson. Do you remember how we rid?

Hanks. Yes, very hard.

Baron Hatsell. What time did you come into the tavern?

Hanks. Between seven and eight, as I remember.

Baron Hatsell. And did you stay there till past eleven?

Hanks. Till about eleven, little more or less; we went away together in order to drink a glass of wine with them at their lodging; but Mr. Rutkin considering that he was to drink a glass of wine, and lie with the marshal, thought it would disturb the marshal; 'So,' saith he, 'I will not go in;' but we saw them go into their lodgings, and returned to the Bull, where we eat part of a fowl, and I was never out of Mr. Marson's company all that time.

Mr. Marson. When you took your leave of me, do not you remember that the door was clapped to?—Hanks. I cannot remember that.

Mr. Marson. Mr. Gurrey saith, I never went out after I came home. Mr. Rutkin, pray, give an account to my lord, and the gentlemen of the jury, of what you know of my coming to Hertford?

Rutkin. My lord, I came to wait on the marshal of the King's-bench to Hertford, and when we were come to Hertford we put up our horses at the Bull, and made ourselves a little clean; we went to church, and dined at the Bull, and then we walked in and about the

court, and diverted ourselves till about seven o'clock; and between seven and eight o'clock came Mr. Marson and Dr. Hanks to town, and then we agreed to go to the Dolphin and Glove to drink a glass of wine: the marshal went to see an ancient gentleman, and we went to the Dolphin and Glove, and staid there till past ten o'clock, and after the reckoning was paid we went with them to their lodging, with a design to take a glass of wine; but then I considered I was to lie with the marshal, and for that reason I resolved not to go in, but came away, and went to the Bull-inn, and drank part of a pint of wine, and afterwards went to the next door to the Bull-inn, where I lay with the marshal.

Mr. Jones. What time did the gentlemen go to their lodging?

Rutkin. I am not positive as to that, but I believe it was about eleven o'clock.

Mr. Marson. If your lordship pleases, now I will call some persons to give an account of me. Mr. Cox.

Cox. I have known Mr. Marson a long time, and had always a good opinion of him; I do not believe 5,000*l.* would tempt him to do such a fact.

Mr. Marson. Captain Wise, I desire you would please to speak what you know of me?

Mr. Cowper. My lord, because these gentlemen are strangers in the country, I think, if in taking an account of any evidence for myself there is any thing occurs to me that they may have a just advantage of, I think I ought not to conceal it, for I am as much concerned to justify their innocence as my own. The principal witness against them is one Gurrey; and I will prove to you, that since he appeared in this court, and gave his evidence, he went out in a triumphant manner, and boasted, that he, by his management, had done more against these gentlemen than all the prosecutor's witnesses could do besides. To add to that, I have another piece of evidence that I have been just acquainted with: my lord, it is the widow Davis, Gurrey's wife's sister, that I would call.

Major Lane. My lord, I have known Mr. Marson ever since he was two years old, and never saw him but a civilized man in my life; he was well bred up among us, and I never saw him given to debauchery in all my life.

Baron Hatsell. Where do you live?

Major Lane. In Southwark, my lord.

Baron Hatsell. Well, what do you say, Mrs. Davis?

Mrs. Davis. I came to the house where these gentlemen lodged; I was in about half an hour, and my sister asked me to air two or three pair of sheets: when I had aired the sheets, she asked me to go up and help to lay them on; and before I had laid them on, these gentlemen came into the room.

Baron Hatsell. What hour?

Mrs. Davis. By the time of my going out again, I believe it might be about ten, or something better, and they drank three quarts of wine, and they had some bread and butter and

cheese carried up, and so they went to bed; and after my brother went to fetch Mr. Gape, that lay at his house, from Hockley's.

Mr. Cowper. I only beg leave to observe, that Gurrey denied that he went for him.

Baron Hatsell. Ay; but this signifies very little, whether it be true or false.

Mrs. Davis. The next day after, these gentlemen were about the town; and she said, she did believe they were come to clear a young man (a minister's son) that was tried at the bar for robbing the mail: I asked why she thought so? She said, she was sure of it: and I asked her, How she could be sure of it, when she was never told so? Why, said I, do they accuse these gentlemen? They ought rather to take up the gentleman that was with Mrs. Stout's maid; and she said, If they took up Mrs. Stout's maid, they should have never a witness.

Baron Hatsell. Who was that that was talking with Mrs. Stout's maid?

Mrs. Davis. I do not know, but she said she did not like their actions; and therefore she ought to have been examined who she was with.

Capt. Wise. I have known Mr. Marson several years, and he is a person of as fair reputation as any in the Borough.

Reading. I have been acquainted with Mr. Marson 20 years, he lives near the house where I now do: he has a general good character among his neighbours, for a fair man in his practice, an honest man, and a man of good conversation.

Baron Hatsell. Well, Mr. Stephens, what do you say?

Stephens. I desire sir Robert Austin to give an account of me.

Sir R. Austin. I have known Mr. Stephens many years; his brother is captain in a neighbouring country; he is reckoned not only an honest man in his practice, but has the general character of a good-natured man; and he is so far from being a person likely to do such an action, that, for a younger brother, he was very well provided for; his father left him 1,000*l.* and he is clerk of the papers, which is reputed worth 100*l.* a year, and is in good practice besides.

Juryman. I have known him several years, and he has the same reputation sir Robert has given him.

Sir J. Shaw. I know Mr. Stephens, and his brother captain Stephens: as to this gentleman, he hath always behaved himself well in our country, and hath the character of an honest gentleman.

Evans. I have known him for these eight years, and to be a very civil person, and well educated, and never heard but a good character of him: I have also known Mr. Marson these ten years, and never saw any ill by him, and do believe, that he or the other would not have done such an ill thing to have gained this country.

Menlove. My lord, Mr. Stephens was my

clerk, and he behaved himself very honestly with me. And since that, I have kept a correspondence with him, and I believe he would not do such a thing for all the world.

Baron Hatsell. Call somebody to speak for Mr. Rogers, if there be any.

Evans. My lord, Mr. Rogers hath a general character in Southwark, for a very honest man.

Mr. Rogers. Pray call Mr. Lygoe. Sir, please to give my lord and the court an account what you know of me.

Lygoe. My lord, I have known all the three gentlemen at the bar, but particularly Mr. Rogers and Mr. Stephens, from their infancy. I have employed them both in business several times, and always found them fair practisers; and believe neither of them would be guilty of doing an ill act.

Mr. Rogers. Call Mr. Thurlby. Sir, pray give the court an account how I behaved myself in your service.

Baron Hatsell. Come, Mr. Thurlby, what do you say of Mr. Rogers?

Thurlby. My lord, Mr. Rogers lived with me about eight years, in which time I frequently trusted him with very great sums of money; I ever found him just and faithful, and cannot believe, that any money could tempt him to do an act of this kind.

Mr. Jones. My lord, we insist upon it, that Mr. Cowper hath given a different evidence now from what he did before the coroner; for there he said he never knew any distraction, or love-fit, or other occasion she had to put her upon this extravagant action. Now, here he comes, and would have the whole scheme turned upon a love-fit. Call John Mason. (Who was sworn.)

Baron Hatsell. What do you say, Sir, to this matter?

Mr. Stout. When Mr. Cowper was examined before the coroner, he was asked, If he knew any reason why she should do such a thing? and he said, she was a very modest woman, and he knew no cause why she should do such a thing as this. John Mason, was you by when Mr. Cowper gave evidence before the coroner?—Mason. Yes.

Mr. Jones. What did he say?

Mason. He said he did not know any thing was the cause of it, but she was a very modest person.

Mr. Jones. Was he upon his oath?

Mason. Yes, he was.

Baron Hatsell. When did he say this?

Mason. It was the same day she was found.

Mr. Jones. Did they ask him any question, if he knew any person that she was in love with?

Mason. He said he knew but of one, and his name was Marshall, and Mr. Marshall told him, That he was always repulsed by her.

Mr. Stout. I desire John Archer, may be asked the same question. (Who was sworn.)

Mr. Jones. Was you present with the coroner's inquest?

J. Archer. Yes.

Mr. Jones. Was Mr. Cowper examined by them?—J. Archer. Yes, he was.

Mr. Jones. What did he say concerning Mrs. Stout then?

J. Archer. They asked him, If he knew any occasion for Mrs. Stout's death? And he said, he knew nothing of it, or of any letters.

Mr. Cowper. Then I must call over the whole coroner's inquest to prove the contrary.

Baron Hatsell. Did they ask him concerning any letters?

J. Archer. They asked him, If he knew of any thing that might be the occasion of her death?

Baron Hatsell. I ask you again, if they asked him if he knew of any letters?

J. Archer. My lord, I do not remember that.

Mr. Stout. I would have called some of the coroner's inquest, but I was stopped in it.

Juryman. We have taken minutes of what has passed: If your lordship please we will withdraw.

Baron Hatsell. They must make an end first.

Mr. Jones. If your lordship please, we will call one witness to falsify one piece of their evidence, and that is one widow Larkin. (Who was sworn.)

Mr. Jones. Do you remember one Mr. Rutkin being at your house?—Larkin. Yes.

Mr. Jones. At what time did he come in?

Larkin. Between nine and ten of the clock.

Mr. Jones. Was the marshal then in the house?

Larkin. No; the marshal did not come till near an hour after.

Mr. Jones. Did not he go out afterwards?

Larkin. Not that I know of.

Mr. Rutkins. I am satisfied it was past eleven when I came in.

Baron Hatsell. It is likely it may be true; for I believe they did not keep very good hours at that time.

Mr. Stout. I desire to call some witnesses to my sister's reputation.

Mr. Jones. My lord, they would call witnesses to this gentlewoman's reputation; I believe the whole town would attest for that, that she was a woman of a good reputation. Indeed they have produced some letters without a name, but if they insist upon any thing against her reputation, we must call our witnesses.

Baron Hatsell. I believe nobody disputes that; she might be a virtuous woman, and her brains might be turned by her passion, or some distemper.

Gentlemen of the jury, you have heard a very long evidence. I am sure that you cannot expect that I should sum it up fully; but I will take notice of some things to you that I think are most material; and if I omit any thing that is material, I would desire Mr. Jones (that is counsel for the king) and Mr. Cowper to put me in mind of it.

The indictment against the prisoners at the bar is for a very great crime, it is for murder,

which is one of the most horrid of all crimes: You are to consider first what evidence you have heard to prove it; and though there be no direct proof, you are to consider what is circumstantial.

They do begin with Sarah Walker, who was Mrs. Sarah Stout's maid; and she tells you, that Mr. Cowper, when he came to this town on Monday the 13th of March last, came to Mrs. Stout's house and dined there, and went away about four o'clock in the afternoon; but she tells you, that the Friday before, there came a letter from Mr. Cowper's wife to Mrs. Stout, to let her know that Mr. Cowper would come and lodge at their house at Hertford at the assizes; so that when he came, she thought that he had intended to have done according to that letter. She saith, that after dinner Mr. Cowper went away, and came again at nine at night, and there he supped; he was desired so to do, (and indeed had been invited to dinner also that day) and she doth say that after supper there was a fire made in his chamber (for this young gentlewoman, Mrs. Stout, pressed him to lie at their house), and she ordered the maid to warm his bed; and I believe, says she, Mr. Cowper heard her say so, for he was nearer to her than I, at that time, and he doth not deny but that he heard it. She says, that accordingly she went up to warm the bed; and having stayed there a while, she heard the door clap; and when she came down into the parlour, where she had left them, they were both gone, and that she could not tell what the meaning of it was; and they waited for her all night, old Mrs. Stout and this maid, and she did not come in all night, nor was afterwards seen alive; but Mr. Cowper was the last person seen in her company.

The other witnesses that came afterwards, speak concerning the finding of the body in the river, and tell you in what posture it was. I shall not undertake to give you the particulars of their evidence; but they tell you she lay on her right side, the one arm up even with the surface of the water, and her body under the water; but some of her cloaths were above the water; particularly one says, the ruffles of her left arm were above the water. You have heard also what the doctors and surgeons said on the one side and the other, concerning the swimming and sinking of dead bodies in the water; but I can find no certainty in it; and I leave it to your consideration.

Another circumstance they build on, and which seems to be material, is, of her belly being lank, and that there was no swelling; whereas, say they, when a person is drowned, there is a great deal of water goes in, and makes the belly to swell; but here was no swelling that morning she was taken out, and no water came out of her mouth and nostrils, only a little froth there was, and her belly was lank. But, say they, on the other side, that may very well be; for, perhaps she might be choaked immediately, as soon as she was in the water; and, say they, you may not wonder at that; for if she went

to drown herself, she would endeavour to be choaked as soon as she could; for those persons that are drowned against their own consent do swallow a great deal of water, but those that drown themselves do not swallow much water, for they are choaked immediately by the water going into the windpipe; that we commonly call going the wrong way. The doctors and surgeons have talked a great deal to this purpose, and of the water's going into the lungs or the thorax; but unless you have more skill in anatomy than I, you would not be much edified by it. I acknowledge I never studied anatomy; but I perceive that the doctors do differ in their notions about these things. But, as to matter of fact, it is agreed to by all the witnesses for the king, that her body was lank, her belly was thin, and there was no sign of any water to be in it: they on the other side tell you, that her stays was on, and she was strait-laced, and that might occasion her belly's being so small, and hinder the water from going in.

Gentlemen, I was very much puzzled in my thoughts, and was at a loss to find out what inducement there could be to draw in Mr. Cowper, or these three other gentlemen, to commit such a horrid, barbarous murder. And on the other hand, I could not imagine what there should be to induce this gentlewoman, a person of a plentiful fortune, and a very sober good reputation, to destroy herself.

Now, gentlemen, I must confess, the evidence that the defendants have given by these letters, if you believe them to be this gentlewoman's hand-writing, do seem to fortify all that Mr. Cowper's witnesses have said, concerning her being melancholy: It might be a love distraction, and she might have been a virtuous woman for all that; for it might be a distemper which came upon her, and turned her brains, and discomposed her mind; and then no wonder at her writing thus, in a manner different from the rest of the actions of her life. Gentlemen, you are to consider and weigh the evidence, and I will not trouble you any more about that matter.

As to these three other gentlemen that came to this town at the time of the last assizes, what there is against them you have heard: they talked at their lodging at a strange rate, concerning this Mrs. Sarah Stout, saying, her business is done, and that there was an end of her court-ing-days, and that a friend of theirs was even with her by this time. What you can make of it, that I must leave to you; but they were very strange expressions; and you are to judge whether they were spoken in jest, as they pretend, or in earnest. There was a cord found in the room, and a bundle seen there, but I know not what to make of it. As to Mrs. Stout, there was no sign of any circle about her neck, which, as they say, must have been, if she had been strangled: some spots there were; but it is said, possibly those might be occasioned by rubbing against some piles or stakes in the river. Truly, gentlemen, these three men, by their talking, have given great cause of suspicion; but whether they, or Mr. Cowper, are guilty or no, that you are to determine. I am sensible I have omitted many things; but I am a little faint, and cannot repeat any more of the evidence.

Jury. We have taken minutes, my lord.

Baron *Hatsell.* Well then, gentlemen, go together, and consider your evidence; and I pray God direct you in giving your verdict.

[Then one was sworn to keep the jury, and in about half an hour the jury returned.]

Cl. of Arr. Gentlemen, are you all agreed in your verdict?—*Omnes.* Yes.

Cl. of Arr. Who shall say for you?

Omnes. Foreman.

Cl. of Arr. Spencer Cowper, hold up thy hand. (Which he did.) Look upon the prisoner. How say you? Is he guilty of the felony and murder whereof he stands indicted, or not guilty?—*Foreman.* Not guilty.

In like manner the jury did give their verdict, that John Marson, Ellis Stephens, and William Rogers were Not guilty.

The CASE of SPENCER COWPER, esq. JOHN MARSON, ELLIS STEPHENS, and WILLIAM ROGERS, gentlemen.* [Published by them in 1699.]

First, in general;

THE said four gentlemen were in very good employments, and easy in their circumstances; Mr. Marson and Mr. Stephens are attorneys at law, in good business, and Mr. Rogers, a scrivener, in Queen-street, London, and of un-

* "As Mr. Cowper's Case made so great a noise, and he made so considerable a figure in life, it is thought proper to insert those curious things that were wrote at that time relating to it." Note to former Edition.

spotted reputations; the last an utter stranger to Mr. Cowper; when at once they were accused of being together, with the basest and most execrable crime that the greatest villain in the world is capable of committing.

Nay, in one respect, they were accused of doing what the most hardened in wickedness never did; that is to say, of having contracted the guilt, and run the imminent hazard of murder, without any temptation or provocation to it, or other cause whatsoever.

For it has pleased the Providence of God to

fence their innocence with such circumstances, that their very enemies and prosecutors (though to make their calumny to gain credit in the world, it was necessary they should assign some cause; and therefore they made it be reported, that it was done for the sake of gain to Mr. Cowper) never once had the impudence at the trial so much as to suggest the same, or any other cause, though often put in mind of it: nor can they yet, with all their malice, invent, much less prove, the least ground or reason that could incite them, or any of them, to the committing a sin so unnatural in itself, and so generally detested and punished, as well in this world as that to come.

And all this without any proof that a murder was committed by any one; it being the verdict of the coroner's inquest, fairly impannelled (on the fresh view of the body, on consulting two surgeons and a midwife, who then had the view likewise, and a full examination, which lasted near six hours), that the deceased drowned herself, being 'non compos mentis:' and it is humbly presumed, that all unprejudiced persons who heard that matter fully canvassed at the trial, on the entire circumstances of the case, were convinced there was no ground to believe the contrary.

So that nothing but the zeal of some Quakers for the reputation of their sect, to clear it from being liable to the same infirmities the rest of the world are, assisted by the heat of faction, which is in most boroughs, could ever have stirred up a prosecution, and have made so much noise in the world, with it, out of such matter.

Next, as to Particulars;

Mr. Cowper, the day on which the deceased's body was found, was examined, among many others, before the coroner's inquest; and which is very remarkable, did then freely give an exact and full account of every the least circumstance of fact that has been at any time since proved, or pretended to be proved against him, throughout the whole prosecution.

When the circuit was ended (for this accident happened while the assizes were holding at Hertford), which unhappily drew these gentlemen to that town, about a month after the sitting of the said coroner's inquest, the said four gentlemen were severally sent for, and readily came to the lord chief justice Holt, and were examined; and what they then informed the chief justice of, on such sudden and several examinations, has not been falsified or contradicted in the least, but on the contrary was constantly adhered to, and at last proved and made good at their trial.

That after their said first examination they were dismissed without bail, and thereby had an opportunity of flying; as undoubtedly they would have done if conscious of any guilt. Then they were sent for a second time and examined, and admitted to bail; and afterwards (the prosecutors having in the mean time collected several informations and certificates, con-

taining observations and opinions of the posture and manner in which the deceased's body was found, and what appeared on view thereof, five weeks after it had been buried by the prosecutors, and used before as they pleased) Mr. Cowper and Mr. Marson were committed, and the other two still continued upon bail.

It is remarkable, that in procuring these informations and certificates, and in the whole conduct of the process (so far as carried on in the country), the prosecutors applied themselves at Hertford to those very persons, and those only, who they knew were professed enemies to Mr. Cowper's relations, upon account of controversies arising at elections, and otherwise.

Mr. Marson, on his Habeas Corpus, was afterwards admitted to bail: but Mr. Cowper appearing in the King's-bench, on the like writ, the court was equally divided as to his being bailed, and consequently he was remanded to prison.

There he lay all Trinity term, 1699, and part of the long vacation, for the space of two months, till the assizes at Hertford drew near; and then, upon enquiring at the crown office, not hearing that any writ was sued out for his removal, in order to his trial at Hertford, he caused a writ to be issued out for that purpose, fearing his enemies designed to keep him in gaol, or at least to continue the slander and prosecution as long as they could: The prosecutors understanding this, sued out the like writ at their instance: and Mr. Cowper was removed on that writ, lest going on his own writ should have shewn too great a confidence in his innocence, which was not to be endured.

These few steps of the proceeding, out of many of the like nature (which are omitted to avoid length) may serve to shew that the prosecution was far from being a faint one, but was industrious and artificial to the last degree, and was (unluckily for the four gentlemen concerned) assisted by a circumstance not material to the justice of their cause, but notoriously true: that an election interest was thought in great measure to depend upon carrying on the accusation: which was the harder upon the four gentlemen, for that none of them were at all concerned in that controversy, and three of them not so much as in a wish one way or other.

Notwithstanding this unhappy juncture, on their trial their innocence was so clear, that they were acquitted, to the satisfaction of all indifferent persons there present.

After the trial, which was at the summer assizes, in the year 1699, their prosecutors, that they might be further vexatious, and keep up the talk against these four gentlemen (though they had nothing to object to the fairness of the trial, nor any defect in their preparations towards it), immediately sought out for an heir male to bring in an appeal, to try them again, and put them to fresh charges, and keep them longer under the suspicion of so

great an infamy on the very same evidence, without any pretence of the least addition to it.

In the same long vacation, 1699, they found out the infant, Henry Stout, (whose name was afterwards made use of for bringing the appeal) and might have sued out the writ of appeal either before the then next Michaelmas term, or in it, in the vacation following, or in Hilary term after; but their end was purely malicious to crush the accused with the calumny; and therefore to keep up the same as long as possible, the writ was not sealed till the very last seal within the year after the deceased drowned herself, and not above three or four days before the end of that year (the time limited by the law for bringing such writ), and then too without the consent, nay without the privity or knowledge either of the plaintiff himself, or of his mother, (his guardian by nurture) without whose approbation the writ, by law, should not have been sued out, nor an infant engaged in such a prosecution for blood, which after a fair acquittal is adjudged innocent.

About a month after the said time limited by law for the bringing the said writ was passed, (after several letters had been sent to the same person, which made no mention of the appeal) a letter was sent either from some of the prosecutors, or by their order, to an aunt of the infant, desiring the child might be sent up to sue an appeal; which the said aunt said she read to the mother, and was the first notice pretended to be given; but the aunt being asked (when this matter was examined before the lord keeper) if she then knew the meaning of the word Appeal? she owned she then did not; and the mother, to whom the letter was read, affirmed before the lord keeper, she did not then know what it meant, it not being explained in the letter; but that she imagined it was some proceeding in order to put her child into possession of the deceased's estate, or some part thereof, which the said Mary Stout (to induce the mother to part with her child, and help the said Mary Stout to prove his pedigree) had before fraudulently caused to be insinuated to her.

And thus the appellant or his mother (who only could legally do it) were so far from having sued out this writ within the year and day, that they never heard of it till a month after, and then only as aforesaid; so that the said writ was unlawfully sued out.

As soon as the mother and the infant (the plaintiff) came to understand what had been doing, and that nothing was done towards letting the child have any part of the estate, but only to prosecute a suit of revenge after an acquittal, against gentlemen of good characters, and where no murder at all had been proved; they declared their utter dislike of the proceeding, and, without so much as treating with any of the said four persons prosecuted, or with any employed by them (purely from an abhorrence of the action, and their resentment of the cheat put upon them, and the advice of their friends, as contrary to good conscience, and their in-

terest, to let Mary Stout the petitioner have the proving the infant's pedigree in an appeal, which was his title to the lands in Mary Stout's possession,) went with an uncle and aunt of the infant, and demanded the writ of the sheriff, tendering him his fee for the return thereof, which he (not then knowing of any guardian assigned) delivered to them; and though it should be admitted, that the sheriff in so doing did not strictly pursue the mandate of the writ, which requires a return at the day in court; yet the same mandate is in most original writs, and notwithstanding the sheriff never scruples to deliver the party his own writ, with the return. And in this case the plaintiff and his mother, and two of his nearest relations, demanding the writ, and the sheriff having no notice of any other guardian, it seems as excusable in the sheriff, as if a plaintiff of full age had come for his own writ: but it is admitted the court of King's-bench was of opinion, that the sheriff in strictness is to return his writ at the day and place mentioned in the return; and for not doing so, the sheriff was fined and paid two hundred marks.

The sheriff, before the said fine, was, by order of the King's-bench, examined very strictly on interrogatories in writing, tending, among other things, to discover how far the appellees were concerned in procuring the writ from the sheriff; to which the sheriff answered on oath fully, in writing, and very truly denied all correspondence with the appellees, or any on their behalf, touching the delivery of the said writ, all reward, or promise, or security; and, in short, that he never knew of the appellants and the other persons coming to him, nor any ways had heard thereof, till he saw them: and then delivered the writ and return to them, as believing it fair and lawful so to do; and for no other reason whatsoever.

Notwithstanding the petitioner preferred her petition to the now lord-keeper (by advice of her counsel) to grant her a new writ of appeal in the same form, as having sufficient authority so to do: and the said infant, the appellant, and his mother, preferred another petition to the said lord-keeper, disowning the former writ, as sued forth without their consent; that they never knowingly approved thereof, and desiring that no new writ might issue in the infant's name: and the lord-keeper, being assisted by the master of the rolls, the late lord chief justice of the Common Pleas, the lord chief baron, and Mr. justice Powell, one of the judges of the Common Pleas, the appellant and his mother appeared, and owned their said petition; and on a full hearing on both the said petitions, and counsel on both sides, the said lord-keeper, master of the rolls, lord chief justice, lord chief baron, and judge Powell, were all of opinion unanimously.

1. That the Chancery had power to relieve in such case, and renew the writ, if it were just so to do.

2. But, that in this case it was not just or reasonable.

The reasons then, and yet, insisted on to maintain the latter of these points, were these :

1. Because the appellant infant, or his mother, guardian by nurture, had no notice that the writ was sued out, till above a month after the year and day past; and consequently the writ was never well sued out: it being in nobody's power, by law, but the appellant's, to sue out such writ; and in case of infancy, as well as in the case of an appellant of full age, the writ is sued out in the person of the appellant, and should be done by the consent of his next friends; and no guardian assigned hath any thing to do therewith till the writ be pending.

2. Because it appeared, that as soon as ever the appellant and his mother knew what was doing, they renounced the said writ, and, to prevent prosecuting the same, went and withdrew it from the sheriff, together with an uncle and aunt of the infant.

3. Because the appellees were none of them in the least privy to this transaction, nor did the petition pretend to prove or alledge they were: But on the contrary, the sheriff, having been examined on the strictest interrogatories that could be framed, had, on his oath, acquitted all the appellees from having the least to do in that matter, but that he did it as conceiving it lawful and usual to deliver the plaintiff in any action his own writ; and not knowing at that time that any guardian was assigned to prosecute the same.

4. It is a maxim in law, that what is done amongst others ought not to hurt a third person; and as the appellees would have been delayed and kept under calumny by this means, without their fault; so no security could be given them that the new writ should be literally the same with the former, as it ought to be; and no writ being now legally to be prosecuted against them, they ought not to be deprived of the benefit and protection of the law, without any act or default in them so much as pretended or assigned by the petition.

5. The infant by law plaintiff in appeal, has, notwithstanding his guardian, such power over the suit, that three cases were cited wherein the infant was by the court permitted to be nonsuited, without and against the consent of the guardian assigned to prosecute the same; and no instance is to be found, wherever an infant was denied so to be nonsuited.

6. If an infant may desist from prosecuting a writ depending, without consent of his guardian assigned, it is much more unreasonable such guardian assigned should force the plaintiff to have or sue out such writ, especially to be restored to it whether he will or no, in an extraordinary manner; which reason is enforced in this their unprecedented applying to the legislative power in this matter.

7. To make good the last reason, a petition was preferred to the lord-keeper by the plaintiff and his mother, against having the writ, and disowning their knowledge of the effect of the former writ; and both, with an uncle and

aunt of the plaintiff, appeared to justify that petition; and the woman avowed, that when she parted with her son, to sue the appeal, she thought that it was in order to obtain the deceased's estate, as the petitioner had fraudulently induced her to believe.

8. The appellant and his mother insisted, that the infant being heir at law to the deceased, and so entitled to her estate unless some way diverted by will or settlement (which the petitioner would never satisfy them in,) and the petitioner, with her son John Stout, being in possession of that estate, they thought it very improper the petitioner should have the proving the plaintiff's pedigree in an appeal, which was his title to an estate the petitioner held from him; for recovery whereof the infant and his mother, as guardian, preferred their bill in Chancery; which suit is still depending.

These Reasons were enforced by several considerations, shewing, that this writ of appeal, of all others, ought not to be favoured:

1. Because sued out clandestinely and fraudulently, as aforesaid, by one who had no power.

2. Because deferred two whole terms after the acquittal on the judgment, and not taken out till the last seal, about four days within the year; which shews they did not design justice, but to spin out a scandal as long as they could, maliciously and vexatiously.

3. An acquittal on indictment, was a bar to an appeal at the common law; and though that bar be taken away, stat. H. 7. (which let in the indictment within the year and day) lest persons should procure themselves to be acquitted on indictments by faint prosecutions; yet, since this prosecution was far from faint, the appellees in this case are within the reason and equity of that plea; and the rather, for that the petitioner, who would prosecute this appeal, was the principal prosecutor of the indictment, and did it with all imaginable industry, assisted by the united interest of the Quakers, and the prejudice of a party in the town of Hertford, disobliged on the score of elections.

4. Appeals have not been favoured since the stat. H. 7, except in cases of conviction, and pardon obtained by surprize, or after some clear or fresh discovery by additional evidence; which neither is, nor can be pretended.

THE CASE OF MRS. MARY STOUT, WIDOW.

In March, 1699, being within the space of a year after the supposed murder of Mrs. Sarah Stout, a writ of appeal was sued out of the high court of Chancery, against Spencer Cowper, esq. John Marson, Ellis Stevens, and William Rogers, gentlemen, in order for the trial of them, at the suit of one Henry Stout, heir at law to the deceased, and the appellant named in the writ of appeal, who at the time of suing out such writ was about the age of ten years.

Mrs. Stout, the mother of the deceased, after such appeal was sued out, caused the same to

be delivered to one Mr. Bostock Toller, the under-sheriff for the county of Hertford, in order for his apprehending of the appellees mentioned in the said writ. And she fearing lest he would be either remiss or unmindful in the due execution thereof, some short time after she sent a neighbour of hers to Mr. Toller, to know what he had done, or would do, with the writ? Whether he had executed the same, or whether he would return the parties were not to be found? Which message was duly carried, with a particular account, that Mrs. Mary Stout, the mother of the deceased, was the person that sent the same. To which Mr. Toller returned this answer, 'Mrs. Stout is a very busy, uneasy woman; but however, when the writ is out, I will make such return thereof as the law directs.'

Mrs. Stout having received such an answer, and expecting to have a return of the writ, according to Mr. Toller's promise, on the 13th of April following, was, in order thereto, and for the further designed prosecution of the matter, duly admitted guardian to the appellant; and as such, on the 15th of the same month of April, being the first day of the then Easter-term, appeared personally in the court of King's-bench, in order to arraign the appellees, in case the under-sheriff should have returned them taken.

Upon such attendance of Mrs. Stout, Mr. Toller was frequently called, pending the whole time the court sate, (the writ being then returnable) to make a return of the writ: but he made default, and instead thereof Mr. Marson, one of the appellees, appeared in court, and prayed either to be arraigned or discharged; though the writ was not then, or ever since, seen or returned in court: so that such Mr. Marson's motion appearing only to be a shew, or bravado, no damage or advantage being to be sustained or gained to him thereby, the same was rejected.

Upon the second day of the same term, the court of King's-bench was moved on the behalf of Mrs. Stout, that a short day might be appointed peremptorily for Mr. Toller to make his return. But then (though Mr. Marson knew of the writ of appeal's coming to Mr. Toller's hand, as appears by his praying an arraignment but the day before) it was suggested in court, that no writ of appeal was ever left with Mr. Toller against the appellees: and upon such suggestion, Mrs. Stout then lost the benefit of her motion, and was forced the next day to get an affidavit of the delivery of the writ, which she accordingly did; and thereupon she moving again for a peremptory return, then the under-sheriff's receipt of the writ of appeal was granted, and thereupon a rule of court obtained to compel him to appear, and make a return of the writ; which rule was served, and thereupon Mr. Toller soon after attended, and by affidavit informed the court, that upon the 16th day of the same month of April (which was a day after the return of the writ, and three days after Mrs. Mary Stout was

admitted guardian to the appellant) he delivered up the writ into the infant's hand.

Upon which account given by Mr. Toller, the court of King's-bench ordered him to be examined upon interrogatories, touching the delivery of the writ; and accordingly Mrs. Stout the guardian prepared the same, but could not without considerable difficulty get him examined (being forced to be at the charge of two or three orders of court, for that purpose, before he came). At last his examination was taken, in and by which he owns the receipt of the writ of appeal; and that he was informed, that Mrs. Mary Stout, the mother of the deceased, prosecuted the said writ; that she sent the same to him; and that the infant, the appellant, was a perfect stranger to him, when he delivered it into his hands: but then, to extenuate the matter on his own behalf, the reasons he alledges in his examination for such his delivery, are, that the appellant came with the mother, uncle, aunt, and one Mr. Woodford, an old acquaintance of his, for the writ; and that Mr. Woodford informed him of the reality of the appellant, and his relations; and delivered him a note under the hand of William Cowper, esq. purporting the same, that the infant was the plaintiff in the appeal; that one of the women was his mother, and that the other man and woman were his uncle and aunt; which, together with the ready answers they gave to such questions as Mr. Toller asked them, induced him to believe them to be the real parties; as in his examination he sets forth.

Mr. Toller says further, That on the 26th of the same month of April he desired the infant, his mother, uncle, and aunt, to deliver him back the writ; but they declared, that the infant with advice had burnt the same.

Mr. Toller in his examination gives this account; That some short time before his receipt of the writ, he received a letter from Mr. Will. Cowper, to know whether any writ of appeal was come to his hands against Mr. Spencer Cowper; to which he answered there was none: that some short time after such writ was come to his hands, he received another letter from Mr. William Cowper, to the same effect as the former; to which Mr. Toller answered there was; and sent him the contents of the said writ: that after such writ came to his hands, Mr. Spencer Cowper sent him a letter, to know whether he had received any writ against him; to which Mr. Toller informed him he had. So that by Mr. Toller's own examination a perfect correspondence is owned; and an intelligence from time to time, and from one party to another, is given.

That upon the last day of the said term, Mr. Toller's examination was reported to the court of King's-bench; who, upon hearing the same, were of opinion, that he was guilty of an high misdemeanour, and was in contempt of that court; and thereupon was committed to the marshal, and fined 200 marks.

That Mrs. Stout having received no satisfaction for the blood of her daughter, by the

under-sheriff's being so fined, did petition the now lord keeper for a new writ; the time being elapsed then for the suing out of another in course: at which time also there was a cross petition preferred in the infant's name, praying, that a new writ of appeal should be sued out in his name. And the subject matter of both petitions being debated before the now lord-keeper, the master of the rolls, the late lord chief justice Treby, the lord chief baron Ward, and Mr. justice Powell; upon such debate it not then appearing, by any positive proof, that the appellees in the writ, nor any of them, were privy to the destruction of the writ; it was therefore thought hardly reasonable that a new writ should be granted; which was a great cause of Mrs. Stout's petition being rejected.*

Now Mrs. Stout's petition was grounded purely upon another bottom, (she not imagining that such an objection would have been started) for she was advised, that if justice had been obstructed, whether it had been by accident or design, in either case a suitable remedy might have been found: as, supposing the writ of appeal had been accidentally burnt when in the sheriff's custody, as it really was when it was out, in respect to have a discovery of truth, the court, which first gave the writ (she was advised by counsel learned in the law) could supply the loss of it.

Had she imagined that all the appellees would have so much as instanced their total

* The Case is reported in lord Raymond and other books. It is observable that great men have entertained different opinions.

In the Report of the Case (*Stout v. Towler*), in 12 Mod. 372, (See, also, lord Raymond's Report of the Case, *Rex v. Towler*), it is said that Treby, Ch. Just. C. B. and others, alleged that an appeal was a revengeful, odious prosecution, and therefore deserved no encouragement.

On which occasion, Holt, chief justice, with great vehemence and zeal, said, that he wondered that any Englishman should brand an appeal with the name of an odious prosecution; that for his part he looked upon it to be a noble prosecution, and a true badge of English liberties. See *per contra* the Case of *Bigby v. Kennedy*, A. D. 1770, reported by Burrow.

Lord Nottingham, in his 'Treatise on the King's Power of granting Pardons in cases of Impeachment,' (see a Note in vol. 7, p. 1524, of this Collection) p. 19, sect. 59, says, 'An appeal of murder, because the king cannot pardon it, is therefore an odious suit in law, and is tied to more strictness and formality than any other suit whatsoever: nor do any of those statutes which were made on purpose to cure defects of form extend to appeals.'

In the Case of *Bigby v. Kennedy*, as reported by Burrow, the proceedings on an appeal of murder are set forth with great particularity. Sir William Blackstone, in his re-

ignorance as to the destruction of the writ, she could have much better prepared herself to have given them an answer; she could have set forth how the infant, his mother, and the appellees' attorney, went in a coach with four horses to the under-sheriff at Hertford, and there took the writ of appeal from him, and from thence brought it to London; she could have informed the court of a more particular intelligence, lately confirmed, concerning the destruction of the writ, by whose order, and at whose chamber the same was burnt: which matters, if yet examined, will sufficiently evince whether the appellees, or some one of them, were privy or not to the destruction of the writ.

There was an objection against Mrs. Stout's petition, that the writ of appeal was never well sued out (the infant, nor his mother, not knowing of the same till afterwards); but to that, besides the proofs Mrs. Stout could have given to the contrary, she was and is still advised, that her being duly admitted guardian, by the free consent of the infant (though subsequent in time to the suing out of the writ), the same in law is very authentic, and makes the same well sued out. And it is presumed, that no person will say, that the lord-keeper, and the other judges, did all agree to the contrary, upon debate of the matters before them.

It was mightily insisted upon by the counsel for the appellees, at the hearing of both petitions, as if Mrs. Stout should cause herself to

port of that case, says, "I was present at the Old Bailey, on the trial and conviction of the appellees in February; and it was indeed a most foul murder: but, through the powerful mediation of their sister, who was intimately connected with some persons of quality, a conditional pardon for transportation was obtained for Matthew, who struck the stroke; and he was on board a tender, when the appeal was exhibited at the Old Bailey. Patrick had been respited two or three times, on the very mornings appointed for his execution. And the appeal was at last taken up and prosecuted, by a set of persons in London, who were in violent opposition to the government; merely to raise an odium and popular clamour, on account of so unadvised a pardon."

Of these Kennedys, I received the following account from the late excellent sir Frederic Eden: "When they were transported to America, they got thither to Maryland (of which my father was governor) with strong letters of recommendation to my father from persons of rank in this country, I suppose to remove them from the coast, where they would have been more particularly known as felons. One of them was drowned in crossing the Delaware, and the other (I have heard from my father's secretary) was some time afterwards hanged in Ireland." See more concerning appeal of murder in Kelyng's report of the Case of *Armstrong v. Lisle*. See also Tremaine, 15.

be admitted guardian to the infant, only to protect her estate from the infant, and that without the privity of the infant's mother, or any of his relations: but (besides the very admittance itself, which is purely for prosecuting the appeal, and for nothing else) Mrs. Stout was always ready to discover the title of her estate; and never but declared, that the infant had no right thereto; and as to the infant's mother not knowing of Mrs. Stout's designs, it is very easily answered; for it is not only sworn, and the affidavits filed in the King's-bench, that Mrs. Stout wrote to the infant's mother what her designs were; but also a particular account is in those affidavits set forth, how willing the infant's mother was to send her son to Mrs. Stout, ordering one of his uncles to carry him to her, for Mrs. Stout to do with him as her occasions required; and withal, directing such uncle to deliver her son to Mrs. Stout, and to none but her, and to do according to her directions.

It hath commonly been reported, as if the prosecution in this appeal hath been purely vexatious, begun by a body of Quakers, and espoused by a faction at Hertford, against Mr. Cowper's interest. But whoever the fomentors or spreaders abroad of such reports are, they would do well to consider, if it were their own case, to have an only child murdered, and her reputation rendered infamous to posterity, whether nature and duty would not oblige them to use all means to make a discovery of the cause thereof? And whether they would not think it hard to have their own endeavours reflected on, and their utmost diligence accounted to be the cause of a party?

It hath also been reported, and perhaps by some of the appellees may be objected, that the very method in the process of this appeal hath been malicious, in delaying the suing out of the writ, until the time was almost elapsed, thereby to keep the appellees in an uneasy suspense. But in answer to that, it is confessed, that it was much longer before the writ of appeal was sued out than was desired or expected; because it was near half a year before Mrs. Stout could find out (though all that while she made a diligent search) the proper person to make an appellant; and after she had, she was forced to examine most of the registers in London and Southwark, to make out his pedigree; and which as soon as she had done, the very next day she caused the writ of appeal to be sued out: so that it was her misfortune, and not her malice; it being under the necessity of so long a delay.

It is commonly urged, as a strong argument against a second trial of the appellees, that there is no new evidence that Mrs. Stout hath against them: but such persons, whoever they are, not only assert what they are totally ignorant of, but also conclude, that Mrs. Stout takes a great deal of pleasure (especially now in her old age) in being in a constant fatigue, and considerable expence, purely to be rendered ridiculous to the world, and uneasy to her-

self, in the fresh and daily renewals of her great loss. In answer to which, she is sufficiently assured, that she goes and acts by other principles and designs; and that she hath more material evidence than ever yet was made public; and that she believes the appellees (though they pretend their innocency is fenced providentially with such circumstances as that they need not fear) do not care to come to the test; or else why should there be so vigorous an opposition against so plain an act of justice, if there was no matter of fact that could be proved against them, nor no concurring circumstances that would any way affect them? (as they seem to insinuate.) It would have redounded much more to their honour and reputation, and have wiped off all occasion of reproach, if (instead of so mean an undermining of justice, in the destruction of the writ of appeal) they had undergone a second trial; it being impossible (according to their own assertions) for them to miscarry, or be found guilty. All persons must certainly know, that it would be no prudence in Mrs. Stout to divulge her evidence before a trial; and if she doth but act prudently, for any therefore to alledge she hath no proof, is purely to speak at random and at a venture, and ought to be regarded accordingly. [But this affair came to nothing.]

THE HERTFORD LETTER:

CONTAINING SEVERAL BRIEF OBSERVATIONS ON A LATE PRINTED TRIAL, CONCERNING THE MURDER OF MRS. SARAH STOUT.

Sir;

I am favoured with yours of the 20th ult. whereby I perceive your pleasure is, that I should give you my sentiments concerning Mrs. Sarah Stout's death, the trial, &c. In answer, I am very sensible of my own weakness, and how unfit I am to enter into a controversy, wherein so many doctors have been worried already: nevertheless, in obedience to your reiterated commands, (though in doing it I may expose my own ignorance) I shall give you my thoughts concerning the natural cause of drowning, floating of dead bodies afterwards, the various sentiments of the doctors, the manner of her death, the letters produced in court, her melancholiness, why no mention was made of the money; and lastly, concerning two public experiments, whereof one was made here, and the other in the river of Thames.

It is a common observation of most people not used to dive, that upon their plunging themselves in the water, whether it be voluntarily or involuntarily, they find a great confusion of their spirits; so that it is morally impossible for them to regulate their actions in this surprise, by the dictates of reason; in this consternation, they lay hold on any thing that comes in their way, not considering whether it may contribute to their sinking or swimming.

In this hurry of the spirits (occasioned partly

from the noise their fall makes in the water, and partly from its running into their ears, nostrils, &c.) the whole animal œconomy is brought into disorder. In this confusion it is no ways surprising, that water, wherein they are immersed, should insinuate itself into some vacuities, no ways adapted for its reception: and it being obvious to all, that no man doth, or can live without respiration, whatever element soever he is in; if in the air, he sucks that in, which naturally flows into the lungs; if in water, what comes into the mouth, as long as his senses continue, he swallows that down the gullet; as long as he doth not breathe, there is little danger of drowning, but on the first inspiration, if he is at the surface of the water, it is much if he doth not swallow down the wind-pipe (with the air) some small quantity of water; but if he is totally immersed in it, it is not improbable, that upon inspiration, a far greater quantity of water than air will enter into the cavity of the lungs.

In every expulsion of air out of the lungs, the epiglottis is lifted up; if the mouth, at the same time, should be full of water, it is impossible but some of it will pass down the wind-pipe; as is observable in those that accidentally laugh while they are a drinking, if a drop falls into the *œsophagus*, it will cause a coughing, which is a convulsive motion of the lungs, &c. whereby nature doth commonly throw up any thing that doth casually fall upon them; by this struggling of nature, to expel the water already slipped down, the epiglottis is lifted up, and instead of ejecting the water just swallowed, the mouth being full of it, a great deal more forceth itself down, by its natural gravity, which gravitates the more by reason of the cylinder or cone of the air, that continually presseth on its superficies. As soon as the senses are gone, the epiglottis is kept open by the force of the stream that runs into the wind-pipe, until the bronchia, and all their ramifications, are filled: as long as the senses continue, they swallow most of the water that comes into their mouths, into their stomachs; but when they are near suffocated, the water runs into those ducts, where it meets with the least resistance.

So long as life continues, there is a convulsive struggling of nature, to expel out of the lungs all those things that are noxious to them, especially water; being never used to be receptacles for any thing but air, they use their utmost efforts to eject it, by a violent contracting their lobes nearer together; by these exorbitant contractions, the water contained in the ramifications of the bronchia, &c. are sometimes forced into the cavity of the thorax, either by dilating the pores of the thin membrane that invests the lungs, (as quick-silver is forced by the pressure of a hand through a piece of leather) or by the rupture of their tunicle, or by some minute vessels, not yet described by anatomists. If any practitioner in physic, &c. shall assert, that anatomy is brought to a *ne plus ultra*, and that all ducts, through which

the juices of animals are strained, are detected; I would desire them to tell me through what vessels the pus in an empyema, where the matter lies on the midriff, when there is no ulcer of the lungs, is expectorated; or through what passages when it is carried off by urine, it is conveyed into the kidneys; or how bitter injections cast into the thorax, can affect the mouth with its taste (as the observations of physicians do demonstrate); or let them read a treatise of Robert Boyle, esq. called *New Experiments Physical-Mechanical*, touching the spring of the air; where, amongst many curious observations about the lungs, he asserts, that the diligent Wallæus relates, That he, divers times, observed in the dissection of live bodies, that the membrane that invests the lungs, had pores in it as big as the longer sort of peas, p. 343.

Water is as frequently found in the cavity of the abdomen, as of the thorax; but by what ducts or passages (when there is no visible rupture of the coats of the stomach or guts) it is carried there, I leave it to the microscopical anatomist to determine: I conceive it enough for me, at present, to tell you, that it is fact. I am conscious you are not ignorant that there are many things that happen in the animal œconomy, that cannot be proved *a priori*; yet when they are *a posteriori*, they are admitted by the schools as undeniable arguments. If any are so sceptical as to deny what is not capable to be proved *a priori*, they would be put to it to prove the circulation of the blood, motion of the animal spirits, or where, or how the chyle is transcolated through the coats of the guts.

As soon as the lungs, stomach, &c. are full of water, the body naturally sinks, and rises no more, until there is a putrefaction in the inward parts, which in cold countries is longer than in hotter regions; but the sooner putrefaction is begun, the sooner the corpse floats, whereof no certain calculation can be made, the time of their rising differing, with respect to the region, and in the same climates with respect to the seasons of the year: in these parts, according to the common reckoning, they float in nine or ten days.

The common cause assigned for floating of bodies drowned, is, the breaking of the gall, which you know is a vulgar error; so that I need say nothing in opposition to it: the cause assigned by the moderns, is putrefaction; but how this putrefaction renders the body more buoyant than it was before, is not obvious to every eye; therefore I shall give you my thoughts concerning its *modus agendi*. Putrefaction is a species of fermentation; by fermentation the air contained in the cavity of the breast, body, stomach, &c. though seemingly full of water, yet they contain great quantities of air, which is rarified with the other juices proportionable to the degrees of putrefaction; and this insensible dilatation of the body increases gradually, until the corruption hath made a passage through the skin; so that a person that

is not above 20 inches in circuit when first drowned, after he hath lain some weeks in the water, will be at least 30 or 40 inches in circumference: this gradual dilatation of the body, I conceive, is the sole cause of its rising to the surface of the water, after some certain time, and also of its more or less buoyantness afterwards.

Having given you my thoughts concerning the cause of drowning, of the floating of the corpse afterwards; I shall now acquaint you with my notions, why bodies thrown dead into the water do not sink, and why some are more buoyant than others.

It is observable, that human bodies, after death, admit no water, especially suffocated, as the experiment made some weeks since doth evidently demonstrate; because, as soon as death seizes a man, the sphincter muscles, in all parts, do naturally contract themselves, for which reason, it is not so easy to inject any liquids into the parts that have them, as before: by this seclusion of water, the vacuities (which in drowned creatures are full of water) are, in those that come by their death some other way, full of air, which, by natural experiments, is proved to be a thousand times lighter than water; and by the same sort of experiments, solid flesh is observed to be but a little heavier than water: if you grant this, which is easily demonstrated, it will be no hard matter for any considerate man to believe, that flesh (which hath many large cavities in it filled with air) may float. If you doubt the immediate floating of human bodies, thrown dead into the water, you may, for your satisfaction, consult the opinion of seamen, who have been the last war in several engagements with the French, or those that have been a Guinea voyage; where, when they throw the dead negroes over-board, they never lay any weight to their feet, to sink them, as they do to white men: it is certain that all those negroes do immediately float; I have spoken with several, lately come from thence, that, if occasion were, would attest it with an oath.

Bodies are more or less buoyant, either in respect to themselves, or in respect to the medium wherein they float.

If the person died in the very act of inspiration, the lungs will be full of air, by which the breast will be sensibly dilated. That the filling of the thorax with air may be a cause of floating, is evident from those that can lie on their backs without stirring hand or foot; it being observable, that those do fill themselves as full of air as they can, and that as long as they can hold their breath they float, but on the very instant of breathing they sink. If they have a large chest, or are very lean, they will float the loftier.

If they are cast into salt water, they will be more buoyant than in fresh; it being experimented, that ships will sink some inches lower under water in the Thames, than when they were at sea; if into deep water, all men observing they can swim more easy in deep than in shallow water.

On the contrary, if the person died in expiration, had a small chest, was fat and fleshy, or was thrown into fresh or shallow waters, he will swim the more under water.

I do not perceive so great a discordancy between the doctors that were evidences for the king, and their opposites, as some seem to insinuate. The witnesses for the king deposed, that it was their opinion, that no person ever was, or possibly could be drowned, that had no water in their lungs, stomach, &c. and that as far as they had made any observations on drowned persons, they always found great quantities of water in the inward parts of drowned persons; part thereof usually, in lifting them out of the water, runs out of their nose or mouth; that upon their dissection, they had found considerable quantities of it in the cavities of their bodies; and that it was their judgment, that the inward parts of drowned persons would putrify in less than six weeks time. Whether these are not undeniable truths, I leave it to the determination of yourself, and all unbiassed people that have made any real (not notional) observations on drowned bodies.

Their learned antagonists, whose sole endeavour and business, as far as I could perceive, was to render it a mute case, by their strenuously urging, 'That two or three ounces of water was sufficient to drown a person;' not from any observations on human bodies, but from a private experiment on a dog or two that was half hanged, as I am told; and I am apt to think there was some artifice used, seeing the experiment did not succeed, when made publicly in the river of Thames by the same person.

Dr. Sloane saith, 'That cases of this kind are very uncommon,' (viz. for Mrs. Stout to be drowned without any water in her) 'and none of them have fallen directly under my knowledge;' nor, as I verily believe, under any other person's since the creation of man: Then he tells you, that 'Water swallowed by the gullet, into the stomach, will not drown the person;' (who said the contrary?) 'But it is that which goes into the windpipe and lungs that suffocates;' and confirms it with an observation, saying, 'I have observed some spoonfuls, if it went the wrong way, to have choked or suffocated the person.' Note, he doth not say 'drowned,' neither do I think any person can properly be said to be drowned, that hath not swallowed above two or three ounces of water, but rather such as are (as the doctor saith) choked or suffocated. In the same paragraph he tells you, that 'Whether a person comes dead or alive into the water, he believes some quantity will go into the windpipe:' Then water in the windpipe is no certain sign of a drowned person; I am of another opinion, which our experiment doth seem undeniably to prove.

Being asked by the judge, whether the parts would not putrify in less than six weeks, if there had been water? His answer was My

‘lord, I am apt to think it would have putrefied the stomach less than the lungs:’ How direct and satisfactory this answer was to the question, you may determine. I observe a general question, (for what intention I cannot divine) which was, Whether any water would go into the thorax? If it did, or did not, I cannot conceive what benefit or prejudice it would be to this case, though I am apt to think the membrane that invests the lungs, may easily be torn by violent coughing, which is observed in all persons when any thing falls into the windpipe.

Near the foot of his discourse, he saith, ‘I am apt to think, if there was any quantity’ (of water) ‘in the lungs, the sponginess of the part would suck up some part of it:’ who said the contrary? But, doctor, if they had sucked up any part, would not her lungs have been moister, than if they had sucked up none? But Mrs. Stout’s were rather drier than usually they are in dead persons; therefore—‘As to the stomach, I have not known it tried;’ have you known it tried, as to the lungs? If not, we are as much in the dark as before, unless we take your ‘I am apt to think’ for demonstration.

This doctor closes his sentiments with ‘If there was a great fermentation, a great deal of it’ (water) ‘would rise up in vapours or steams, and go off that way:’ here he terminates all with an ‘if.’ Suppose I should grant him there was a great fermentation, to be as true, as I am confident it is false, his inference I doubt would not follow, viz. ‘That a great deal of it would rise up in vapours or steams, and go off that way;’ if it should rise into vapours in the stomach, I am subject to believe, that the coldness of the parts through which they must pass, would condense them again, before they could get out of the body. What way he means by ‘that way,’ I cannot imagine; if it is through the gullet, the contraction of the mouth of the stomach, gullet, (which as Dr. Garth says) contracted or pursed up by a muscle in the nature of a sphincter, and the closure of the lips, &c. would either keep them in the stomach, or else the coldness of the part, through which they must of necessity pass, would condense them in their passage out of the body: if through the guts, the pylorus, the coldness of the guts, or the sphincter ani, would obstruct their passage: if it could be imagined that the subtleness of these vapours could get through the coats of the stomach, I conceive the coldness of the omentum peritonæum, and the thickness of the muscles, fat, &c. of the abdomen, would impede their exit out of the body. In fine, it seems very probable to me, that if there had been any fumes raised in the stomach by fermentation, that they could never get an exit through so many impediments.

Dr. Garth tells you, that ‘it is impossible that the body’ (of Mrs. Stout) ‘should have floated, unless it had rested, or been intangled amongst the stakes.’ This is a certain truth,

if she had been drowned; but if she was thrown in dead, there is nothing more common than for it to float; and this my assertion is consentaneous to the universal experience of those seamen that use the negro trade; for when any of their slaves die, they throw them overboard, without any weight to their feet, and these float immediately.

That she was found sideling in the water, is a mighty argument with this doctor that she did not float; but grant she was intangled (which is denied by several) between the stakes, as it is asserted, I think it no greater wonder, than for a deal-board twelve inches broad (which should accidentally get edgewise between two stakes, not above nine inches distant one from the other) to float edgeling, as long as it is intangled between them. Nay, on the contrary, I think it morally impossible for any body, that is much broader than it is thick, if it casually gets edgewise between two stakes, whose distance will not let it lie flat, but it must continue more or less edgeling, till it is disintangled.

I observe the judge asked this gentleman, whether water in the body would putrify it? He answered, ‘I say not; for in some places they keep flesh-meat from corrupting, by preserving it in water:’ if he means water in a deep well will keep it a day or two in hot countries, I may admit it; but that it will keep it six weeks, or more, I utterly deny it: if it will not keep flesh from putrefaction forty-six days, it hath little analogy with the case under debate.

This doctor tells you, ‘He must differ from him’ (Mr. Coatsworth) ‘where he infers she was murdered, because he found no great quantity of water in her.’ This is a mistake; for neither he, nor any of the other doctors, or surgeons, that were present at her dissection, inferred she was murdered, because she had no great quantity of water in her; but because she had none at all in her.

Dr. Morley saith, ‘That these which seem to be the questions of the greatest moment, are, Whether there was a necessity for this body’ (if drowned) ‘to have a great quantity of water in it? And whether bodies thrown dead into the water float?’ To the first I answer positively, ‘That there is no absolute necessity that she should have a great quantity of water in her.’ With submission, doctor, pray tell which of your opposites said there was an absolute necessity for Mrs. Stout to have a great quantity of water in her; they said, they could not conceive that she was drowned, that had not one drop of water in her. If you would have contradicted them, you should have demonstrated to the jury, either by reason or experiments, how a person might be drowned without any water in them: if you could have done this, you had answered the question of greatest moment.

This doctor’s difference between persons drowned by accident or design, I would flatter myself, was rather a *lapsus linguæ*, than his

real judgment; for it is certain, with whatsoever design a man may go into the water, before he is half dead he is deprived of his senses, and how he governs himself then, you may judge. To the second question, he saith, 'I think, if bodies new killed float, it is by accident:' it is as accidental for bodies new killed, when thrown into water, to sink, as it is for persons just drowned to swim.

Dr. Woolaston being asked his opinion, 'If a person be drowned, whether it can be discovered six weeks after?' His answer was, 'I think it impossible to be known:' I am apt to be of his opinion, that it is impossible precisely to determine what, and how many injuries her *viscera* had received, or what accidents had happened unto them forty-six days after any person is drowned; for naturally they would have been putrified in half that time; and when the bowels are reduced into a putrelaginous mucilage, who can give a rational judgment concerning their former figure, position, or how they had been affected? This is what naturally happens to a drowned person, but there was nothing of this in Mrs. Stout; which is no small argument with me, that she was not drowned. I shall take little notice how he contradicts his brothers, by his affirming, 'That in drowned persons the water lies only in the stomach and guts.' As to his experience, I doubt he is not candid; for I believe I have heard the same story, which was thus: two men quarrelling in a wherry, one of them took up the stretcher, and knocked the other down; in his falling, he accidentally caught hold of his adversary, and they both fell into the water together; he that was knocked down was not swelled, but the other was exceedingly.

Mr. Cowper affirms, 'That it is not reasonable' (in Mrs. Stout, though drowned) 'to expect any thing but froth.' What, will all the water turn to froth, that a dying person receives before he is drowned? It is a paradox to me: how contrary this surgeon's sentiments are to the universal experience of the learned and unlearned part of mankind, let the unbiassed judge. If he had consulted Ambrose Parey, and had thought him a reasonable man, doubtless he would have been of another opinion; who saith, 'The belly of him that was thrown in alive, will be swollen or puffed up by reason of the water that is contained therein.'

The whole stress of this gentleman's arguments seems to depend on a supposed difference that there is between persons that drown themselves, and those that are casually suffocated by water; whereas I am apt to think there is little more difference, than between him who puts the halter about his own neck, and one that the hangman forceth it on; there is a parity of causes, why the effects in the same species should extremely differ, is more than my weak intellect can comprehend: in both I conceive, that in less than a minute, their rational faculty is so egregiously distorted, that nothing is done regularly, or by its dictates.

The verity of his private experiments, I doubt, because when he made a public one, it infinitely contradicted his clandestine ones. There is a vast difference in drowning a creature in a tub, and in a river; in sinking him with a weight tied to him, and permitting him to sink by his own gravity. I am not of opinion, that it is ridiculous to expect water in the cavity of the thorax, though the lungs had not suffered an imposthumation, or the like, for reasons formerly assigned.

Dr. Crell saith, He shall only insist upon what Ambrose Parey relates in his chapter of renunciations—He tells us, 'That the certain sign of a man's being drowned, is an appearance of froth about his nostrils and mouth; which could not be, as he declares, if the person had been strangled, or otherwise killed before.' For the confirmation, or confutation, of these positive assertions of this learned doctor, I shall give you the verbal expressions of Ambrose Parey: 'Whosoever,' saith he, 'is found dead in the waters, you shall know whether they were thrown into the water alive or dead; for all the belly of him that was thrown in alive will be swelled and puffed up, by reason of the water that is contained therein; certain clammy excrements come out of his mouth and nostrils.' In the foregoing paragraph he gives you the signs, whether one is hanged dead or alive; his formal expressions are, 'If he was hanged alive, there will be a foam about his mouth, and a foamy and filthy matter hanging out of his nostrils.'

Observe this author, whereon he only insists, saith, There is a foam and filthy matter about the mouth and nostrils of them that are hanged alive. Now whether froth at the mouth and nostrils, is a certain sign of a man's being drowned, or whether it is not incident to persons that die of other diseases, any physician can easily determine? If you will be pleased to read Paulus Zachæus's *Quæstiones Medico-Legales*, on the same subject, you may find that he agrees with Ambrose Parey, That an appearance of foam about the nostrils and mouth, is no certain sign of drowning. By such positive assertions of the learned, how easily may the ignorant be imposed on? By this you may evidently see the difference between a witness on his parole, as this gentleman was, and one upon his oath, as the king's were.

Mr. Herriot being asked by Mr. Cowper, what observations he had made concerning this matter? answered, 'When I was a surgeon in the fleet, I made it always my observation, when we threw men over-board, that were killed, some of them swam, and some sunk.' Then being interrogated by the judge, 'When a body is thrown over-board, doth it sink or swim?' his answer was, 'I always observed that it did sink.' What incoherence is here! First, 'I made it always my observation, when we threw men over-board that were killed, some of them swam, and some sunk:' and almost in the same breath saith, 'I always observed that it' (a dead body thrown over-board) 'did

'sink.' I am apt to be of Mr. Herriot's mind, as to his first assertion, That men killed in a fight being thrown over-board, some of them sunk, others swam; those whose breast and belly are no ways injured float, but those whose breast and belly are perforated, so that water gets into their cavities through the wound, I doubt not but they will sink.

Mr. Bartlett tells you 'He never saw any body float, though he had been in several engagements.' It is very probable, he kept himself all that time in the cock-pit, and it may be long after dressing the wounded persons. The fittest persons in this case to give their observation, are officers and seamen, who are always upon deck, and often obliged to look out; and not surgeons, who are all the time of engagements secured in the hold of the ship.

Mr. Camlin saith, 'There never were more and greater signs of the stagnation of blood on the body of this child, than on the body of Mrs. Stout.' But on what parts these 'more and greater signs' were, whether on the breast, belly, &c. not one word. The mother of the child asserts, there was not the least sign of any stagnation of blood on any part of her child: She having lately had the small-pox, her face where the small-pox had fluxed, was somewhat discoloured; but it was no more discoloured, after her drowning, than it used to be (when she was cold) before her death; the soil of the water doth generally alter the faces of people: so Mrs. Stout was not known by her neighbours, till that was wiped off. The settlements of blood on Mrs. Stout were dispersedly on her ear, both sides of her neck, breast, arm; but on what part of the child's body these 'more and greater signs of stagnation' were, he doth not specify; because had he assigned any particular place, there were several present that would have contradicted him. General terms are the fittest covers for falshood.

If this gentlewoman was not drowned, as the doctors and surgeons for the prisoners seem to insinuate, the query then will be, how she came to her end? With submission to better judgments, I shall here offer my private sentiments concerning it. I am induced to believe, she was knocked down with a blow on her left ear, from the large settlement of blood there, which, as Mrs. Kimpson swears, was as much as her hand could cover, and more: After she was felled to the ground by the blow, it is probable, with the gripe of a strong hand, she was throttled: From the stagnation of blood on both sides of her neck, under her ears, which Mr. John Dimsdale, jun. swears there was, and from the settlement of blood on her breast, I am inclined to believe, that the person that throttled her, to support his hand that he might gripe the stronger, rested his arm on her breast, which occasioned the stagnation there.

The circumstances that induce me to think she was not accessory to her own death, are these following: Her being found without her

gown (which probably was torn in the scuffle) and nightrail: her gown could not be found, though the river was diligently raked several times, until about a week before the trial, it was found hanging on a stake, which the miller had cleansed from the trash that hung on it about half an hour before, and he will depose that it was not there then: It was torn to rags, without one of its sleeves, some parts of it were as rotten as dirt, other firm; you might tear it (which was made of a sort of Norwich stuff) and the lining (which was a silk damask) with your fingers, as I did: Query, Whether stuff or silk will naturally rot so soon under water? Here is no news of her nightrail yet. 2. From her floating; whereof I make no doubt, because it is sworn by several witnesses. 3. Because her belly was not swollen. 4. Because no water came out of her when lifted out of the river, nor purged out of her afterwards. 5. Because her inward parts were not putrefied, though her outward, that had been injured, were? Which I suppose was impossible they should have continued so 46 days after her death, had there been any water in them. 6. From the several distinct settlings of blood, which is unusual in drowned persons: If it had been occasioned (as some may think) from a blow, which she received when she threw herself in, I am subject to believe, that the coldness of the water, in the month of March, would have hindered its settlement in the cutaneous parts of the body, as it is generally observed to do; for what is more common than to dip a linen rag, or a piece of brown paper, in cold water, and apply to a bruised part, to hinder the blood from settling there? 7. From the continual disturbance that Mrs. Gurrey was under, both in mind and body: Nevertheless, she would not discover it till she was almost frightened out of her senses, by the voice, as she thought, of Mrs. Stout, which uttered these words, 'Divulge, conceal nothing.' 8. From what is sworn by the Gurreys against their lodgers at the trial, viz. 'Mr. Marson was hot, and put by his wig; I see his head was wet—they came in about 11 and 12 o'clock—she turned me off, but a friend of mine will be even with her by this time—Her business was done—He would pass his word, Mrs. Sarah Stout's courting-days were over—The use money is paid to-night—You have forty or fifty pounds for your share—Asked him, Whether the business was done?—And he answered, he believed it was; but if it was not done, it would be done to-night—Pulled a handful of money out of his pocket, and swore, he would spend it all for joy the business was done.' 9. From the sentiments of the grand jury, who, after a nice examination, were of an opinion, that she was murdered; as were several of the petty jury, but by whom they did not know.

As to the letters produced in court, my thoughts are, they are not of a legitimate, but of a spurious production. 1. Because the stile doth no way suit her character. 2. Because

her mother doth affirm, the letter shewn her in court was of a smaller character than ever she observed her daughter to write; neither doth her brother think them to be genuine. 3. Because there was no mention made of these letters, till the common report of her being with child (which had been industriously spread abroad by several, but by none more zealously than by a nominal Quaker, her quondam admirer) was proved to be utterly false, by the oath of several doctors and surgeons that had opened her body. 4. Because Mr. Marson and Mr. Archer, on the trial, swore (and several of the coroner's inquest were ready to swear) that Mr. Cowper, before the coroner's inquest, being on his oath, deposed, 'That Mrs. Stout was a modest person; that he did not know of any thing that was the cause of it' (viz. her death); 'That he did not know any person she was in love with, but of one whose name was Marshall; and Mr. Marshall told him, that he was always repulsed by her.' Whether this oath is not diametrically opposite to his pleadings on the trial, you may determine. 5. Because they did not insist on these letters, when Mr. Jones said, 'Indeed they have produced some letters without a name; but if they insist upon any thing against her reputation, we must call our witnesses.' If the witnesses then present in court (who were some of the most reputable in that town) had been called, to speak to her reputation, a great deal of that dirt, that is now cast upon her, would have been wiped off. I cannot but take notice here how seemingly unwilling he was to expose the weakness of this gentlewoman, or to meddle with her letters, had he not those innocent gentlemen to defend; when before her death he had shewn them to Mr. Marshall, a repulsed lover, and his brother, and after the trial, the printers, who at the trial did not take them in short hand, were favoured with them, to be exposed to the whole world.

What concerns her melancholy, I am induced to believe, that she was no more than is incident to all people that are sickly, or much troubled with the head ach; from what her maid swears, 'That she was ill sometimes, and I imputed it' (melancholy) 'to her illness; and I know no other cause.' And Mrs. Walker doth assert, That Mr. Cowper told the coroner's inquest, That he did not observe her any ways melancholy; that he should not have taken notice of it, had not such an accident happened; only now he remembers, that she was not so free in discourse at dinner as sometimes she used to be; and that the discourse then was chiefly between him and her mother. Her mother and brother do affirm they never observed her melancholy, and all her intimate companions do assert the same: It is much that none but this gentleman's sister, and two or three others, devoted to a party, should observe any such thing.

Mr. Firmin, his wife, and several others that were in her company, with Mr. Taylor, do

affirm, that she did not say her head cloths would serve her time, or any thing like it, and that they esteemed his discourse with her pure banter; that she was in her night dress, and presently went home and put on clean linen: I am apt to think there are many relations and friends, bigotted to a party, that will not boggle to tell a lye, to save a friend, or near relation from—

The afternoon before her death, she was observed to stand to see the judges make their entrance, with her friends, as brisk and airy as any there: About four hours before her death, as I am told, she was in company with a knight of that county, and several others, who observed her to be as merry and pleasant as any amongst them: At nine at night, she earnestly importuned a young gentlewoman of that town, to tarry and lie with her that night, as she had formerly done several times; which she refused then, for some particular reasons. When Mrs. Stout perceived she would not tarry all night, she invited her to dinner next day, and told her what she had provided, and that she should be glad of her company; not intending to go out of doors the next day.

I am apt to think, that if she had been such a furious lover, as is pretended, or had any intention that night to destroy herself, that she would not have fallen out with any body about the payment of money; much less have refused to sign a receipt for six pounds, which her d——st had prepared when he paid her the interest money; what was the true cause why she refused to sign this receipt, is a riddle to most.

If she had so great a kindness for some years for this Joseph, as is insinuated, certainly his wife would have observed something of it; and then she would not be importuning her every month, by her letters, to come to London, that she might enjoy her sweet company: neither would she, in all probability, (if she had been so desperately in love with him) have lived here several months together, without his company, even when importuned by his wife; but would, as we may reasonably conjecture, have resided in your city, where she might the oftener, and more privately have enjoyed his company: and, as for her going out at the window, it is morally impossible, the bars being so close together, that a child of a year old cannot get out between them; neither was there any occasion for it, the keys being always left in the doors.

Because there is no mention made on the trial, of the missing of any of her money; several are apt to report that her relations want none of it, which is a grand mistake; for they want, as they compute it, at least a thousand pounds of her original fortune, besides the improvements she had made thereon, which were considerable; they made little mention of it there (that was taken notice of), because their evidences that could speak materially to that point, were Quakers, whose affirmation will not be taken in criminal cases.

The last assizes, here was a man hanged; after he was dead, was cut down, and buried without a coffin, the grave filled up, and the earth well trod down; in the evening he was digged up again, being pressed almost flat by the weight of the earth, was privately cast into the river, and when it was observed that the corpse would sink, it was exposed to public view, and an advertisement of it was printed in the *Postman*, the 25th of July last, with a great shew of exultation, by their saying, 'Many hundreds having seen this experiment with their own eyes, the opinions of the surgeons produced on the part of the king is thereby destroyed and exploded, and all persons convinced of the contrary.' What influence this experiment may have on you, I know not; but when all the circumstances attending it are duly considered, I am of opinion it will make more against them, than their opposites: If they had been certain of success, what need of so much art? Why did they not insert in their advertisement, how the body had been managed before it was thrown into the water, how they opened it afterwards, and how they made a strict scrutiny after water, yet could not find a drop in it? Not one word of this. Methinks this partial relation is calculated on purpose to magnify their own evidences, and put a slur on the king's.

I doubt not but the ingenious contrivers of this experiment did not only expect it would sink, but that it would have some water in it also. I am apt to think it reasonable, to expect that the weight of the earth would have driven out the wind contained in the cavity of the breast through the wind-pipe, which is impossible to be done without lifting up of the epiglottis, which continually closes the mouth of the aspera arteria; but in expiration, this being once forcibly removed out of its natural situation, it was very likely that it would not cover it again so nicely, but that some small quantity of water might insinuate itself through the small passages, which the violent forcing out of the air had made: If this had succeeded, what a triumph there would have been, you may easily determine.

Some weeks since a surgeon, that had been an evidence at the trial at Hertford, going into a bookseller's shop, meeting some acquaintance there, he fell into discourse about Mrs. Stout, and asserted there, what he had affirmed at the trial, viz. 'That two or three ounces of water will drown a dog': One of the company told him, 'He could not conceive that so small a quantity would do the business.' He replied, 'Sir, I will lay a guinea, that I will drown a dog in the river of Thames, and he shall not have above three ounces of water in him.' The proffer was no sooner made than accepted, time appointed, dog brought, and with a weight tied to his hinder feet, flung into the river: some time after, he was taken out, and dissected; where instead of three ounces, there was about thirty-three; whereby he not only lost his wager, but, in a great measure his reputa-

tion, as to what he had so confidently asserted to the contrary on the trial.

Having, in some measure, answered your commands, though by it, I have, I am afraid, a little too much trespassed on your patience, I shall take little notice now, what omissions and alterations there are in the printed trial; how Mr. Stephens was taken with a strange sort of a fit, (just after the petty jury went out) which disturbed the whole court: or how a wine cooper in Southwark (who came down as an evidence for the prisoners) fell into a sort of distraction; and all the time of the trial was mightily discomposed in his mind, so that he was fain to be tied in bed, yet would often ask how the trial went, and whether they were like to be cleared; and would often tell the people about him, that he had done a very bad thing, but would not confess what, though often urged to it: but shall conclude, desiring that the authors of this horrid murder may be detected and brought to condign punishment; but that the innocent may be cleared from all aspersions thrown undeservedly on them, which I doubt not, but that the Great Jehovah, in his own time, will bring to pass; and that it may be so, shall be the daily prayers of, Sir, your humble servant.

P. D.

Hertford, Sept. 5, 1699.

POSTSCRIPT.

I doubt not but you have heard, that the gentlemen that opened Mrs. Sarah Stout's body, did depose, that she was a virgin; for your information, I will give you a true copy of their certificate, which is as followeth:

Hertford, April 28th, 1699.

'We whose names are here under written, having examined the body of Mrs. Sarah Stout, deceased, do find the uterus perfectly free and empty, and of the natural figure and magnitude, as usually in virgins. We found no water in the stomach, intestines, abdomen, lungs, or cavity of the thorax.

JOHN DIMSDALE, sen.

ROBERT DIMSDALE.

JOHN DIMSDALE, jun.

WILLIAM COATSWORTH.

SAMUEL CAMLIN.

DANIEL PHILLIPS.

After this certificate was delivered to the relations, they desired the gentlemen that had signed it, to give their opinions, whether they thought she was drowned or no? All of them were unanimous that she was not drowned, except Mr. Camlin, who was unwilling to give his opinion, either *pro* or *con*; but when asked, would only say, 'There were very odd circumstances.' Yet, at last, when he was asked, whether he did conceive any person could be drowned, that had no water in their stomach, intestines, abdomen, lungs, or cavity of the thorax? He replied, No; which the others thought virtually to include as much as they had said.

A REPLY TO THE HERTFORD LETTER:

WHEREIN THE CASE OF MRS. STOUT'S DEATH
IS MORE PARTICULARLY CONSIDERED; AND
MR. COWPER VINDICATED FROM THE SLAN-
DEROUS ACCUSATION OF BEING ACCESSARY
TO THE SAME.

Sir;

I received your letter from my bookseller, on the 20th of September last: And though I am far from thinking your sentiments upon this matter were either desired or commanded; yet am I well enough pleased with your apology, wherein you tell us, you are very sensible of your own weakness, and how unfit you are to enter into a controversy, &c.

This, I must confess, may be of some use to the ignorant, by forestalling their expectation of any wonderful discovery; but for the learned, the compliment might have been spared, since the performance does so evidently discover what you acknowledge.

The Introduction does indeed promise us great matters, viz. 'I shall give you my thoughts concerning the natural cause of drowning; floating of dead bodies afterwards; the various sentiments of the doctors; the manner of her death; the letters produced in court; her melancholiness; why no mention was made of the money; and lastly, concerning two public experiments,' &c.

But pray, Sir, if we find your thoughts arise from the ebullition of a heated fancy, and that your too eager zeal for your friend has carried you oftentimes to over hasty conclusions; if, instead of a well-grounded and rational solution of these phænomena, we are only entertained with incoherent expressions, false grammar, tautology, groundless surmises, and want of proof; in a word, if these pregnant thoughts of yours are found to be mere trifles, had it not been better yourself alone had been still master of them? Or, if there was a necessity for their breaking out, had you not better have communicated them only to your friend in London, than to have exposed yourself thus ridiculously to the learned world?

That I may make good what I have alledged, I shall now proceed to your letter. 'It is a common observation of most people, not used to dive,' &c.

Give me leave, Sir, here, only to question the truth of your proposition, whether or no, the greater number of those who are not divers, have made any observations upon drowning, or from their own experience can satisfy us of the consternation that ensues plunging themselves into the water? But admit the confusion (as without doubt it is) to be very great; it may not hence follow, that the very first moment of submersion reason must be lost: or, in your own words, that 'there is a moral impossibility to regulate their actions by the dictates of reason.'

As to the laying hold of any thing in their

way, it is what equally happens in the fall from a house, and seems not so much to argue a total eclipse of the rational faculty, as a want of time to deliberate: for the action of falling being instantaneous, it is impossible to form a settled act of judgment.

We all know the prospect of sudden death, by what way soever, impresses a certain horror, (which I must yet think is not so great to one who wilfully destroys himself, as to him who either by accident or constraint is put upon it) but that it leaves us immediately destitute of choice, or a power to refuse, both which are acts of free will, and import reason, I cannot allow; as conceiving, if it were so, he that wilfully throws himself from a house, and he that falls accidentally, would both equally lay hold of any thing that might save their fall.

'In this confusion' (you say) 'it is no ways surprising, that water, wherein they are immersed, should insinuate itself into some cavities no ways adapted for its reception.'

On the contrary, I must alledge, that whether in or out of this confusion, it is not only very surprising, but absolutely impossible, that water should insinuate (though never so cunning), or enter into any cavity, which is at the same time no ways fitted, or (if you had rather) adapted to its entrance.

I will not stand to comment on your notion of suction; I thought such kind of notion had been long since exploded: For my own part, instead of believing that the lungs do suck in the air, I think it more rational to conceive, that as by pulsion they are emptied, so by the weight of the air, from the pressure of the atmosphere, they are presently filled again. Be this, however, as it will, I cannot grant you that every man under water swallows down the same into the gullet whilst his senses continue: For I doubt not but that he who designedly drowns himself, may choose to let it into the windpipe, that he may thereby the sooner be choked.

The swallowing of air or water down the windpipe, is a term I do not readily apprehend; I take deglutition, or swallowing, which is the sole office of the gullet, and respiration, or breathing, which only appertains to the windpipe, to be two different actions, and diversely effected. Whoever swallows any thing, either in or out of the water, must, by opening the sphincter of the gula, let it into the stomach: and whilst a person under water continues swallowing, there may be no great danger attending him of being drowned; it being very probable that during this action no water gets into the lungs; but being unable to hold out for want of breath, he must necessarily make an attempt to respire; when ceasing to swallow, the epiglot riseth, and the water spontaneously (if you will allow me the expression) rusheth on the lungs: so that when a person is totally submersed, provided he swallows not at all, or cannot swallow longer, it is not only not improbable, but I believe certain, that in his attempt to respire, a far greater quantity of water than

air (perhaps nothing but water) will get into the lungs.

'In every expulsion of air out of the lungs, 'the epiglottis' (you say) 'is lifted up.' And is it not so, I would be informed, in every impulsion of the air into them?

It is my opinion, that this part does never exactly close upon the larynx, but upon deglutition: and although by your account it may be thought to be raised up like a trap-door, and presently shut down again; I do find it a sort of springy body, and is, I doubt not, at all times somewhat elevated from the glottis, unless, as I said before, at the time of swallowing; when by the weight of the aliments, whether liquid or solid, some peculiar muscles assisting, it is forced down: and after this action is over, by its own proper elasticity, it raiseth itself again, that the successive motions of inspiration and expiration may be orderly carried on.

When once there is any considerable quantity of water got into the windpipe, I imagine this mighty struggle of nature doth not long continue; and therefore cannot choose but wonder to hear you to say, 'By this struggle of nature 'the epiglot is lifted up,' &c.

It seems, in my opinion, very natural; the cover to the windpipe being a springy body, and for the most part inclining to an horizontal position: this, I say, considered, if the mouth be full, and the person almost spent, or though he can, yet if he will not swallow, the nature of all fluids is such, that they will run into any declivity; unless (as upon another account you have it) they are shut out, or that the vacuity is no ways adapted to let them in.

'As soon as the senses are gone' (you say) 'the epiglottis is kept open by the force of the 'stream.' To which I reply, that the natural posture of the epiglot being such as I have described it, we might rather think the force of the stream should clap it down, than keep it open; unless by the force of the stream, you mean somewhat like that of an injection through a large syphon, whereby the said trap-door may be beat within the rimulæ of the larynx; but in stagnant waters the force of the stream will be inconsiderable.

'As long as the senses continue, they' (I suppose you mean persons under water) 'swallow most of the water which comes into their 'mouths, into their stomachs.' And the rest, you tell us elsewhere, they swallow into their windpipes. But this I deny; for as long as the senses continue, and they can hold their breath, they very often swallow none: and after this, in the case of voluntary drowning (which you may smile at as long as you please,) it is more likely by far that they admit it into their lungs; since by swallowing never so much, they do not destroy themselves; but by letting a small quantity into the lungs, they presently put a period to their miserable lives.

'But when they are near suffocated' (you say) 'the water runs into those ducts where it 'meets with the least resistance.'

I would, methinks, be informed what you mean by those ducts. The nose and ears, I

presume, are full before they are near suffocated: and if the sphincter gulæ does oppose its entrance into the ventricle, what other duct remains, unless that of the windpipe? Out of which too, after suffocation, it is not impossible but it may be kept, by the contiguity of the tongue's basis to the palate.

'So long as life continues' (you tell us.) 'there is a convulsive struggling of nature, to 'expel out of the lungs all those things that are 'noxious to them, especially water,' &c.

Let me tell you, Sir, I am apt to think this especially will be found a great mistake; for I doubt not but any thing of a more uneven texture, slipping into the lungs, will excite much stronger convulsions than those from water: But indeed, according to some experiments lately made, I could not perceive the marks of those violent convulsions you here speak of.

I took a dog, and by a weight directly sunk him under three foot of water, which was so clear that I could perceive what happened to him: and, to be plain with you, I observed that for almost a minute he threw his head disorderly about before he gaped; upon which the water getting into his windpipe, in half a minute more he fell down with his neck to the bottom, void of sense and motion. After this, I plunged another somewhat less; when, in like manner as the former, I found when he had turned his neck two or three times about, he was to appearance dead in a minute's time.

Now in all this there were none of those violent efforts, to throw the water out of the lungs, discernible; or did I think it all rational to expect the same forced into the cavities of the thorax, either by dilating the pores of the thin membrane that invests the lungs, as quicksilver is forced by the pressure of a hand through a piece of leather; or by a rupture of their tunicle, or by some minute vessels not yet described by anatomists: and the reason of my thinking so is this, because I could perceive little more to effect it, but the specific gravity of the water; which, according to the laws of the libration of liquors, I take to be inconsiderable.

I know of no physician that boasts of a *ne plus ultra* in anatomy; nor should I expect any such pretension from a physician, so soon as from the anatomist: These two, you know, are not always inseparable companions. But as to your instance about the empyema, though I think it foolish to deny facts, when I am unable to account for the manner how they are brought about; yet I see nothing to hinder me from believing, that very often, where the matter you speak of is cast forth by excretion, the lungs have suffered a solution in their continuity. In two persons I have inspected, who died under these circumstances, it was apparent; in both of which, as I suppose from a preceding peripneumony, there had been abscesses formed in the lobes of the lungs, which had rotted their outward membrane; so that whether the purulent matter, which was coughed up, came from the said abscess, or whether some of that which fluctuated on the diaphragm,

might not also be imbibed by the ulcerated lung was very uncertain.

The injection of bitter liquors affecting the throat, if they are cast into a fistula which took its rise from an internal apostem; or otherwise, if the penetration has been of long continuance, and discharged great quantities of foetid, ichorous, or corrosive matter; I should less wonder the experiment should answer: for in these cases the tone of the viscera is very much weakened, the patient very frequently dies tabid, and we find upon dissection, that very commonly the lungs are corrupted. It may happen also in a recent puncture; but then we may be likewise sometimes uncertain, whether the membrane of the lungs received no damage.

I desire not that greater stress should be laid upon these cases than they will readily bear: But this I must aver, that in penetrations of the chest it does not always happen; for in a puncture I have seen injected, and a fistula of this part, into which I have cast at times several ounces of a bitter decoction, with a tincture of myrrh and aloes; during which, I can safely say, I never heard any such complaint, though I have purposely enquired.

Your citation of Mr. Boyle's citation from Wallæus, if matter of fact, might be preternatural: and as to his finding the same divers times, how diligent soever he might be, rather than shew myself uncivil to him, by saying it is false, I shall turn sceptic, and suspend my assent till I am better satisfied: at present I cannot see, if there was an admission of air, through pores much smaller than those made by the longer sort of peas, into the cavity of the chest, how respiration could be carried on: and I must needs think, that Dr. Garth's remark upon the trial is very pertinent; where he tells us, 'There is a great providence in such a texture; for if' (saith he) 'there were any large pores in this membrane, the air would pass through into the cavity of the thorax, and prevent the dilatation of the lungs, and consequently there would be an end of breathing.'

But that I might put this matter yet farther out of controversy, being willing to be made sensible of the utmost efforts of a drowning creature, and the result of the most violent strugglings it could make to save itself; I sent for a dog, and lest you should find fault had I made use of a tub, I procured the use of a distiller's back, which, if I may call it so, is a sort of trough, containing in dimension thirty foot of length, and half as much of breadth: into this, when filled with water, I caused the animal to be cast, having before ordered his forefeet to be tied together.

By the force of the fall he was plunged over head and ears, but rising up again, made to the side as well as he could; and though several times repulsed, continued struggling, and by the liberty of his hind-feet often raised his head above the water: upon which, seeing no likelihood of his being drowned under a very long time, I ordered him to be taken out, and his hind feet also to be fastened together. Thus he

was a second time thrown in, and continued struggling, sometimes under and sometimes above water, with his head and neck; in a quarter of an hour's time his navel started, and soon after there was a visible prolaps of the intestinum rectum: having thus between while had the liberty of an imperfect respiration, it was half an hour before he had done struggling; after which, under water he gaped several times. When dead, I left him, and returned five hours after; at which time I desired he might be taken out with his head erected, that we might lose no water.

I think, if it had been possible, I had reason in this case to expect water in the two cavities, i. e. the thorax and the abdomen, which seemed much tumefied; but was so far from it, that upon the opening the peritonæum, instead of an inundation, I found not a drop of water; and even the small intestines had received very little, if any at all from the pylorus. What was contained in the stomach was much short of half a pint, or little more than four or five ounces. Having raised the sternon, we perceived the thorax, in like manner as the abdomen, perfectly clear of water. Out of the windpipe there issued a spumous matter, and the whole of what we pressed from its ramifications was about three ounces.

Thus, Sir, have I given you a faithful history of the fact; but if you think the experiment was made clandestinely, or that the dog was half strangled before thrown into the water, as you pitifully insinuate about Mr. Cowper's experiments, for your farther satisfaction, you may be informed of Mr. Harrison, without Bishopsgate, of Thomas Serjeant, esq. gentleman porter to the Tower of London, Mr. John Litchfield, surgeon, with sundry other persons, as honest and judicious. But to proceed:

'Water is as frequently found in the cavity of the abdomen as the thorax.'

It may be so; but if the stomach, guts, &c. in the former, and the lungs in the latter, continue firm and sound, (as is reported they were in Mrs. Stout) I cannot see how it should happen to be found in either. I must confess, I have never seen it, nor was there any thing like it in my late experiment. If the viscera are putrid, I should not wonder at it; but if otherwise, I should be thankful to your microscopic anatomist to shew me how or which way it should enter.

'As soon as the lungs, stomach, &c. are full of water, the body naturally sinks.'

I suppose the &c. includes the thorax and abdomen, as well as the guts; but though the lungs, stomach, and the &c. are full of water, in the sense of fullness here meant, I deny that the body will always sink, as having seen the contrary, and can bring proof of the same.

'It is observable' (you say) 'that human bodies after death admit no water; because as soon as death seizes a man, the sphincter muscles in all parts do naturally contract themselves.'

How it is in human bodies I cannot say,

having made no experiment of that kind; but that it is always so in other animals, I deny; and indeed can see no reason why it should not be admitted for a parallel case: for though you say, the sphincter muscles do contract themselves, yet the epiglot stands open; so that unless the tongue and palate, by their contiguity, or some spumous matter already in the windpipe, intercept its passage; what hinders, in a supine position of the body, but that some small quantity of water may slip within the rimulæ? But whether or no the sphincters do always naturally contract themselves before death, may be disputed; for they sometimes labour at that time with such a paralysis, as occasions a resolution of their nervous fibres, and forces them involuntarily to let go their contents: thus nothing is more common than for dying animals, whether rational or irrational (if soon before they did not exonerate) to let fall their urine and intestinal fæces.

That I might inform myself whether the water would get into a dead body, I caused a dog to be suffocated over the fumes of a spirituous liquor, prepared for distillation, in the time of its fermentation; and though his nose was held some little distance from the surface, yet it stifled him to death in two or three minutes time; after this he was thrown into the water, and sunk presently to the bottom, where he lay several hours. Being carefully taken out, I opened his throat, and found the epiglot (as is always usual) raised from the windpipe, which inclining downwards, there was discharged about three spoonsfull of fair water.

The immediate floating of human bodies, thrown dead into the water, I believe to be very uncertain: and whoever goes about to establish it for an infallible hypothesis, I must needs think very rash, if not guilty of a downright folly; for, though your seamen should tell me a thousand idle stories, I know there are so many causes that may alter the case, that it would be very ridiculous to credit so bold an assertion. I cannot say, I have as yet tried the experiment on a human body, but of those other animals (both alive and dead when thrown into the water) which I have made use of, there was but one which floated, and that I thought most likely to be found at the bottom, as having received most water into the lungs and stomach. If the dead body of an ascetical person should not sink, it might seem strange: on the other hand, if that of a purely tympanical should not float, it would be equally a wonder.

‘If the person died in the very act of inspiration, the lungs,’ (you say) ‘will be full of air,’ &c.

Here, Sir, you must give me leave to think you very much out of the way; for unless in the case of some very sudden and violent death, I am apt to believe all persons finish their lives in the act of expiration; and even in the most sudden, setting aside that of strangling by a ligature, where the air is forcibly included, and its passage from the windpipe intercepted, I

make it a question, whether the last motion of the lungs is not that of its systole or contraction: For although to outward appearance, a man or other creature may be thought to die inspiring, and seem perfectly devoid of sense and motion; yet by laying any polished or diaphanous body to the mouth and nostrils, there is oftentimes a damp contracted on the same; which is nothing but the air insensibly proceeding out of the lungs, and condensed on the surface of the said body.

It is this general opinion that hath given rise to that very common expression, when he would signify the death of a friend, by saying, He is expired, or hath breathed out his last. But admit the assertion good, of dying in the act of inspiration, it will not follow that any dying person can take a tenth part of the air he did in perfect health; and so consequently cannot fill his lungs with air: for, not to instance in asthmatic persons, who at all times take but little air, by reason of the obstructions of the bronchia; and are therefore forced upon quick breathing; it is very rational to believe, that immediately before death the constrictive fibres are much weakened, the blood begins to stagnize in all parts, and being carried by the arteria venosa into the lungs faster than thrown off by the vena arteriosa into the left ventricle of the heart, a great part of the pulmonary cells are so stuffed that they can admit but little air: so that the quantity of what we take in perfect health, and that which we receive dying, is vastly disproportionate.

By filling the thorax with the same air forced into the windpipe, unless you mean filling the lungs in the thorax, it seems of kin to the jargon of filling the thorax with water out of the lungs. For my part, I have several times, through a tube, blowed with as great force as I could into the lobes of the lungs, and caused at the same time a lighted candle to be held nigh their extremities, and round about them; I never could perceive the least motion of the flame, whereby I might conjecture the air had any vent: so that I must think it impossible that either air or water, whilst their texture continues firm, can insinuate itself into the cavity of the thorax; till you can bring me some of the diligent Wallæus’s gentlemen, that have pores in the investing membrane of their lungs as big as the longer sort of peas.

I think it very likely, that a dead body will be more buoyant in salt than in fresh water: but your experiment I take to be inconclusive; for unless you had said that a ship will sink some inches lower in a sea of fresh water than in one of salt, your adversary may object, that the reason of the lower sinking in the Thames, may perhaps be as much owing to the want of depth, as salt.

The discordance of the physicians is best perceived by reading over the trial: some part of the disagreement, as I remember, did consist in this, that whereas on the king’s part, it was affirmed, the lungs of Mrs. Stout were firm and sound, and not the least appearance

of water in the thorax; for the prisoner, Mr. Cowper, it was replied, that if the investing membrane of the lungs was sound, it was ridiculous to expect water in the chest, their enclosure.

Again; for the king, it was thought impossible that any person thrown alive into the water, should be drowned without swallowing or taking in a great quantity of the same into the stomach, and other cavities; whereas, for the prisoner, it was thought very possible two or three ounces might be sufficient to drown any submersed person. And this leads me to a passage in the last cited page; where I find you much concerned, that Mr. Cowper's physicians should strenuously urge, that so small a quantity of water was sufficient for this purpose: which you say they grounded on a private experiment on a dog half-hanged, you being apt to think that there was artifice in the case; and indeed so should I, if I were sure they had half-hanged him: but if you were told so in your sleep, it may happen to be false; or if not, I think you are but little obliged to any person, who was so officious as to tell you an untruth. However, that you may not be told of any artifice, made use of in my experiments, I shall refer you to the aforesaid Mr. Serjeant: he is a gentleman very curious in these enquiries, a man of unquestionable probity, and very well known in our city of London.

In his presence with divers others, I caused a dog, who had been kept fasting almost twenty four hours, to be plunged under water, without suffering him to rise: When he had been dead some time, I took him with his head erected, that we might not lose a drop of water he had taken in. Having made a ligature on the gula, I turned down the larynx, and with a moderate pressure there was discharged of water, mixed with a spume or froth, about four large spoonfuls.

After this I came to the stomach, which I perceived to be very lank and flaccid; when cutting into it, there was not a drop of water to be found, nor indeed the least remains of the chylous juice, which had been before carried off through his long fasting; so that the wrinkles of the inward membrane were very conspicuous.

Soon after, I drowned another before the same company, and do assure you, have all imaginable reason to persuade myself, that all the water he had received was let into the lungs, which did not exceed two ounces and an half: But in this latter (having, unknown to us, been fed a little before) the stomach was half full of indigested aliments; yet no appearance of water, which in drowning we could suppose he had gulped down.

I come now to your pleasantry with Dr. Sloane, who it seems was so unhappy as to tell the judge, That cases of that kind were very uncommon; and lest some ignorant person should be to seek for the meaning of the words, here is a parenthesis clapped in, to tell us, that

by cases of this kind is meant ' (for Mrs. Stout to be drowned without any water in her)'

I thank you, Sir, for your information; till now I did not think the doctor's words were so mysterious, but harmlessly gave them quite a different construction, which before you were pleased to be so witty with them, I thought very natural; and having since asked others, they tell me the doctor means the cases of drowned bodies remarked upon, especially when they have been laid six weeks under ground, and afterwards inspected to find water. Now, Sir, if, since the creation of man or woman either, you have heard of such a case before, or if, in the multiplicity of your practice, you have met with any thing like it, I think it is great injustice that you have so long concealed it.

I would gladly know precisely what you mean by drowning. You think that no person can properly be said to be drowned, who hath not swallowed (I should rather like received or let in; because swallowing, as I have already told you, is proper to the gullet) above two or three ounces of water: And, I think, that if under water those two or three ounces do effect his destruction, he is as truly said to be drowned as if he had taken in two or three gallons.

If respiration could by any contrivance be secured to a person under water, he would then be in no danger of drowning. Again; set him up to the chin, and, if it were possible, let him swallow a tun; though it may be otherwise mischievous, it will not drown him; For if, as may be inferred from your opinion, drowning must be measured by a great quantity of liquor swallowed into the stomach, we have abundance of those drowned persons, some of them top full, daily reeling about our streets in London, and I believe you have some few of them in your town of Hertford: Hitherto we have called them drunken persons; and you will find it a very difficult matter to persuade them that they are properly or truly drowned.

Since then it is not the greater quantity swallowed into the stomach, but the lesser taken into the lungs, that kills the creature; and since there is no such thing at all as drowning, but by that smaller quantity entering the said part; I reckon that if a man dies under water, without the distinction of more or less water taken in, he is as much and as really drowned as any thing can be. I know the word is somewhat ambiguous, and custom has applied it differently; for if a person upon land, by liquor accidentally rushing on the lungs, or, as it is called, going the wrong way, receives his death; this I say is named suffocation: But if the same thing betides him under water, we usually call it drowning; though the latter is as much suffocated as the former. But I have already been too long on this matter, and shall therefore proceed.

I hope by this time you are no great stranger to the meaning of that general question you take notice of, about water in the thorax; if

being sensible of the blunder, they had ingenuously quitted it, I believe it had been much better; but whether or no their persisting in it has been any advantage to them, the learned world must judge.

I cannot think the investing membrane of the lungs so easily torn in coughing; if it should, there may an ulcer of the lungs ensue; for the solution would not presently, if at all, be re-united. But what of this, or what would you infer? I cannot persuade myself there is any coughing under water that should break their continuity.

I find the doctor is not yet got out of your clutches: He brings us, poor gentleman, so many If's and And's, that his sentences happen to prove unintelligible; for where he tells us, that if there was a great fermentation, a great deal of the water would rise up in vapours and steams, and go off that way; we are at a loss, it seemeth, what way he means.

'I cannot imagine' (say you) 'by that way' 'what way he means.'

I know not what you may imagine; yet I cannot think you altogether so dull as you pretend: But others do imagine, that by the way of steams and vapours, he means the way of steams and vapours; or, if it will be more easy to your imagination, under the form, after the manner, or by the way of evaporation. Through what passages these vapours were to make their way, was another question; which, if you were to ask him, he would perhaps tell you, through the pores of the body. But it seems, to serve a turn, all outlets must be barred and bolted; the sphincters must be locked up, and all the coverings of the body grow so dense and compact, that not one poor corpuscle shall gain its liberty: So that although some steams cannot extricate themselves from putrid flesh, yet others will get through plaistered and brick walls; nay, the very stones themselves are not a fence against their penetration. But if a certain person, present at the dissection, does not retract, I was told there was a moisture somewhat like these steams on the burial-clothes of Mrs. Stout; in others I have been informed it has been frequently observed: But rather than this putrefactive moisture, or sort of dew, which has been seen upon the shrouds of the dead, should be thought to arise from the body; I suppose you would choose to account for it, from the subterraneous damps, working through the coffin, and so settling on the corpse.

I make no doubt, but that dead flesh, whether in or out of water, will quickly grow putrid; but which of them will be so soonest, I cannot be positive; though I am rather inclining to Dr. Garth's opinion, and to think that water will rather retard than hasten putrefaction: In a little time I shall be better able to give satisfaction to them who require it.

You must excuse me, if I do not come up to your belief, that there was a *lapsus linguæ* in the doctor's distinction of accident and design; as believing it founded both on reason and experience: But if you will allow them as much

difference as may be found in your witty simile, between the person who putteth the halter about his own neck, and one (as you express it) that the hangman forceth it on; I know not whether they will desire any more.

The animals I drowned had all of them much froth come from their mouth and nostrils; and after having taken out of one of them the lungs and windpipe, and laid them on the table, I observed this spumous matter plentifully to rise up, and to run over the epiglottis; insomuch that it seemed likely the lobes might be quickly emptied of their water by this way of purgation. I cannot say this froth is peculiar to drowned persons; for though perhaps the lungs may not furnish the matter, yet to persons dying otherwise, there very often happens so quick a ferment in the stomach, that the contents thereof are frequently discharged by the gullet, under this appearance. I know it is positively asserted by one of the physicians, that if Mrs. Stout had not been drowned, there had been none of this purgation: I suppose he means from the windpipe; and then I am inclined to the same opinion.

Mr. Herriot must be answerable for his own contradiction; I am so far from defending him, that if he or any one else should tell me it was so general a rule as did admit of no exception, I should give little heed to them, since I find it very uncertain.

Having now, as you suppose, cleared the way, and knocked down all before you; the next thing is your account of her death: But if I am not much deceived, the entrance to it is, either through your unfitness for the task, or the weakness of your intellect, ushered in with a very great mistake.

'If this gentlewoman' (say you) 'was not drowned, as the doctors and surgeons for the prisoners seem to insinuate.'——

How! Did the doctors for the prisoners insinuate that she was not drowned? I profess, I thought they had all taken it for granted that she was drowned. Dr. Crell, I think, in particular, was a physician for the prisoners; and he expressly tells the judge, that he is not to descant upon the matter of fact, whether she drowned herself; yet, saith he, my firm opinion is, that she was drowned.

Now if to be positive, or firmly to believe she was drowned, be the same thing as insinuating she was not drowned, I see not how any man can rightly apprehend another's meaning, but by the rule of contraries. I confess you have already told us of the weakness of your intellect; but how weak soever that may be, I must needs think your memory is very treacherous. Now as to the manner of Mrs. Stout's death.

First then we are to understand, 'she was knocked down with a blow upon her left ear:' Secondly, 'after she was down, she was throttled with the gripe of a strong hand:' And, Thirdly, 'that the person who throttled her might gripe the stronger, he rested his arm upon her breast.'

On my word, Sir, you have made it out extremely well; I find it is a rare thing to have a quick invention: And I must tell you, for your encouragement, it is a question whether the best mathematician in our city of London could have done it more exactly. It was well your fruitful genius was consulted to untie this knot, otherwise we might have met with much difficulty, and perhaps had never been able to have solved so many perplexing phenomena with so much perspicuity.

I must confess, it was very unlucky for Mr. Cowper, these settlings happened so pat for your learned comments: But had they been elsewhere, I fear they would not have escaped your penetrating judgment. Thus upon the belly they might have been made by kneeling to keep her down; upon her back, by falling on the said part against the ground: Her thighs might happen to be trampled on in the scuffle; and nothing more likely, than that somebody should lie upon her legs, for fear she should rise again before they had dispatched her. Thus, right or wrong, rather than it should be thought she was accessory to her own death, we must find out the best means we can, on which to ground a persuasion than it happened otherwise, that then of necessity there must be violence in the case.

We come now to the reasons, why you cannot believe she did destroy herself: Which I shall briefly speak to, as they lie in order; and, with you, submit myself to better judgments.

The first is, 'because she was found without her gown and nightrail; which' (that we may have a salve for every sore) 'were very probably torn in the scuffle.'

As to this, I must think it rational to suppose, that she herself might take them off, to promote (as she might imagine) the speedy sinking, or prevent the discovery of her body, by their spreading on the surface of the water; nor do I see any great difficulty in the thought, that a Norwich stuff may be rotted under water in as little time as the gown was of which we are speaking. If the nightrail be never found, I hope it does not follow that she was murdered: I should rather think, if the gown was brought and thrown in afterwards, so might the nightrail too; which would have been as easily rotted elsewhere as the gown, and with the same trouble both might have been cast into the water. I cannot suppose, admitting it had been in the river from the time of her drowning, that it would have been always in one place; but rather carried by the stream under water, sometimes to one place, sometimes to another; sometimes lodged, and sometimes at liberty; as we find other trumpery will be under a current; So that, supposing the miller had very diligently cleared that very stake but half an hour before, what hinders the possibility but that the next half hour the gown, either by itself, or together with other trash, might be carried thither by the stream and lodged?

Secondly, 'Because she was found floating;

of which you make no doubt, because it was sworn by several witnesses.'

I have already taken notice, that from this there can be nothing certainly inferred: Dead bodies thrown into water, I am satisfied, will often sink; and drowned bodies sometimes will not: But as to the case before us, it is plain that some of those who viewed the body gave a different relation from some others. Thus some of them said she did float, though it was under water: whilst others, who should know best, being the parish-officers, and employed by the coroner to take her out, depose, that the body lay half a foot under water, and that, for any thing they could perceive, her feet might touch the bottom; and farther, that when she was heaved up, there were several sticks and flags on which she rested: But without all this, Sir, I think it very natural for a dead body, which is always buoyant in a current four or five foot deep, by the bare force of the stream, when it meets with a slanting opposition, to be raised from the bottom.

Thirdly, 'Because her belly was not at all swollen.'

Nor was it at all necessary, though drowned, that it should.

Fourthly, 'Because no water came out of her when lifted out of the water, nor purged from her afterwards.'

This, with submission, is a mistake: For though there is no quantity of water taken notice of to issue from her, yet it is agreed on both sides, that she did purge at the mouth and nostrils; some say more, others less. The two principal, who took her out, and stood by for some time afterwards, do affirm, that the froth came out after such a manner as to run down the sides of the face, and that as it was wiped off, fresh froth came presently on again; which Dr. Crell does assert could not have happened, had she been strangled, or otherwise killed, before. Whether this be so or not, I believe it very possible, where little water is received (and very little will suffice to drown a person), if there be so great a purgation at the mouth and nostrils, most, if not all the water may be turned into a spumous matter, at least so much, that there will be no absolute necessity for water to run out upon the motion of the body afterwards.

Fifthly, 'Because her inwards were not putrefied.'

After six weeks time I should indeed have expected putrefaction from any person under ground, that had not been embalmed, without regard to water taken into the body; which, whether or no it hasten putrefaction, is very disputable: What it may do under the earth, I know not; But I much question, whether dead flesh, covered over with water, will grow putrid so soon as that which is exposed to the immediate contact of the air. Of this I shall be able to say more in a little time, and for the present leave it as a problem undecided.

Sixthly, 'From the several distinct settlings of blood, unusual in drowned persons.'

Upon the trial, it is affirmed by Mr. Camlin, that both Mr. Dimsdale and himself having viewed the body, did give it in as their opinion to the coroner, that there were no other settlements or stagnations of the blood, than what may usually happen to drowned bodies: Mr. Camlin instances in the child for one; but whether that were so or not, I have perceived it myself on the superficies of a drowned body; nor do I see why it may not be found on the neck and breast, as soon as on other parts.

Seventhly, 'From the continual disturbances Mrs. Gurrey was under, both in mind and body; nevertheless she would not discover it, till she was almost frightened out of her senses, by the voice, as she thought, of Mrs. Stout, which uttered these words, Divulge, conceal nothing.'

If Mrs. Gurrey was disturbed in mind, it would seem strange that she should not be disturbed in body; the latter being, as I suppose, seldom or never easy whilst the former is under trouble or disquiet. But whether Mrs. Gurrey's mighty disturbance had other rise than a whim of the brain, founded upon a strong prepossession of fancy, may very reasonably be questioned: For my part, I look on it so natural for a doating, ignorant old woman to be terrified with the disorder of her own imagination, before hand perverted by too deep reflection, though the same has nothing but a chimæra to support it, that I am never startled when I hear of their pretences to voices and revelations. These you know are not ingrossed, though more peculiar to a distinct sect. So that if once such persons happen to be strongly opinioned that any thing may be so, they need but fall asleep, for a confirmation that it is so.

Had you not already acquainted us with the weakness of your intellect, and your incapacity, &c. I should have been startled that a man of learning and solid judgment should build on the idle fancies of a dreaming old woman. I think, how greatly soever she might be disturbed before in mind or body, she has now more reason to be concerned, that by a fond belief of a revelation, those men should be brought into danger of their lives, whom we have a great deal of reason to believe were as innocent as herself, and little or none to think they should be guilty of such a horrid fact as they were accused of.

Eighthly, 'From what is sworn by the Gurreys against their lodgers at the trial.'

Could I believe all to be true that the Gurreys swore, I should make no question of the likelihood of these men's guilt: But that they did stretch in some things, is very easy to believe, by some particulars at the trial; and by their behaviour before, at, and after the same, we have great inducements to persuade us that they did so in others. Thus it is proved that Gurrey himself went out of the court in a boasting way, to tell some of his acquaintance, that he had done Cowper's business, or to that effect. And at another time he said, that if

Mr. Cowper had visited old Mrs. Stout, none of this trouble had befallen him. Another thing discovers the malice of the prosecution, in that though themselves suspected Mrs. Stout's maid, yet this was not to be taken notice of, for fear of taking off her evidence: And if his wife could so readily turn the fifty shillings Mr. Marson had that day received in Southwark, for business done in the Borough court, into fifty pounds, supposed to be paid him for murdering Mrs. Sarah Stout at Hertford; she might by the same kind of improvement, or by a mistake, understand all the rest.

It seems indeed to me the most notorious absurdity that can be imagined, that had these men really come down on such a design, they should go directly to tell their landlady, Mrs. Stout's business was done; they had spoiled her courting days; and that one of them had received fifty pounds for doing her business.

In matters of this nature, where we can have nothing but idle stories and an old wife's dream, to raise the suspicion, I think it highly behoves us, before we pass our censure, to pay a just regard to the character and reputation of the person. Thus, indeed, though it will be impossible for Mr. Cowper to clear himself in the opinion of every one who knows nothing of him, yet I am ready to think, there are few who know him (unless some particular persons, that upon any terms would willingly ruin the interest of his family in that county) will be brought to a persuasion, he could so barbarously imbrue his hands in blood, though instead of the pretended one thousand pounds he might have gained ten: and as to the other persons it is visible they live in credit and reputation, their characters well attested, and not one of them in the least likely to make an assassin for the lucre of five hundred pounds.

Ninthly, From the sentiments of the Grand Jury.

I must needs think, that on so formal an indictment drawn up against these gentlemen, such strenuous allegations of their being guilty, so foul a crime charged on them, such a circumstance attending as that of Mr. Cowper's being last in her company, and the others of his acquaintance; especially when Mrs. Gurrey's tale had been set out with abundance of aggravation; I see not how for public satisfaction as well as private the grand jury could do less than find the bill. But as to the petty jury, as you call them, I wish you had named those several who did believe her murdered after the trial: I am assured that some of them have openly declared, they thought the gentlemen we speak of had been so much abused, that the prosecutor's estate, if it were ten times larger than it is, was little enough to make them reparation.

As to the letters produced in court, your thoughts it seems are, that they are not of a legitimate, but a spurious issue: and why?

1. Because the stile doth no ways suit her character.

If the author of the Hertford Letter had no

extraordinary, or perhaps no knowledge at all of her, but takes every thing on trust from her friends and relations; he ought not to be so positive, that the stile does no way suit her character. If by stile, as the word generally is understood, you mean the order of her thoughts, or the manner of her expression, you must own she might have sense enough to be the author of those compositions. But I find you make so bold with the use of words, and take them so differently from other learned men, that in some places it occasions a little difficulty to understand you. If by stile then, as I imagine, you would signify the subject of the discourse, or the matter of the composure; I have more reason to think, than I will at present make public, that these letters do well enough suit her character with some that knew her: and I must tell you, that I am ready to believe, had her mother been asked the question some months before she died, when she had some words with her one evening in the garden, or about the time when Theophilus was sent for to reprove her, about her falling from the light; I say, at these times I cannot think her mother would have denied but that these letters might have been suitable to her character. However, she is now out of a capacity to defend herself; and upon that account it might seem ill with contempt to tread upon her ashes: I shall therefore say no more, but that I would not have you too busy with the character, lest you should happen to make good an old proverb.

2. 'Because the mother doth affirm, the letters shewn in court, were of a smaller character than ever she observed her daughter to write; neither doth her brother think them to be genuine.'

Would it not have been very odd, if the mother and brother, who came to secure the reputation of so near a relation (though never so well satisfied that it was her hand), should have said otherwise than they did? For my part, I take both their answers to be so unsatisfactory, not to say foolish, that nothing but the relation they were speaking for can plead their excuse.

The mother being asked by the judge whether she thought it was her daughter's hand? replies only, 'How should I know? I know she was no such person; her hand may be counterfeited.' Being questioned again, what she would say to it if it had been written in a more sober stile? she answers, 'I shall not say it to be her hand, unless I had seen her write it.'

The brother being interrogated on the same question, says, 'It is like my sister's hand:' But being asked if he did believe it was her hand? He replies, 'No.' And why? 'Because it does not suit her character.' Now let the world judge, if this contains any more than if the mother had said, because she was my daughter, or the brother, because she was my sister, we will not believe it, lest the world should look on her to have been a lewd woman.

3. 'Because there was no mention made of

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'these letters, till the common report of her being with child (which had been industriously spread abroad by several, but by none more zealously than by a nominal Quaker, her former admirer) was proved to be false, &c.'

If these letters were taken notice of so soon as the report of her being with child, it was very early; for that morning she was taken out of the water, it was whispered in the country, and at night I heard from some in London, that they believed it very likely for her to be with child; and that to prevent the ensuing infamy she had made herself away. This was no more than what is generally suspected, when a single gentlewoman is by any means accessory to her own death. So that without dispute, if the nominal Quaker had not been concerned in it, the report would have spread without him. But I judge this epithet is bestowed on him, not so much for that he thought and reported her to be with child, which hundreds did besides him at that time, but because he was so very officious to prove her hand by his receipt.

This may indeed be thought a mean-spirited action from him, as he had been her former admirer: and I think if her hand-writing could have been proved without his appearance, he should have stirred last. However, I would not have you so very angry at him, since I do not find that he got any thing more by it, than to have the judge informed that he was one of their own sect. And if for this only he must be a nominal Quaker, I could tell you of some that have had great parts to act in this prosecution, that are as far from being real Quakers (if to be so is a perfection) as Mr. B——.

4. 'Because Mr. Marson and Mr. Archer on the trial swear, That Mr. Cowper deposed, that Mrs. Stout was a modest person, &c.'

When Mr. Cowper was before the coroner, he dreamed not of the approaching storm that was coming upon him: and I think it was not reasonable that he should concern himself at all with her character; there were not wanting those who were ready enough to think he had been too familiar with her, and that on some resentment taken at his carriage to her she had destroyed herself: so that if it were only to wipe off this suspicion, his account of her was no other than what any man under his circumstances might have given. I cannot tell what you might have thought of him, but had he told the coroner he knew she was melancholy; that it was upon his account, for that having formerly been very civil to her, he grew of late sick of her acquaintance; and that because in his last visit he had betrayed some little indifference, and notwithstanding her importunity, would not stay to lie at her house; she had therefore in a passion thrown herself into the river; if Mr. Cowper, I say, had given the coroner such a relation as this, I should have thought him a person of very little understanding.

As to her melancholy, I believe it was such as did make her head and her heart ache also;

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and that it was more than a common hemicrane, whatever you (who had perhaps no great intimacy with her) may imagine, or her mother and brother give out, I am satisfied there wants no proof of such a melancholy as was next to distraction. There is a certain gentlewoman now in being, who cannot deny that she had heard Mrs. Stout wish herself dead, saying, she was the miserablest creature living; and that she hoped, if it were possible, to die after such a manner that the world might know nothing of the matter, nor ever so much as mention there had been such a person living. But indeed her melancholy is too well attested, to be so much as doubted of by any disinterested person; and therefore as you are apt to think there are many friends and relations bigotted to a party that will not boggle to tell a lye to save a friend or near relation from — I suppose you mean the gallows; so, on the other hand, I believe there may be those in the world who would not scruple to tell an untruth, which is of near kin to a lye, and if it were in their power, would bring a man to the said place, rather than it should be thought a near friend and relation was in love with a married man.

The gentlewoman you take notice of, so much importuned by the deceased to stay with her that night, if she has not altered her story, will acknowledge that Mrs. Stout did tell her she was very much indisposed; and farther, saith she, you see I am very melancholy, so that it will be the greater unkindness if you leave me at this time alone.

You say there are a thousand pounds wanting of her original fortune: I wish you had told us whether you set aside the charge of the prosecution; if you include this in the want, one half might be expended that way; for I suppose there was nothing spared to carry it on.

I have heard of people's wanting that which they never had; and I am credibly informed this is the case in debate. Some of your countrymen, that have been many years acquainted in the family, do tell me there is as much found as ever she could be thought worth; but if you would be credited, you must give better proof than yours, or her relations say so. However, I think this to be very little material; she might, though in some things be very frugal, in others be as extravagant; but which way soever it is gone, it seems nothing less can repay it than the lives of persons who had never seen her.

Though the Quakers' affirmation will not be taken in criminal cases (it was well, I think, that it was not admitted in this particular one), yet they have now the privilege to publish their reasons, why they suspected Mr. Cowper to be privy to the receipt of any of her money, more than that which the writings found in her custody, and his own acknowledgment do evince. I am sure he has bid them a fair defiance, having openly challenged the worst of his adversaries to discover what they can of this nature.

If they think fit to draw up any thing of this kind, I should advise them to make use of some abler clerk than the author of the Hertford Letter; for if he has the management, it is a great chance if we are not entertained with one of Mrs. Gurrey's dreams, or some such ridiculous innuendo.

In this place we are once more acquainted with the use of the epiglottis, which you will have continually to close on the mouth of the aspera arteria, unless in expiration. On the contrary, I have told you (and will submit myself to any anatomist in Europe), that it is for the most part open, and never exactly closes but upon deglutition; so that whatever you build upon that notion must fall to the ground.

I think it is but reasonable, that Mr. baron Hatsell return his thanks to you, for the compliment you put upon him in the close of your letter. I am ready to apprehend, that there is no trial suffered to be printed, till after the examination of the judge, and his permission first obtained; and therefore must needs think omissions and alterations, especially of great moment, as these should be, which, you insinuate, is a very great injustice to the world, an injury to truth, and too sinister an action for a judge to be guilty of. But let who will stand in your way, I see you will have a fling at them; and rather than be thought to have nothing at all to say, will be telling us of that, which, if possible, comes to less.

Thus, to heighten the suspicion of guilt, we are entertained with a tale of a tub, about Mr. Stephens's being ill; or as you express it, taken with a strange sort of fit. I hope, Sir, it is not always an argument of a man's guilt, that he cannot carry himself unconcernedly, when he sees his life hanging by a hair, or depending on the delivery of a word or two from the foreman of a jury; it is time enough to censure when we ourselves have undergone the trial.

Your story of the wine-cooper I have never heard of; and really, I am so desperate jealous of your relations, that I dare not credit them till they come with more authority: when I have better informed myself, I shall be better able to give you my opinion.

Your prayer, methinks, with which you conclude, had better have been left out; since, though it wants the length of the Pharisee's, whoever takes notice of the spirit that runs through the whole letter, will need no argument is to persuade him that it proceeds from an hypocrite. There is little appearance that it is your desire the innocent may be cleared from aspersions cast undeservedly on them, when for more than six pages, you are venting the utmost of your malice, and by the basest means imaginable, would insinuate those gentlemen are guilty, who, for any thing you know of the matter, may be as innocent as yourself.

Let me tell you, Sir, I think it a very bold attempt, and such as it is great pity does not come under the lash of the law. When a gentleman has taken his trial, and it does appear

upon that trial, there is no proof of the fact he is charged with, nor indeed any thing on which to ground so much as a suspicion, unless that of his being unfortunately the last person in her company: in a word, when faction and personal prejudice appear the only motives of the prosecution, whoever brings the business afresh on the stage, does only expose the restlessness of his own mind, and plainly evidence that he is neither a true gentleman, nor a good Christian.

I have looked over your postscript; and, as in many places of the letter, perceive through the weakness of your intellect, or your unfitness for the controversy, you have made good your prognostic of betraying a little ignorance.

First of all you tell your friend, you make no doubt but he has heard, that the surgeons that opened Mrs. Stout's body, deposed she was a virgin. Now if he had heard as much before, as you make no doubt he had, I don't see to what purpose, or what news it could be to inform him of that he had heard before; but being fearful it had not reached every body's ear, I make no doubt, this intelligence is to inform the world. But doubt you as you please, had I found the surgeons deposed as you report, I should be ready to doubt whether they were wise men or fools.

I find nothing like it in the affidavit, of which, you say, you have delivered us a true copy.

They tell us, indeed, 'They found the uterus perfectly free and empty, and of the natural figure and magnitude usually in virgins;' but surely this will not amount to a deposition, that she was a virgin: all that can be hence inferred, is only that she had not conceived; and if it be possible for a woman in coitu to miss of conception; if missing of a conception, the womb may, notwithstanding the carnal contact, retain the natural form and figure usually in virgins; why then, I say all this implies no more than a bare probability that she had not known a man.

I must confess, till now, I never heard that the figure or magnitude of the womb were numbered amongst the indubitable marks of virginity: and as to the state of the vagina, the myrtiform caruncles, and hymen, which mother Peppercorn herself could only guess at, there is no notice at all taken; if there had indeed, it would only have furnished matter of derision, the body having been so long interred. So that you see, for any thing pretended to in the affidavit, or elsewhere, she might not be a virgin; though charity should oblige us to hope at least that she was.

POSTSCRIPT.

Since this Reply went into the press, I have been informed by a gentleman of unquestionable credit, that the story of the wine-cooper, at the close of the Hertford Letter, took its rise only from what follows: There was, it seems, a person going down to the assizes, who had the misfortune to be thrown from his horse,

and was taken up as dead: being carried to his lodging, he began to rave and talk idly; which was no more than the effect of a delirium, arising from the concussion of his brain, which might have made any man light-headed as well as he; and which nothing but one as mad could have improved after such a manner as the letter-writer has done. By this the public may be informed of the disingenuity, not to say down-right villainy, of some people in the world; who, missing their design of taking away a man's life, seek all possible ways of murdering his reputation.

SOME OBSERVATIONS

ON THE TRIAL OF SPENCER COWPER, J. MARSON, E. STEPHENS, W. ROGERS, THAT WERE TRIED AT HERTFORD, ABOUT THE MURDER OF SARAH STOUT; TOGETHER WITH OTHER THINGS RELATING THEREUNTO.

To lead, and to give some light into this matter, it may be necessary to give some account here, how, and upon what occasion the acquaintance of Spencer Cowper and Sarah Stout began.—The ground and rise thereof took its original from her father, who at all elections promoted the interest of the Cowpers, to the utmost of his power; through which a great intimacy was created between the families of the Cowpers and the Stouts; which did not expire with the death of her father; for her brother, by the father's side, continued his respects to that family, and spared no pains to espouse and carry on their interest, in order to their being chose parliament men for that town. These obligations engaged the two families to a frequent conversation; insomuch, that when they were in the country, some or other of them were often together, as well the young women as the men; as appeared by what his brother's wife said at his trial, 'That she was but six days at Hertford the summer before, and that she saw her' (to wit, S. Stout) 'every day.' And great pretensions of love, and proffers of kindness, were expressed by the Cowpers in general to the Stouts; and by this man, Spencer Cowper, and his wife, in particular, to the deceased young woman: and thus it continued, in appearance, till the day that she was forced off the stage of this world.

When her father died, he left her sole executrix, and gave her most part of his personal estate: and a considerable part of it being in the brewer's hands, and in malt, which she sold afterwards, she was often advising with one or other, how to dispose of this money, so as to have good securities for it. About a year before her death, she went to London about those occasions, and lodged at a goldsmith's house; as soon as the Cowpers' wives heard where she was, they made her a visit, both Spencer's and his brother's, and invited her to their houses. Whilst she lodged at this goldsmith's house, he laid out several hundred pounds for her in malt tickets, and other securities of the government;

but she being not willing to lay out much that way, but rather on some mortgage of land, she went to a lawyer, with whom she was acquainted, to see if he could dispose of some for her; he told her he could help her to a mortgage for 500*l.* but they would give but five in the hundred: so she takes it into consideration; but afterwards, she being at Mr. Spencer Cowper's, and he falling into some discourse with her about her affairs, and understanding she had a considerable sum of money to put out, he proffered to do her all the kindness that lay in his power; and would help her to a mortgage of land three times the value of the money lent on it, at six in the hundred; and would see that the title should be good, and be as careful in it, as if it were his own concerns; and if she wanted counsel at any time, either to put out, or to recover money that was owing her, or any thing else, for which she had occasion, he would give it her gratis, which from another must cost her some guineas: so she accepted of his proffer, and told him, she would depend on his advice, not questioning to have good security for her money. When she came home to her lodging, she told the goldsmith where she lodged, that now Mr. Spencer Cowper had promised to help her to securities, and he was to dispose of her money.

Soon after this, she went home to Hertford, and told her mother the same, and asked her if she had any money to put out; if she had, it might go amongst her's, and her mother should have no trouble with it; for she would pay her the interest as it became due: her mother then asked her, if she could so far confide in him, as to receive her money, to pay it, and to make the writings, and to look after the title, and all without the inspection of any body else? she said, Yes, she believed that he was a very honest man, and she thought she might trust him with more than she had to put out; and he being a man of repute, it was below him to wrong her. Then her mother, thinking the same, gave her 150*l.* to put amongst her's, which she hath never heard of since; but it is gone with the rest.

About a month after, Spencer Cowper came to Hertford, and took lodgings for his wife and family, and then brought his wife to give this young woman a visit, and to be further acquainted with her. After this, she seemed to love and like her company so well, that she said, 'She did not desire the company but of few, or none else in the town; and therefore would make no returns of their visits, till the week before she went home to London;' and would come frequently two or three times in a week to visit her: and when her husband was in the country, he sometimes would come with her, and thereby had the opportunity of discoursing her about her affairs.

When she had gathered in near what she intended he should put out, from the brewers and others that were indebted to her, she writ a letter to London to him; and one of her acquaintance coming to visit her, before she had

sealed it up, she bid her read it, which she did; in which letter she writ, viz. 'That she had a thousand pounds to put out, and that several hundreds of it were then ready; and the rest, to make up that sum, would be so in a little time, or so soon as he could dispose of it advantageously for her.'

After this, she several times, in discourse with this woman, hath told her, 'That he was buying an estate for her, in ground-rents, which he had recommended to her for an extraordinary pennyworth; and that it would be sold for a thousand pounds, but he believed it was worth more; and if he could not oblige her with it, he looked upon it to be so great a bargain, that he would buy it for his own use;' and she also told her mother the same.

The next quarter sessions after this, which was the last before that assize, at which time her days were ended, Spencer Cowper came to Hertford, and in the evening he came and enquired for Mrs. Sarah Stout, at her mother's house, where he was not at all expected to lodge, he not having lodged there for several years, viz. not since her father died: and after about an hour's discourse with her, he said, 'He was destitute of a lodging, for his landlord Bates' (where he used to lodge) 'was discomposed, and made a great noise, and he did not like to lodge there.' So she thought she could do no less, in civility, than ask him to lodge at her mother's house, he having then brought her that mortgage deed for 200*l.* about which he made such a long discourse at his trial; which money had been carried publicly to him some time before: at the receiving of which security, she seemed to be very much pleased. But she having told him, that she intended to reserve some part of her portion for her own particular use, in case she lived to marry, which she would put out for that end, she having enough besides; he advised her then to keep it private from all persons, else her end would be frustrated; which, in all likelihood, he thought she had, and that none had known her mind in that particular but himself, he having advised her to privacy.

Indeed S. Cowper doth suggest, in a Case lately presented to some of the members of parliament, (see p. 1189) that his prosecutors had not the impudence to suggest at his trial (though put in mind of it), that what they accused him of was done for the sake of gain. It is true, he did demand a proof, that he had any of the deceased young woman's money in his hands: and it cannot be supposed that he would conceal it, if he knew there was any one alive that could make positive proof of it; for then it would have been in vain to have denied it: but her mother did then attempt to speak what she knew in that particular, and other things too, but was stopped several times, and not suffered to speak, unless she would swear; which he knew well enough, her persuasion would not admit her to do.

The next thing observable is, the same woman, before-mentioned, which read and saw

her letter sent to him, which gave an account what money she intended he should dispose of for her, and that she had several hundred pounds of it then ready: she being with her one day in her chamber, about two weeks before her death, she bid her look in a drawer there, and bring her the money therein; upon perceiving it, 'Am not I very rich?' said she. The other demanding the reason of that question, 'Because,' said she, 'it is all the money that I am now mistress of;' which was only two guineas and a little silver, notwithstanding she had so many hundred pounds in her possession not long before. And about the same time, she being in discourse with another person about her concerns, she said, 'That Spencer Cowper had a great deal of her monies in his hands, and that he was to have more:' and her relations do miss about a thousand pounds; and they know of none she disposed of any other ways, after she writ that letter to him. And when her mother asked him before the lord chief justice Holt, what money he had in his hands of her daughter's? He said 'None;' and also said, 'He thought his reputation would have secured, or carried him above suspicions or examinations of that kind.'

But it may easily be gathered who carried her money away, for a great deal of it was in gold; and that very morning he went away, when he had lodged at her mother's house, he very much importuned her to come to his house at London, and told her how glad his wife would be of her company, and used many arguments to persuade her to it; and at length said, 'He would not go out of the house till she had promised him to come:' but she refused to promise, and said, 'She did not know when she should come to London.' This discourse was in the hearing of one that will evidence it upon oath.

The week before that assize, she received a letter from his wife, which was writ after the usual manner, as she had several not long before, very earnestly inviting her to her house at London, with high expressions of love; and so much the more she desired her company then, because she believed they should not come to lodge at Hertford that summer: and in that letter tells her, 'that they must expect her husband at their house at the assize;' the which she told her mother and others who read the letter. This letter Spencer Cowper confessed to the coroner's inquest, that he ordered his wife to write it for his lodging at her mother's house; but when he was examined by the lord chief justice Holt, he then denied it, and said, 'his wife writ no letter:' but her maid, Sarah Walker, being present, told him, 'His wife did send a letter, and that she herself took it in of the post-man, and gave it to her mistress;' so then he could not deny that there was a letter sent.

And accordingly he came, and sent his horse thither; and being asked, before he rid from the door, whether he would come to dinner? He said, 'He was not certain, but he would

'send word:' but her mother and she staying long, and he not sending, they sent her maid, to see whether he would come or no; who then quickly came, and dined there: and when he went from thence, the young woman, Sarah Stout, going to the door with him, asked, 'If he thought to lodge at their house?' He said, 'Yes, he would come and lodge at their house.' This she said as soon as he was gone, and then bid the maid go get his bed ready: at night, when he came, her mother being in the room with her, he fell into some discourse remote from any thing of her daughter's business; and, after some time, called for pen and ink, to write a letter to his wife, although it was not post-night, nor did any carrier go next day. When he went to write, her mother and she went out of the room, and staid a considerable time; but it growing late, the young woman went in, to see if he had done, and if he would have any supper; and what he desired, he had. Her mother went not in again, because she knew her daughter expected he would give her some account of her money, and have brought her security for it, as he did the sessions before for 200*l.*; and she finding that he would not speak of it before her, would not interrupt them, but gave her daughter time and opportunity to speak to him. What discourse they had, is not known; but sure enough it was very different from, and inconsistent with, what he rendered it to be at his trial; for he had writ a receipt in full for use-money he paid her then, which lay on the table, but was never signed by her, although he pressed her to it several times, and bid her put on her considering-cap, (as he confessed to the coroner's inquest) and asked her, 'If she was lazy?' yet still she refused to sign it; which plainly shewed her dissatisfaction, and that there was more due to her, else she would never have refused it.

Between ten and eleven o'clock, she called her maid to make a fire in his chamber, and to warm his bed, in his hearing; and while the maid was doing it, he went out: her mother hearing the door clap, went into the parlour, to ask her what the reason was of his going out when his bed was a-warming, and, to her surprise, found she was gone too, and never saw her alive afterwards. She admired what the meaning of this should be, knowing that she never used to go out so late; neither could she imagine whither they should be gone; but after some consideration, did think he might tell her, that the securities she expected were to be signed and sealed somewhere in the town; and that he had persuaded her to go out upon that account, and so was in expectation of them quickly. The maid that was warming his bed stayed, expecting him to come up; thinking, when she heard the noise of the door, he was gone to carry his letter somewhere; which, it is thought by some, was his pretence in going out, thereby to draw her to the door, to let him out; for there is no ground to believe she went any farther with him willingly: so they sat up all night, both her mother and the maid, ex-

pecting them every minute, not knowing where to look for her at that time of night; but if they had, would never have gone to the river, where she was found floating the next morning; for there was no manner of circumstance, either in her words or actions, that did give them any cause to think she would drown herself, or that she ever had any thing of that nature in her thoughts.

No sooner was she taken out of the river, but it was spread, by his party, both in city and country, that she was with child, and had drowned herself to avoid the shame. That she was not drowned, is clear unto all who are impartial, and have had a true account of the case, either at the trial, or otherwise; as it plainly appeared by those settlements of blood and bruises about her head and neck, and on one of her arms; and her having no water in her, but was empty and lank, when she was first taken out of the water.

The evidence was very full and plain against them, and the judgments of the doctors stand firm and good, and are not, nor ever can be disproved, by all the evasions and distinctions of voluntary drowning, and drowning by accident; nor by all those little tricks made use of by those on the other side, by drowning, and half drowning of dogs, and other such like experiments, whereby they have only exposed themselves. But when she was taken up again, after she had been buried six weeks, in order to be cleared of that infamous report, which then was given out, for the only reason why she drowned herself (to wit), her being with child; then nothing could be more plain, than that she was not drowned, but came by her death some other way, as the doctors and surgeons did give their opinion upon oath, before the lord chief justice Holt, and at the trial also.

And it is very probable, that these three gentlemen, John Marson, Ellis Stephens, and Wm. Rogers, knew very well how she came by her death, (whose lives Spencer Cowper seemed to be more tender of than of his own) by their discourse that night her death was, about an hour after she was missing; for as soon as they came into their lodgings at John Gurrey's, they could not forbear, but began to ask him several questions about her. Although we do not understand that either of them had any former knowledge of her, yet Marson pretended, that he had made love to her, and that she had cast him off; 'But,' said he, 'a friend of mine is even with her by this time;' then one of the others asked him, 'If the business was done?' 'If it is not,' said he, 'it will be done this night.' 'Yes,' says the other, 'her business is done; Sarah Stout's courting days are over.' What could have been spoke plainer, except they had said, 'She is dead?' This was positively proved against them. Also, the said Marson, when he came into his lodging, was in a great sweat, and called for a fire to dry his feet and shoes, they being wet both without and within; and pretended, that he was just then come from London, it being then between

eleven and twelve o'clock at night; whereas it was proved, that he came into town two or three hours before. And when Marson asked the other two, 'what they had spent that day?' one of them asked, 'what was that to him?' 'He was to have forty or fifty pounds for his share.' The said Marson also pulling out money out of his pocket, swore that he would spend it all next day, for joy the business was done. And whereas they say, in their Case to the parliament, 'They are men in good business at London;' if they are so, it had been well if they had staid in it; for sure enough, they had no good business at Hertford; neither did they pretend to any at all, but said, 'they came only to see fashions,' to the woman where they lodged.

And it is very observable, how highly displeased Spencer Cowper was at her being taken up, and how he earnestly besought the judge, that what the doctors did and said then, might not be allowed, or taken for evidence; alleging, that she ought not to have been taken out of her grave without legal authority, for private inspection of parties, altogether amongst themselves; whereas there ought to have been some on both sides, he says, lest they should have broke her scull, and the gentlemen should have been trepanned; and yet doctor Camlin, sir William Cowper's doctor, was with them all the while, as doctor Coatsworth told the judge, and was sent for, on purpose to take off any such objection; and did set his hand to the certificate, of her clearness of that scandal, with the rest of the doctors: which is as followeth:

'We whose names are here under written, having examined the body of Mrs. Sarah Stout, deceased, do find the uterus perfectly free and empty, and of the natural figure and magnitude, as usually in virgins. We found no water in the stomach, intestines, abdomen, lungs, or cavity of the thorax.

JOHN DIMSDALE, sen.

WILLIAM COATSWORTH.

SAMUEL CAMLIN.

ROBERT DIMSDALE, M.D.

JOHN DIMSDALE, jud.

DANIEL PHILLIPS, M.D.

Hertford, April 28th, 1699. (Copia vera.)

When all mouths were stopped, and put to silence in that matter, and no reason could be given why she should drown herself; then Spencer Cowper was at a loss, and knew not what to pretend, why she should do so; until (to use his own words) some heads were laid together, to contrive that she was in love with him.

In order to this design, those letters were invented, which were produced in court, (for not a word was ever heard of them before she was taken up again) and a witness was provided to prove the receiving of them both; but his friend Marshall, who was his witness, had forgot the year when the first was writ, and said, it was March was twelvemonth; till his

memory was refreshed by the second, which was dated but four days after; and it seems they had forgotten to date that second letter, so as to give it any credit at all. This was that which he calls that importunate letter by which he was invited down to lodge at that gentlewoman's house, which was dated the ninth of March.

Now if her maid Sarah Walker's evidence is observed, which she begins with, 'My lord, on Friday before the last assize, my mistress Stout received a letter from Mr. Cowper's wife, to let her know we must expect Mr. Cowper at the assize; and accordingly we expected him, and provided for his coming.'

This was the same day on which he says he received her letter of invitation that she received his wife's, by which he invited himself down. So that if she had really writ that letter, his wife's must needs be writ and sent the day before her's could come to his hands.

And how those letters should be known to come from Sarah Stout is very unaccountable: for if there had been such a person as Mrs. Jane Ellen at that coffee-house he mentions, (which, upon enquiry, we cannot hear there was), what he had to do to open her letters? and how could he tell that they were for him, and came from Sarah Stout, seeing they were not directed to him, nor either S. Cowper nor S. Stout within them, but only Sir?

To prove these letters to be her hand, he brings his friend Marshall to shew letters which he pretended she writ to him, as false as the other; in one of which there were thanks for his songs. It is very unlikely that she should desire or accept of songs, one who was never heard to sing a song in her life; and from Marshall too, whose courtship she never received: for he himself said at the trial, that upon very little trial she gave him a very fair denial. And Spencer Cowper also said to the coroner's inquest, that Marshall told him, she always gave him the repulse.

This confirms the falseness of that story which he brings to introduce his letters. And although she is gone, and not in a capacity to defend herself; yet the woman who he says walked with them is alive, and doth affirm it is not true; which is as followeth:

He says, It happened one evening that Mrs. Stout, and another, and Mr. Marshall, and he, were walking together; and Mr. Marshall and the other being a little before, she took that opportunity to speak to him, in such terms as he confessed it surprized him, and said, she did not think he had been so dull: he desiring to know wherein his dulness did consist; she asked, if he thought she would marry Marshall? He said, Yes; else she had done ill in what she had done: she said, No; she thought it might serve to divert the censure of the world, and favour her acquaintance with him.

This discourse, if it had been true, would have argued, that she kept Marshall company, and made him believe she would have him: whereas it seems she had never seen him in all her

life but once, and that was but two or three days before; and they were not so much acquainted then, as to speak one to the other: and therefore there could be no ground for such discourses if she had walked alone with Spencer Cowper, which she did not; for the two young women having been taking a walk in the field, as they were coming home they met Spencer Cowper and Marshall; and they both turned, and walked back before, and the two young women together behind him: and she had no private discourse at all with Spencer Cowper; neither had they four any walk together afterwards, in the field or elsewhere.

These letters, which were ushered in by this discourse, he would have it thought that the shewing of them was so tender a point with him, and that he did it with so much reluctancy and compulsion, that nothing else should have forced him to have brought them upon the stage, if he had not those three innocent gentlemen to defend (surely they had greatly obliged him); and he solemnly protested, that if he had stood there singly upon his own life, on that evidence, he would not have done it: when at the same time, and with the same breath, he himself proved it false; for he says, upon the receiving of them, he shewed one to his brother, and both to Marshall, and they both saw it, and read it: that was the last, the Friday before that assize, when neither his own life nor his three gentlemen's were in any danger; for she was then alive. And if there had been such letters of her's, he could not have shewed them to one that in all probability would have exposed or defamed her more than Marshall, a repulsed lover, a kinsman of his wife's, unto whom he endeavoured to betray her; who, upon some slight or disgust she gave him, told Spencer Cowper, that if he was his friend, he would shoot her. This she told both her own and her mother's maid: and also, as it is observed in the Hertford Letter, the printers, who writ the trial in short-hand, not having taken those letters, were favoured with the copies of them, to be exposed to the world.

Then there was an account given to the judge, in the court, of his going to Deptford, and was said to be told his father at dinner in her hearing, about a year and a half before; which put her into a swoon, if any body will believe it: and the use that was made of this was, to render her as bad as possible, and make the world believe how deeply she was in love with him. But it is matter of admiration to most that hear it, that he did not tell his wife, as well as his father and brother, how fond she was of him: if it had been true, surely that would have diverted her from frequenting her company so often as she did all that summer following, as is before mentioned, which all the neighbourhood can witness. And if she was such a person as they now render her, why did they seek and desire her company, as they did? For she has several times said, she never sought theirs.

And also, it is as much to be wondered at,

that so chaste a man as he would appear to be, and one in so flourishing a condition, as he says he is, should order his wife to write, or have any thoughts of lodging at a house, for saving the charge of a guinea (for so he said at his trial, that his good husbandry to save a guinea had brought all that mischief upon him), where so lewd a woman as he would have her thought to be did dwell, if he had been really invited; which sure enough he was not, but invited himself; and so she told her mother before he came.

But it is plainly to be understood, that the respect she had for him, was not as for one that she believed to be viciously inclined, but as for an honest man; as appeared by the trust she reposed in him; and also his being related to that family, whom she, as well as her relations, did so highly value and esteem, that she could have put not only her money, but her life into any one of their hands.

She little thought what sort of a man she had to deal with; she was so deceived by his seeming sobriety when in her company, and the great pretended kindness to her by him and his wife, both for her own sake and her father's, she could not imagine that a branch of that family could have touched a hair of her head, to have hurt her, or have wronged her of one farthing: she was so honest and plain-hearted, and so innocent herself, and so far from deserving any ill usage from him, or any of that family, or indeed from any else, that she, as well as her relations, could have served them to the utmost of their power: but what returns of kindness have been made, and how she hath been treated and defamed, now she is gone, and not in a capacity to defend or answer for herself, let the world judge.

But it is evident and plain, that most, or chiefly what he made use of at his trial, to defend himself and his three gentlemen, when he was not upon his oath, is proved false, even by what himself did swear when he was examined by the coroner's inquest: for when they asked him, if he knew any thing that troubled or put her into a discontent, or discerned she was melancholy, or knew any one she was in love with, or any cause why she should drown herself? Unto all which he answered, No, upon his oath; he discerned nothing of melancholy, neither knew he any that she was in love with: he knew one Marshall that was in love with her, but she had none for him, but always gave him the repulse; and she was a very modest woman, and he knew no cause why she should drown herself.

And yet at his trial both he and his witnesses pretended to know her to be so melancholy as was near to a distraction: and this depth of melancholy he would insinuate as for love of him; and therefore she drowned herself.

Now what can be more contradictory, or more fully prove that which he spake at his trial to be false, than this which he himself did swear? And this was evidenced by two of the coroner's inquest, and several more would have

done the same, if they had been suffered to speak; but, as the trial relates, they were stopped.

Many observations might be made, and instances given, to clear her reputation, and to prove the falseness of what was cast upon her; as, in particular, her so earnestly inviting a young woman, an acquaintance of hers, who had kept her company that afternoon, and used to lie with her sometimes, to stay and lie with her that night her death was; and she telling her, she could not well stay then, she engaged her to come and dine with her the next day, and told her what was for dinner; desiring her company all day after, she not intending to go from home; which she promised to do.

And it is very observable, from the beginning of the trial to the end, what shifts and devices he is forced to make use of to drill out the time, that there might not be enough for the witnesses on the other side to be heard; and also his endeavouring to baffle the evidence against him; as first, above twenty frivolous questions he asked her maid about poison, which she bought to poison a mischievous dog which haunted the house; and if he could by any means confuse and put her out, if she had not had truth on her side, and gladly would have picked something out of it, if he could have told what.

Also, the many impertinent witnesses he calls to prove his intention to lodge at Bardford's that night her death was, and sending for his bag thither, and lodging his things there; which it seems was not at all expected by them, for John Bardford's wife said, upon her oath, she believed Spencer Cowper did not intend to lodge at her house? But was surprised when he sent to her, between eleven and twelve o'clock at night, to get his bed ready, and came before it was quite done.

And the next night after, when he was sent for by the coroner's inquest to give an account where he left her, he said, in the parlour where we sat. And being asked, if he did not hear her bid her maid warm his bed? He said, I thought she had meant her own bed. But it is very unlikely that she would go to bed and leave him sitting there; or that when he went out she should sit still, and not light him to the door. But if it were as he says, that he left her in the parlour; for a man of his education and figure in the world to go away at that time of night, when he knew there was a fire in his chamber, and his bed was a warming, and let himself out in the dark, and say nothing to any body, it certainly looks very darkly.

And then his sending for his horse three times to her mother's house the night after her death, before he was examined by the coroner's inquest, and would have gone out of town then, if he could have had him, as he confessed to the lord chief justice Holt; but at the trial he said, I sent for him, for fear the lord of the manor should seize him.

Also, when it was taken notice of at his trial,

by the counsel, that he never came after that night her death was, to give her mother any account where he left her, or in any wise to give her satisfaction; to this he answered, It might be strange for me to come and visit a woman that I never had the least knowledge of: And yet he had several times lodged at her house when her husband was living. And that night also, that he was examined by the coroner's inquest, when they asked him, if he discerned her daughter to be melancholy? He said, No; only he thought she was not so free in discourse at dinner as sometimes he had seen her; for most of the discourse then was between her mother and him. Surely he will be hard put to it to reconcile himself in this discourse.

And it is very remarkable, what great dissimulation he manifested at that time; for in his discourse, he taking occasion to speak of the people called Quakers, he expressed so great love for them, and for their principles, that if ever he changed his religion, he said, it should be for theirs: Notwithstanding he derided them so much at his trial, about their being by education intitled to the light within.

Thus, in short, upon the whole matter, it may be concluded, that the defence he had made for himself and his three gentlemen, and the most material things he made use of, whereby they got off, and were acquitted, were proved false out of his own mouth before he went out of the court; as it may be seen in the trial, where the counsellor for the king says thus: 'My lord, we insist upon it, that this is a different evidence from what Mr. Cowper gave to the coroner's inquest; for then he said, he knew none she was in love with, nor any cause why she should do such an extravagant action as to drown herself. But now he would make the whole scheme of things turn upon a love fit.' And then he moved the court to give leave to call several persons of quality and good repute, who were there present, to speak to her reputation, in contradiction to the letters produced; declaring, that he believed the whole town would do the same. Then the judge said, they would grant that; and did not question it. So there was none permitted to say any thing to that purpose.

406. The Trial of MARY BUTLER alias STRICKLAND, at the Old Bailey, for Forging a Bond of 40,000*l.* in the Name of Robert Clayton: * 11 WILLIAM III. A. D. 1699.

October 12, 1699.

Cl. of Arr. BRING Mary Butler to the bar. [Accordingly she was brought.]

' Mary Butler alias Strickland, you stand indicted by the name of Mary Butler alias Strickland, late of London, widow; for that you endeavouring, and maliciously intending, to deceive and oppress sir Robert Clayton, knight and alderman of London, the 1st day of December, in the 7th year of his now majesty's reign, at London aforesaid, in the parish of St. Mary Woolnoth, in the ward of Langborne, a certain false writing, sealed in form of a bond, bearing date the 14th day of April, 1687, in the name of the said sir Robert Clayton, for the payment of the penal sum of 40,000*l.*, to be made by the said sir Robert Clayton to you Mary Butler alias Strickland, with condition there under written; concerning, among other things, the payment of 20,000*l.*, to be made to you Mary Butler alias Strickland, after the death of the said sir Robert Clayton, by his heirs, executors, and administrators; falsely, knowingly, unlawfully, and subtilly did make, counterfeit and write, and cause to be made, counterfeited and written: And further, that you, Mary Butler alias Strickland, af-

terwards, viz. the 1st day of December, in the 7th year aforesaid, at London aforesaid, in the parish and ward aforesaid, a certain false and forged writing, sealed in form of a bond, in the name of the said sir Robert Clayton, for the payment of the penal sum of 40,000*l.* by the said sir Robert Clayton, to you Mary Butler alias Strickland, with condition under written, concerning, among other things, the payment of 20,000*l.*, to be made to you Mary Butler alias Strickland, after the death of the said sir Robert Clayton, by his heirs, executors or administrators, as a true bond of the said sir Robert Clayton, as if really made by him; falsely, subtilly, and deceitfully, did publish, you Mary Butler alias Strickland well knowing the said writing to be false, forged and counterfeited, and not the deed of the said sir Robert Clayton, to the great damage of the said sir Robert Clayton, to the evil example of all others in the like case offending, against the peace of our sovereign lord the king, his crown and dignity.'

Cl. of Arr. How sayest thou, Mary Butler alias Strickland, art thou guilty of this forgery whereof thou standest indicted, or not guilty?

Prisoner. Not guilty.

Cl. of Arr. Prisoner, look to your challenges. Cryer, swear the jury, which follow: William Clark, William Christopher, Thomas Wharton, George Kimble, James Church, John Whistler, George Ludlam, Richard

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* For the law of Forgery, see East's Pleas of the Crown, c. 19.

Kemble, John Clarke, Stephen Broughton, Joseph Sheppard, Thomas Wickham.

Clerk of Arr. You of the jury that are sworn, look upon the prisoner, and hearken to her cause. She stands indicted, &c.

Mr. Montagu. May it please your lordship, and you gentlemen of the jury, this indictment does charge the prisoner at the bar, Mary Butler, alias Strickland, with a fraud and intended cheat. It sets forth, that the prisoner at the bar, intending to cheat sir Robert Clayton, did counterfeit a certain writing, purporting to be the bond of sir Robert Clayton, for payment of 20,000*l.*, and that it was to be paid to the said Mary Butler, alias Strickland, after the death of the said sir Robert Clayton. Likewise, that she did publish this writing as sir Robert Clayton's deed. To this indictment she has pleaded not guilty. If we prove the fact, I do not question but you will find her guilty, that she may have her due punishment.

Serj. Wright. My lord, I am counsel for the king in this cause. You hear what sort of crime it is that is charged on the prisoner. It is for forging a bond of no less penalty than 40,000*l.*, for the payment of 20,000*l.* This is made in the name of sir Robert Clayton, and the 20,000*l.* were to be paid a little after his own death, by his executors or administrators: and that in the mean time 1,200*l.* a year were to be paid for the interest of this sum. But, my lord, the prisoner did not rest here, (a second contrivance will be opened to you.) That which she is now charged with, is the forging of a bond of the penalty of 40,000*l.*

My lord, the prisoner for some years had a great intimacy with a great peer, the late duke of Buckingham. And she either had, or pretended to have, a bond from him for 5,000*l.*, payable to herself after his death, and an annual interest in the mean time, till the principal was paid. Sir Robert Clayton being a trustee of the duke's estate for the payment of his debts, the prisoner came frequently to sir Robert Clayton, to solicit his favour and interest for the payment of this debt. On this account she insinuated herself into his company and into his family. Sometimes she pretended to be a great penitent, and that she was sorry for the conversation she had with the duke; that her own relations were papists, and if she should go to them, they would send her into a nunnery. All which was but counterfeit, and in order to win upon sir Robert Clayton; and he finding she was an ill woman, notwithstanding all her pretences, he at last, about twelve years ago, forbid her his house; and since that she never was there.

About the year 1695, sir Robert Clayton had some private intimation given him, that the prisoner had a great demand on him, no less than 20,000*l.* Upon this sir Robert Clayton took the best course he could to find it out, and exhibited a bill in Chancery against her, and some of her accomplices, to discover whether they had any pretences upon him or his estate. To this bill the prisoner put in an answer, that she

had no claim or demand against him upon any account whatsoever. While this was in agitation, the prisoner came to Mr. Woodward, an attorney of this city, and brought him a writing, purporting a bond, with the name, Robert Clayton, subscribed to it, sealed and attested by four witnesses, as the bond of sir Robert Clayton; and told Mr. Woodward, "That bond was given to her by sir Robert Clayton, upon some good considerations; but it having taken air, some uneasiness had risen about it in sir Robert Clayton's family; and (as she pretended) upon this account he had exhibited a bill in equity against her, therefore this bond must be delivered up; and sir Robert had promised to give her a new bond for 20,000*l.*, and that all the money in arrears for interest, was to be turned to principal, and put into the new bond: But this was to be done very privately, so as not to be known by any of sir Robert Clayton's family; and therefore none of his servants were to be privy to it." Thereupon she gives to Mr. Woodward the bond, desiring him to make a new bond by it, and to turn all the interest that was due into principal. Upon this, Mr. Woodward made her a bond of the penalty of 54,000*l.*, conditioned for payment of 27,000*l.* after sir Robert Clayton's death, and interest in the mean time. This bond she took away with her, and likewise the first bond; but what she did with them since, we are not privy to. And a great charge she laid upon Mr. Woodward, to carry it with all possible privacy, that no notice might be taken by sir Robert's family.

Some few months ago there was another intimation sent to sir R. Clayton, that this gentlewoman pretended to have a great claim upon him of a great sum of money that was to be paid her, either at present, or after his death; and that Mr. Woodward made the bond, and he could give an account of it. Upon this sir Robert Clayton sent to Mr. Woodward, who like a very honest man, told the whole business, in what manner it was the prisoner came to him, and how he came to make the bond; and that he was desired to be silent in it, sir Robert Clayton having desired this bond should be made out of his own house, that none of his family might take notice of it. Sir R. Clayton having this notice, and finding from Mr. Woodward, the prisoner had taken this course to carry on this design to charge his estate, he got a warrant from the lord chief justice to have her before him, to be examined before his lordship: Where being brought, she, upon her examination, has confessed the whole matter, her having the first bond, and where it was made. What is become of the latter bond, we cannot get out of her, nor whether she ever affixed the name of sir R. Clayton to that. But we will produce credible witnesses to prove her guilty of forging the first bond for the payment of twenty thousand pounds; and that it had the name and seal of sir R. Clayton affixed to it; and that she affirmed it to be a good bond, well executed by sir R. Clayton,

and that there was interest due upon it from sir R. Clayton and that the interest was in the second bond to be turned into principal. We will call witnesses to prove this, and then I hope she shall have such punishment as she deserves.

Mr. Northey. My lord, what the nature of our evidence will be, I shall inform you. It cannot be expected from us to produce the bond, for that she carried away from Mr. Woodward; so that we cannot give the writing itself in evidence; but, if she insist on it, we hope she will produce the bond. We have the copy (taken by Mr. Woodward) of the first bond which he had from her, that he might draw the second bond by it. But we can prove from that, which agrees with our record, that she affirmed, that the first bond that she produced was sir R. Clayton's: That that bond which she produced, of which this is the copy, she affirmed to be sir R. Clayton's deed. We shall do that, and afterwards prove her publishing it; for our indictment is against her for forging a bond, and publishing that forged bond, knowing it to be such, and close all with her own confession. And, my lord, there is this to shew there could be nothing in the bond; that from the time she pretended to have this bond, when she was to have twelve hundred pounds a year, she remained a prisoner all that time, and got herself out by swearing she was not worth five pounds in all the world. Call Mr. Woodward.

(Who appeared and was sworn.)

Serj. Wright. Mr. Woodward, you hear what the charge is; pray give an account of what you know in reference to it.

Woodward. My lord, Mrs. Butler has been my client many years. About two or three years ago, more or less, Mrs. Butler came to me, and brought me a bond; she gave it me to peruse, and told me another must be drawn by it. When I had perused the bond, I found it was signed Robert Clayton, and four witnesses names set to the bond. It was a bond of the penalty, as I remember, of forty thousand pounds, and I think it was in the year 1687, for to pay, I think, twelve hundred pounds a year, by four quarterly payments yearly, during sir Robert Clayton's life, and 20,000*l.* within six months after his death. There were some other things in that bond, which will appear by the copy, which indeed I did take; for Mrs. Butler desired it might be a secret, being of a very great concern. And I asked her why such a bond should be given; I thought it must be great generosity, and not for money lent. But she told me the 40,000*l.* bond was to be delivered up to sir Robert. I asked her, why, since she had it, she did not keep it? She said, that he would give her another bond. She told me it had taken air, and my lady Clayton had some disquiet about it; and for my lady's satisfaction, a bill in Chancery was exhibited against her, to which she was to put in her answer, and thereby disclaim any sort of bond, or interest,

or any pretence that she had upon sir Robert Clayton.

Serj. Wright. She told you this herself?

Woodward. Yes; and when she gave me the bond, she told me it was sir Robert Clayton's bond, or to that purpose. But there being about nine or ten years arrears of interest, she desired me to cast up the interest that was in arrear, and that it might be put to the principal in the new bond, saying, that sir Robert would give her a bond for the whole together.

Serj. Wright. Was the whole interest pretended to be in arrear?

Woodward. I cannot say, all the interest.

Serj. Wright. How did you compute it, from the date of the bond, or from what she told you?

Woodward. She said she had received some money, and I computed the rest rather under than over, and so made the interest to come to 7,000*l.* (the interest payable by the bond being 1,200*l.* a year). Whereupon she desired I would draw a bond for it myself; and accordingly she left the first bond with me. I took some time, and drew it; and made the penalty thereof 54,000*l.* conditioned for the payment of 27,000*l.* And it was to be made in the same nature as the former was, in respect of the principal, and in the mean time to continue the payment of the interest yearly, by proportionable quarterly payments.

Mr. Montagu. What discourse had you with her about it?

Woodward. I did draw a bond, and did take notice, That whereas sir R. Clayton had given her this bond of 40,000*l.* and at his request she had delivered it up to him; and upon an account stated, there did remain 7,000*l.* in arrears for interest, which in all amounted to 27,000*l.* or thereabouts; when I gave it her, I said, it was a very great sum, it concerns you to have witnesses of credit, for nobody will believe sir Robert Clayton did give you this bond, especially after his death, unless it be very well attested. I told her, if she pleased, I would go and be a witness for her to see it executed. So she went away. And when she came to me again, she told me, that sir Robert knew me very well, but did not think fit to have me for a witness. I answered, I do not care; but it being a very great sum, take care it be well executed. I gave her both the bonds, and from that time heard no more of it till about two months since.

Mr. Northey. Was there any body came to discourse with you of making a new bond, besides herself?

Woodward. Not that I know of, I do not remember any. It was an extraordinary sum, I did take a copy of the bond.

Mr. Northey. Have you it here?

Woodward. Yes, I have it here.

Mr. Northey. He swears he took a copy of it, and delivered it to the prisoner again. We desire it may be read.

Mr. Mallet. Is it a true copy?

Woodward. I cannot say I examined it.

Mr. Northey. Did you write it from the bond?

Woodward. I did.

Mr. Northey. Do you believe it is a true copy?

Woodward. I believe it is. The reason why I did not examine it, was because it was to be a secret.

Mr. Mallet. Do you look upon yourself to be infallible?

Serj. Wright. Had you any direction from the prisoner to take a copy?

Woodward. I cannot say that.

L. C. J. Holt. Why did you write it out; for your direction to draw the new bond?

Woodward. I did write it out, because it is a special condition, more than is usual in bonds: for it is expressed, that there should be no prosecution against her by sir Robert Clayton, or his executors, either at law or in equity, for the 20,000*l.* or the interest, or to do any act to obstruct her in receiving the same.

L. C. J. Holt. When did you take a copy of it?

Woodward. At the same time, and before I returned it.

L. C. J. Holt. Did you make the new bond by this copy, or by the former bond?

Woodward. Very likely I might use both.

L. C. J. Holt. Did you keep them both?

Woodward. I did keep them both by me till I delivered the new bond.

Serj. Wright. Is the copy your own handwriting?—*Woodward.* Yes.

Mr. Montagu. What did you take it from?

Woodward. From the original.

Mr. Wright. And do you take that to be a true copy?

Woodward. I believe it is a true copy.

Mr. Hall. Did you read it over at that time?

Woodward. I did read it over.

L. C. J. Holt. Did you write it?

Woodward. I did write it.

Mr. Mallet. And did you examine it afterward?

Woodward. No, I did not examine it; it was not to be taken notice of.

Mr. Hall. Can you say you read it carefully over at that time?

Mr. Cutts. It may not be the very same bond, if he did not examine it by the original, signed by sir Robert Clayton.

Mr. Northey. They may shew the bond.

Mr. Mallet. Did the prisoner bring the bond to you, of which this is the copy, and tell you, this was her bond?

Mr. Northey. We will prove it by her own confession.

Mr. Mallet. If it be not the same bond, she cannot be convicted.

Mr. Northey. No doubt of it.

Serj. Wright. Produce the copy; and, if your lordship please, it may be read.

L. C. J. Holt. Let it be read.

“Noverint Universi per presentes me Robertum Clayton, Militem et Decurionem, Anglice Kt. et Alderman de London, teneri et firmiter obligari Mary Butler alias Strickland, de South-street in Parochia de Edmonton, in Comitatu Middlesex, vidue, Quadraginta mille

libris bone et legalis monet' Anglie, solvend' eidem Mary Butler alias Strickland, aut suo certo Attornat' Executor' vel Administrator' suis, ad quam quidem solutionem bene et fideliter faciendam obligo me, hæredes, Executores et Administratores meos, firmiter per presentes Sigillat' dat' decimo quarto Die Aprilis, Anno Regni Domini nostri Jacobi Secundi, Dei gratia Anglie, &c. Regis, tertio, Annoq; Domini 1687.

“The condition of this obligation is such, that if the above bounden sir Robert Clayton, or his assigns do, and shall well and truly pay, or cause to be paid unto the above-named Mary Butler alias Strickland, her executors, administrators, or assigns, or any of them, yearly and every year, during the term of his natural life, the full and just sum of 1,200*l.* of lawful money of England, by four equal quarterly payments, being the just and legal interest, to grow due of and for the principal sum of 20,000*l.* hereinafter-mentioned, in manner and form following; that is to say, 300*l.* on the 14th of July next ensuing the date of these presents; 300*l.* on the 14th of October next coming; 300*l.* on the 14th of January, which shall be in the year of our Lord 1688, and 300*l.* on the 14th of April following; and so on every the said 14th day of the said months in every year, one next, and consequently coming after another, the like sum of 300*l.* during the time and term of the natural life of the said sir Robert Clayton: and also, if the heirs, executors, and administrators of the said sir Robert Clayton do, and shall, on or before the end and expiration of six months next after the death or decease of him the said sir Robert Clayton, not only well and truly pay, or cause to be paid, unto the said Mary Butler alias Strickland, her executors, administrators, or assigns, the full and just sum of 20,000*l.* of lawful money of England, above expressed; but also all such interest thereof, after the rate aforesaid, as shall be in arrear and unpaid at the death of the aforesaid sir Robert Clayton, and also all such as shall grow due to be paid for the same, for so long time of the said six months as the said sum of 20,000*l.* shall be unsatisfied and unpaid after the death or decease of the said sir Robert Clayton, without coven, fraud, or deceit; nor shall not commence any suit, either in law or equity, against the said Mary Butler alias Strickland, her heirs, executors, or administrators, for, concerning, or in respect of the said 20,000*l.* and interest, or any part thereof; and shall not do any act or thing to obstruct, molest, or hinder her, them, or any of them, from receiving, having, or enjoying the same; then this obligation to be void, and of none effect, or else to remain in full force. ROBERT CLAYTON.”

Sealed and delivered in the presence of us,
J. PENNINGTON, JOHN HEBDEN,
EDW. SPENCER, ELIZ. RIVERS.

Serj. Wright. Did the prisoner bring you the bond, of which this is a copy, as a true bond?—*Woodward.* Yes, my lord.

Serj. Wright. I ask you this, Had you a charge from her to keep this matter secret?

Woodward. Yes; and that I would write the bond with my own hand.

Serj. Wright. She giving you this charge, how came this matter to be known then?

Woodward. Mr. Nicholas Baker came to me from sir Robert Clayton, and asked me, if I did not know the prisoner, and particularly about a bond; and whether I did not make one for her. It was not in my memory at first, till further discourse occasioned me to remember it; and I told him, that I did do some business for her. He told me sir Robert Clayton had some information given him, that there was such a bond drawn by me: then I told him, I did remember there was such a bond brought to me, and that I had made a bond for Mrs. Butler, and had taken a copy of the first bond, which I had by me; and also of the second bond, in which I had left out a material word in the obligation, and was fain to write it over again, and had the first draught by me till about a month before that time, when meeting with it among my papers, I threw it into the fire in my closet; but this copy did remain by me.

Mr. Hall. You say this copy is all your own hand-writing?—Woodward. Yes, it is.

Mr. Hall. Was it sealed or cancelled?

Woodward. No; it was sealed, I am very positive.

Mr. Hall. Are you positive the seal was on it at that time?—Woodward. Yes, Sir.

Mr. Mallet. Did she tell you that bond was to be cancelled?

Woodward. She told me, she was to deliver up that bond to sir Robert Clayton; and that he would give her another instead of it.

Mr. Mallet. Was the bond then delivered up, or no?

Woodward. I cannot say she did.

Mr. Cutts. Did you never hear any bill in Chancery? to what end was this bond delivered to you? For what reason?

Woodward. I asked her why the bond was to be delivered up, and she told me, there was some uneasiness in the family, and my lady Clayton had got the air of it; and therefore, to satisfy her, there was a bill preferred against her in Chancery, and she was to put in her answer; and that he would give her another bond, and that was to be delivered up.

Mr. Northey. We have other witnesses to prove the forging of it. Call Mr. Baker. (Who appeared and was sworn.)

Serj. Wright. Mr. Baker, were you present when the prisoner Mrs. Butler was before my lord chief-justice concerning this bond? Look on that copy.

Baker. I was present at my lord chief-justice's chamber when the prisoner was brought before his lordship; and she did there acknowledge, that the bond, of which she was accused, she had ordered to be made.

Serj. Wright. Was that the bond in question?

Baker. Yes, she did confess she caused sir Robert Clayton's name to be set to it, and

the witnesses names; and that it was done by one Mr. Lewkar, a scrivener in Bishopsgate-street.

Serj. Wright. She said so?

Baker. Yes, Sir.

Mr. Hall. Did she confess it? Where was it?

Baker. At my lord chief-justice's chamber; she confessed it was her own act; she caused it to be made, and directed the scrivener to set sir Robert Clayton's name, and the witnesses' names to it.

Mr. Mallet. Was there not at that time a discourse of a bond that she had on the late duke of Buckingham?

Baker. I cannot be positive in that; but this was the fact she was charged with; and she did confess that she caused it to be done, and that the persons as witnesses were innocent of it, and that she did direct Mr. Lewkar to set sir Robert Clayton's name to it.

Mr. Hall. How do you know this is the very same bond?

Baker. Mr. Woodward shewed me this very bond when I went to him from sir Robert Clayton, to know whether he was acquainted with the prisoner; who, after some discourse with him relating to this bond, very frankly and ingenuously told me the whole matter of fact, as he has done here.

Mr. Mallet. But we ask you about her confession; did you shew her that copy? Did she confess that?

L. C. J. Holt. What was the discourse of at that time?

Baker. It was about the bond of 40,000*l.* with which she was charged before your lordship to have counterfeited.

Mr. Northey. Did he give an account then of this bond?

Baker. Yes; Mr. Woodward produced this copy before my lord chief-justice, and she owned she had ordered Mr. Lewkar to make it, and to put sir Robert Clayton's name to it.

Serj. Wright. Now, my lord, we will shew you, that she is going on still, and that very lately she has owned it, and that she is going about to make the bond of 50,000*l.* a very good bond.

Mr. Mallet. When it is in question, you may then invalidate it.

Serj. Wright. Mr. Woodward has told you he did make the bond of 54,000*l.* but, I think, we have no need of it.

Mr. Hall. They have failed in the indictment, so that it cannot be supported by this bond; it should be laid especially, according to the condition of the bond to be paid; for it is a bond of 40,000*l.*, to be paid by his heirs after his death 20,000*l.* Now the bond, whereof they produce a copy, is of other things.

Mr. Northey. It is for the same.

Mr. Hall. It is a different thing.

L. C. J. Holt. Not at all.

Mr. Mallet. It is laid in the indictment, to be paid by sir R. Clayton: in the bond it is said, it is not to be paid till after his death.

Serj. Wright. It is laid in the indictment, that the bond was of the penalty of 40,000*l.* to be paid by sir R. Clayton, with condition thereto under-written, concerning, among other things, the payment of 20,000*l.* to the prisoner, after the death of sir Robert Clayton, by his executors.

L. C. J. Holt. Let your exceptions proceed from the indictment; it is to be paid after the death of sir Robert by his executors.

Serj. Wright. Have you any more to say for yourselves?

Mr. Hall. We have a great many witnesses here to prove her reputation. It is a strange thing any one should go to forge a bond on such an eminent person.

L. C. J. Holt. It is strange indeed; but the question is, Whether it be true?

Mr. Hall. Her confession is proved by Mr. Baker; but we have many witnesses as to her reputation.

Mr. Mallet. This bond is not in the indictment. The bond of 40,000*l.* is several years since. Now there are two bonds. Now that of 54,000*l.* is not in this indictment, and this of 40,000*l.* is several years since that it was shewn to him. It is strange he should be so very exact, and yet did not examine it. And probably he might mistake in the copy, and it may not be the very bond in the indictment. Now, as to Mr. Baker; it is true, we have a bond of 5,000*l.* from the duke of Buckingham, and we are suing sir R. Clayton for this money, and hope to have it, now after so many years. And sir R. Clayton did prefer a bill in Chancery against us, and we in answer did disclaim having any such bond. And now, when we are like to have a decree for this sum against the trustee of the duke of Buckingham's estate, he comes and would take off our credit in this matter. We did, in the year 1695, disclaim any such bond.

Mr. Northey. Then you do admit that she owned the bond.

[Then her witnesses were called.]

Mr. Mallet. Mr. Glover, do you know Mrs. Butler?—Glover. Yes.

Mr. Mallet. Give an account of what you know as to her reputation.

Glover. I have known her 15 or 16 years. All that I know of her is fair and clear.

L. C. J. Holt. Where do you live?

Glover. In Red-lion-street.

L. C. J. Holt. What profession are you of?

Glover. I belonged to Lincoln's-inn.

L. C. J. Holt. A gentleman of Lincoln's-inn.

Glover. I was brought up at the university, but have not resided there lately.

L. C. J. Holt. How do you live? Are you a house-keeper?

Glover. I live privately at present.

L. C. J. Holt. Who knows you?

Glover. I cannot tell who knows me here. I believe Mr. Northey does.

Mr. Northey. I do not intend to give any character of you, I do not use to give characters of my clients.

L. C. J. Holt. How long have you lived in Red-lion-street?

Glover. Ten or eleven years.

Mr. Mallet. How did she live?

Glover. I knew her live in Devonshire-square very reputably; I always thought so.

Serj. Wright. Had she any estate of her own?

Glover. I cannot say so certainly; it was thought so. She paid every body very punctually.

Mr. Hall. Acquaint my lord how long you have known her, and whether you think she would be guilty of such a forgery?

Glover. I have known her 14 or 15 years. I cannot believe she would.

Mr. Montagu. Have you heard the evidence?—Glover. Yes.

Mr. Montagu. What do you think of it then?—Glover. I know not what to think.

Mr. Montagu. Do you think she would confess herself guilty of a forgery, if she were not?

Glover. I cannot tell what to say to that. I suppose nobody would confess, if they were not guilty.

Serj. Wright. Do you know one Hebdon?

Glover. I know Hebdon.

Serj. Wright. He is a witness to the bond. Was he sir John Hebdon's son?

Glover. I can give no account of that; but he has had a very honourable character.

[Mrs. Rodum called, and appeared.]

Mr. Hall. Mrs. Rodum, do you know Mrs. Butler?—Rodum. Yes.

Mr. Hall. How long have you known her?

Rodum. Five or six years.

Mr. Hall. What do you know of her character?

Rodum. I am the widow of one of them that killed one another by the Temple. I never knew of any bond, nor never heard her claim to any such bond. She lived in good reputation. She was in my house when my husband was killed. She lived in my house about a year; I never heard she made any such pretension. She lived honestly and decently. She owes me upwards of 300*l.*

L. C. J. Holt. For what? How came she to owe you 300*l.*?

Rodum. I kept a shop in the Exchange, and my husband was a broker. She owed it me partly for goods out of my shop, and partly for goods out of Scotland. He was killed about half a year ago, and I have kept the shop still. About three or four months ago she left me, and I never heard of any bond.

Serj. Wright. Did you never hear of a bill in Chancery against her?—Rodum. No, Sir.

Mr. Mallet. Did you hear of any money that was due to her from the duke of Buckingham?

Rodum. I was told she was suing sir Robert Clayton for money that was to be paid her on the duke of Buckingham's account, and upon the credit of that I trusted her. [Shaw called.]

Mr. Hall. How long have you known Mrs. Butler?—Shaw. About sixteen years.

Mr. Hall. Do you think she would forge a bond?

Shaw. Indeed I cannot give an account of that.

Mr. Hall. How has she behaved herself?

Shaw. I never knew her guilty of any rudeness.

Serj. Wright. Put up more witnesses if you have any.

Mr. Hall. We have done.

L. C. J. Holt. Mrs. Butler, will you say any thing for yourself?

Mrs. Butler. I am altogether innocent in the matter, I never wronged sir Robert Clayton, nor any body else, in my life.

L. C. J. Holt. Gentlemen of the jury, this Mrs. Butler, alias Strickland, stands indicted for forging a bond in the name of sir Robert Clayton, in the penalty of 40,000*l.* the condition for the payment of 20,000*l.* among other things, within six months after the death of sir R. Clayton. And also, that she did publish this bond as the true bond of sir R. Clayton. You have heard what evidence has been given, to prove her guilty of this forgery, and the publication of it.

It seems, some time since, as is proved to you by Mr. Woodward, this gentlewoman came to him with this bond of 40,000*l.* And it was upon this account, as she said: To wit, sir R. Clayton having given her this bond, it had taken air, and was come to the lady Clayton's ear; which occasioned some difference between sir R. Clayton and his lady. She said, that this bond, by direction from sir Robert, was to be delivered up to him to be cancelled; and that sir R. Clayton had engaged to enter into a new bond in the penalty of 54,000*l.* for the payment of 26,000*l.* (there being at that time supposed an arrear of interest for 20,000*l.*) payable after sir Robert's death, and interest in the mean time. She delivered this bond to Mr. Woodward. He takes a copy of it, which is produced and read. And so, according to her direction, Mr. Woodward does draw another bond, with the penalty of 54,000*l.* and she then told Mr. Woodward sir Robert would seal this bond upon the delivery up of the bond of 40,000*l.* Mr. Woodward having considered, that it was an extraordinary sum for sir Robert to engage himself in, and he being a very considerable man, he advised her to have this new bond well attested; and to be sure to get witnesses of unquestionable credit to see it executed. And thereupon he offered himself to go with her to sir Robert, to be a witness to this new bond. No, says she, sir Robert is not willing that this should be known; you are not a proper person to be a witness to it; therefore, says she, I will get some other witnesses to attest it. Whereupon he gives her this first bond of 40,000*l.* which she brought to him for the payment of 20,000*l.* and gave her also the draught of the new bond. He says, this bond that she brought to him was attested by four witnesses. Sir Robert, it seems, upon her answer in Chancery, not imagining any thing of this, she having

disclaimed in Chancery the having of any; some time after he had heard a report, as if she was setting up of a new bond, and that Mr. Woodward could give an account of it. Wherefore he sends Mr. Baker to Mr. Woodward, who gave him the same account that he has done here. Then sir Robert makes a complaint, and has her brought before me; and there was Mr. Woodward with this copy. And this was objected to her, as if she had forged this bond. And it seems, when she was there under examination, and is proved to you by Mr. Baker, she did plainly confess, that she had forged this bond of 40,000*l.* and that she had procured one Lewkar to do it for her, who set sir Robert's name to it; and said, that the witnesses, whose names were set to it, were innocent, and knew nothing of the matter.

Now what is said for her on the other side? They bring some persons for her, that say they have known her. One, that says he belonged to Lincoln's-inn, and had been acquainted with her fourteen or fifteen years, and did look upon her as a civil woman; and for his part, he does not believe she would be guilty of such a forgery. Another, who is a woman, says she has known her some time, and she says, she has trusted her much, and did never hear her say any thing of this bond, but she behaved herself civilly, and she took her to be a very sober person. Another witness says, she looked on her to be a very honest person. This is the sum of the evidence.

There is a very strong evidence to induce you to believe that she did forge the bond. Such a bond she had, that is plain. She does give no account what is become of it; and she does not shew any manner of pretence of having so much money from sir R. Clayton due to her; she does not make it appear, why sir Robert should give her a bond upon any account. Now, for any to say that they knew her, and they do not believe she would forge a bond, that is no evidence; nobody ought to believe ill of Mrs. Butler, or any one else, unless it be made to appear. But the question is not, what they do believe; but whether the matter be proved to you to your satisfaction that she has forged this bond? And if you are satisfied that she did forge it, you ought to find her guilty; and if you do not believe the evidence to be satisfactory, you ought to acquit her.

[Then the Jury withdrew, and being returned, gave their verdict as follows:]

Cl. of Arr. Are you agreed of your verdict?
Jury. Yes.

Cl. of Arr. Who shall say for you?

Jury. Foreman.

Cl. of Arr. Bring Mary Butler to the bar. How say ye? Is the prisoner at the bar guilty of the forgery whereof she stands indicted, or not guilty?—Foreman. Guilty.

The Judgment which the court pronounced against her was, That she should pay a fine of 500*l.* to the king, and continue in prison till she paid it.

407. Proceedings in Parliament against THOMAS Duke of LEEDS,
on an Impeachment of High Crimes and Misdemeanors:
7 WILLIAM III. A. D. 1695—1701.*

April 27, 1695.

THE House of Commons having read a Report from a Joint Committee of both Houses relating to the distribution of Money by the East India Company, the following Debate arose:†

[B] stood up and said, Mr. Speaker, I conceive there is a necessity to search this matter to the bottom. The House has a thread in their hands, they ought to provide laws for the future to prevent the members of this House taking money. All imaginable endeavours have been used to stifle all discoveries. 10,000*l.* has been pretended to be given to the king. 50,000*l.* offered to buy an act of parliament, or gain their charter. The facts prove themselves, and Mr. Bates appears an unfortunate person, whom the care of his friend, the duke of Leeds, and the sense of his oath, have caused to make such contradictions. I move that the House would put the matter in such a method as becomes their justice, and as the shortness of their time will allow.

[D] Mr. Speaker, I do fully agree with the worthy person near me, that there never were greater and more general instances of corruption, and necessity of speedy remedy. That it is very fit this House should let the world see that they are in earnest. I ask leave to put you in mind, what practice and arts have been used to stifle and stop your discovery, so that what you have is, as it were, by the utmost force and constraint. You cannot wonder at it, when you now find so great a man at the bottom; but there is no person in a post so high that this House cannot reach, no man's practice or art so deep that this House cannot discover. Here have been all imaginary endeavours used to obstruct this enquiry. First, his majesty's name was made use of at the committees, with hopes perhaps that that might

* Sir Thomas Osborne, created baron of Kiveton and viscount Latimer, by king Charles 2, August 15, 1673, and earl of Danby, June 27, 1674, marquis of Carmarthen by king William, April 20, 1689, and duke of Leeds, April 30, 1694. This is the third time that Articles of Impeachment had been exhibited in the House of Lords, against him. The first was in 1675, upon which the House resolved, "That there was not sufficient matter contained in them to impeach the Lord Treasurer;" the second was in 1678, see vol. 11, p. 599.

† From "A Collection of the Debates and Proceedings in Parliament, in 1694 and 1695, upon the Inquiry into the late Briberies and Corrupt Practices."

stop any farther enquiry; and if it were made use of there, you may reasonably expect it was made use of elsewhere: but that appeared to be so far from being a matter of reflection on the king, that sir Josiah Child often complained of it as a rudeness to his majesty, that what other kings had yearly as a present, they had not offered to his majesty in three years: it was indeed, if not a matter of right, a matter of custom.—Then a noble lord, who may be named for his honour upon this occasion, the earl of Portland, he, when the great sum of 50,000*l.* was pressed upon him, did absolutely refuse it, and told them he would for ever be their enemy and opposer if they offered any such thing to him. I having thus mentioned the innocent, must say somewhat of the guilty. A stop having been put, the duke of Leeds must be applied to; certainly there never was a more notorious bribery, and that in a person whom we might have expected to have been free from such a crime, whether if you respect the greatness of his place, or of his former obligation. It is fit to speak plainly on such occasions, the House ought to endeavour to remove such a person from the king's council and presence. What security can the nation have, when we are bought and sold to one another? We have seen our designs defeated, our attempts betrayed, and what wonder is it? Can any man think it more strange that our counsels should be sold abroad, than that charters should be sold at home? Certainly a man may reasonably believe, that he who will sell the subjects will sell the kingdom if he can have a sufficient bribe. What prince can be safe in such counsels which are given for private advantage; several proposals for remedy may be here offered. One, that this house should address his Majesty to remove the duke of Leeds; but, with submission, an address is too mean, too low a thing for the House to do at this time, and upon such an occasion: I therefore move we may lodge an impeachment. "That Thomas duke of Leeds, Lord President of his majesty's council, be impeached by this House." Or thus, "That Thomas duke of Leeds be impeached by this House of high crimes and misdemeanors; and particularly of Corruption in taking a bribe of 5,000 guineas to obtain a charter and regulation for the East India Company."

[E] says, I wonder the gentleman who spoke last should say that which I hope he did not believe, That that lord should have sold our counsels to France.

[D] rose again and said, It is with some uneasiness I stand up, but that gentleman forces me to it, for I do not take pleasure to rake in a

dunghill. I was far from saying any such thing, but argued only from possibility; that it was as reasonable to believe one as the other. That when honour and justice were not the rule of mens actions, there was nothing incredible that might be for their advantage.

[F] seconds and agrees in the motion for an impeachment.

[G] says, That God alone who can produce light out of darkness, can fully discover the dark practices in this affair. That such actings as these are a blemish, if not a scandal to the Revolution itself; I agree in the motion for an impeachment.

[I] Demanded, by what law it is a crime to take money at court?

[K] answered, if there be not a law, it is time there should be a law to prevent it.

[L] says, The law of God is against him, and broke by him. He took an oath as a privy-counsellor. Justice is not to be sold by the common law. But there are parliaments to punish such crimes, and it is hoped there will be still.

[M] says, it seems doubtful whether there be matter in this Report for an impeachment; therefore before the House goes to an impeachment, they ought to put the question upon the Report, and see whether it be a crime.

[N] objects, there is no law, so no transgression.

Resolved, "That there does appear to this House, upon the Report from the Committee of both Houses appointed to examine the persons mentioned in the Report of sir Thomas Cook's account, That there is sufficient matter to impeach Thomas duke of Leeds, president of his majesty's most honourable privy-council, of high crimes and misdemeanors."

Resolved, "That Thomas duke of Leeds, &c. be impeached of high crimes and misdemeanors."

Ordered, "That Mr. Comptroller do go up to the Lords, and, at their bar, in the name of the House of Commons, and all the Commons of England, impeach Thomas duke of Leeds of high Crimes and Misdemeanors; and acquaint them, That this House will in due time exhibit particular articles against him, and make good the same."

THE DUKE'S SPEECH IN THE HOUSE OF LORDS.

On the reading of the Report from the Lords' Committee, his grace expressed himself in this manner, viz.

"That as he had formerly protested himself to be free in this matter; so he still denied, upon his faith and honour, that he was guilty of any such corruptions as were suggested against him, and that if the whole truth were laid open, it would tend to his honour and advantage. That he would be very free in telling their lordships now before hand, all that passed, in which he was any ways concerned. And thereupon declared, that Mr. Bates intro-

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duced sir Basil Firebrace to him, and that he had had conferences with sir Basil upon the subject of the East-India Company, which Firebrace was concerned for. That some time after, Mr. Bates came and informed him that he was to have a sum of money of sir Basil; and desired his lordship to lend him one of his servants, Mr. Bates keeping but a footman, to receive the money, and so he lent him M. Robart. That his lordship knew nothing of the sum; but afterwards Mr. Bates came to him, and told him, he had received 5,000 guineas, which he offered to him, telling his lordship that he had been very obliging and kind to him; and that, in acknowledgment of the many favours he had received from his lordship's hands, he humbly desired him to accept of them: which he refusing, Mr. Bates pressed him earnestly to take one half or a quarter; which he still refused, declaring he would not touch a penny of them; and told him, since he had taken them, he thought there was no need of returning them, they were his own, and wished him good luck with them, as I remember, said his lordship, I did once to Mr. Harry Saville, for whom I had a great respect; which reminds me of a story I must needs tell your lordships upon this occasion. He then related the story: That when he was treasurer, the Excise being to be farmed, for which many put in, the bidders for it, who were to give in their proposals sealed up, having applied to Mr. Saville for his interest at court, he came to his lordship and desired that he would tell the gentlemen that put in, who were several, that Mr. Saville had spoke for them: what, said I, (proceeded the duke) would you have me tell all of them so, when but one is to have it? No matter for that, said Mr. Saville, for whoever has it will think I have done him this service; and I am sure of a good present, without more ado: so, my lords, when the men came, I told them one after another, Sir, you are very much obliged to Mr. Saville; Sir, Mr. Saville has been very much your friend. A little after, when the thing was settled, Mr. Saville came and thanked me for what I had done: and told me he had got his present that he had expected; which I told him I was glad of, and wished him good luck with it, as I now did to Mr. Bates. And thus I was then a shadow to Mr. Saville, as I was now to Mr. Bates."

THE DUKE'S SPEECH IN THE HOUSE OF COMMONS.

The Duke had proceeded thus far in his Speech when he received private intimation, that the Commons were proceeding to impeach him: upon which he broke off somewhat abruptly; and immediately quitting the House of Peers, presented himself at the door of the other House; and by the means of one of the members, caused the House to be informed, that he desired to be heard; which being complied with, he was admitted, with the usual compliments of a chair, and leave to be covered; after accepting of which, he rose, and put-

4 M

ting off his hat, expressed himself to the following effect:

"Mr. Speaker, and gentlemen of the House. In the first place, I thank you heartily for this favour of hearing me. I had attended sooner, if I had had the least intimation what the House was upon. I wish the dispatch thereof had not been so quick. The occasion of my coming is from the two Votes, upon the Report from the Committee of both Houses; I did all I could to be informed of the particulars, but could not, nor have I any notes. I was earnest therein, finding myself concerned, and hearing of a report, a monstrous long report, to the end that I might not be under the displeasure of either or both Houses; it is a bold truth, but it is a truth: this House had not been sitting but for me. I was formerly pursued by this House in two points, for being for the French interest and for popery; I had then, if I might have been heard, justified myself, as I hope I have since done, and shall by all the actions of my life. One Firebrace was introduced to me by the means of Mr. Bates, whom I have long known, and if I am not much deceived in him, I cannot believe that gentleman would have transacted such a matter if put upon it. The evidence is but hearsay, and I hope you will not condemn on hearsay. I would not take up your time by entering into particulars; but there is a money-part, as well as a treaty-part; and as to the money-part, much of it is false; what is true, I have made no secret. I can, and do say, that neither directly nor indirectly, upon my faith and honour, have I ever touched one penny of the money. I observe a great deal of pains has been taken to hook and draw men in this matter by a side-wind, and Firebrace thinks his merit will deserve 10,000 and 30,000*l.* This 5,000 guineas was no part of the 40,000*l.* The committee called in and examined several witnesses; but Firebrace, after his first hearing, desired to be called in again himself, contrary to all rules, which shews at least that he is a very willing witness. I have a thread which I hope to spin finer, and make it appear that this was a design laid against me, long before the naming of this committee; that warning was given me some time since, that this matter would be proved against me, and that Firebrace had been told, he should be excused if he would charge the duke: I ask no favour but your favourable justice. It will be a most unfortunate thing in point of time, to be under the displeasure of this House, or of the nation. I pray that no severe sense be put on what will bear a candid one, and that if it may be, the House would re-consider what is done, or at least preserve me from cruelty; and not let me lie on the rack and be blasted, until the parliament shall sit again. If you will proceed, I hope it will be speedily, for I had rather want council, want time, want any thing, than be under yours or the nation's displeasure. I thank you again for this favour, and pray if you will not re-consider, that this matter may

be brought to a determination, and that I may have at least your speedy justice."

This Speech being ended, and the duke withdrawn, Mr. Comptroller, attended by many members, went up to the House of Lords with the Impeachment; and the committee who were joined with the Lords, were ordered to prepare the Articles against the Lord President.

Debate thereon.

The Commons taking the duke's Speech into consideration, a worthy member said,

[D] said, By this noble lord's Speech, the point is now, whether the House will arraign the committee of both Houses, or go on with their Impeachment. This noble lord, when he came to the matter, would not enter into particulars, but passed it over with excuse of wanting time. He makes no excuse as to the facts: his argument of a contrivance was, that the 5,000 guineas charged on him, was no part of the 40,000*l.* Firebrace was to account for. But this is an aggravation of the crime; for sir Thomas Cooke had a double account, one with, and one without the 5,000 guineas; and this is an indication, that if there was a contrivance, it was not by the committee, but with sir Tho. Cooke, to trifle the enquiry, and conceal the corruption. The speedy justice of the House is to be wished and desired. If there is such a contrivance, such a thread as is mentioned by this noble lord, it is not to be doubted but the House where he is impeached will clear him.

[T] moved, That a committee might be appointed to withdraw, to consider what was to be done, in order to gratify that lord by 'speedy justice.' His friend Mr. Bates's tricking and contradicting himself, is more than the evidence of Firebrace. Who was his friend? Who was his servant? Those were questions not to be asked. M. Robart was a servant of my lord president's and is fled. Mr. Bates said, he kept the money in his house? What was become of it? Sometimes he had spent it, sometimes it was in his closet. He did own the money was not in his house on Sunday, but on Tuesday morning, M. Robart brought it to him; but he would never declare from whence he brought it.

In the middle of these debates, a message was sent from the Lords, to acquaint the Commons, that it was the opinion of their lordships, that the discovery made by sir Thomas Cooke was not satisfactory, nor so full as to entitle him to the benefit of the act to indemnify him, and that their lordships desired the concurrence of the Commons. They thereupon passed a vote, as the Lords had done, and sent it up by the lord Coningsby.

April 29. The Lords acquainted the Commons that they had passed a bill entitled, 'An Act for imprisoning sir Thomas Cooke, sir Basil Firebrace, Charles Bates, esq. and James Craggs, and for restraining them from alienat-

ing their estates,' to which they desired the concurrence of the Commons.

April 29. Mr. Comptroller Wharton and others, brought up the Articles of Impeachment against Thomas duke of Leeds, lord president; which are as follow:

ARTICLES OF IMPEACHMENT, exhibited by the knights, citizens, and burgesses in parliament assembled, in the name of themselves and of all the Commons of England, against THOMAS duke of LEEDS, President of his majesty's most honourable privy-council, for high crimes and misdemeanours.

"1. That certain merchants trading to the East-Indies, having either forfeited their charter, or being under an apprehension that they had forfeited the same, and having made their humble applications to their majesties in council for obtaining a charter of confirmation; the said duke of Leeds, being then president of their majesties most honourable privy council, and sworn to give their majesties true and faithful advice, did, contrary to his oath, office and duty to their majesties, and in breach of the great trust reposed in him, by himself, his agents or servants, corruptly and illegally treat, contract and agree, with the said merchants or their agents, for 5,500 guineas to procure the said charter of confirmation, and also a charter of regulations, or to use his endeavours to obtain the same.

"2. That in pursuance of such corrupt contract and agreement, the said duke of Leeds did, by himself, his agents or servants, receive or accept, from the said merchants or their agents, certain notes or securities, whereby he or they were empowered to receive the said 5,500 guineas upon the passing of the said charters.

"3. That, soon after the passing of the said charter of confirmation, the sum of 2,500, part of the said 5,500; and soon after the passing of the said charter of regulations, the further sum of 3,000 guineas, other part of the said 5,500 guineas: were, pursuant to the said corrupt contract and agreement, actually received by the said duke of Leeds, or by his agents or servants with his privity and consent.

"And the said knights, citizens and burgesses, by protestation, saving to themselves the liberty of exhibiting, at any time hereafter, any other accusation or impeachment against the said Thomas duke of Leeds, and also of replying to the answer that the said Thomas duke of Leeds shall make unto the said articles, or any of them, or of offering proof of the premises, or any other impeachments or accusations that shall be exhibited by them, as the case shall (according to the course of parliaments) require; do pray, that the said Thomas duke of Leeds be put to answer the said crimes and misdemeanours, and receive such punishments as the same shall deserve; and that such proceedings, examinations, trials, and judgments, may be upon every of them had and used, as is agreeable to law and justice."

THE DUKE'S SPEECH THEREUPON.

The Articles being read, the duke of Leeds, repeating several things to the same effect as formerly, said, "That Mr. Bates desired that he would allow him to bring sir Basil Firebrace to him; and that he bid Mr. Bates take care of sir Basil, for he took him to be a very ill man; but Mr. Bates said, he knew him very well: so after much intreaty his lordship permitted Mr. Bates to bring him. That Mr. Bates and his lordship had had a long acquaintance and friendship, and what he did in this manner was only to befriend him." His lordship added, "That this storm which was now fallen upon him, was some time a gathering: and it was promoted by a faction, and a party who had only a pique against him; and the king's business had been delayed on purpose. That he had an original letter which gave him an account of this some time before it broke out; and it appeared only levelled against him, because none else were prosecuted; and there appeared a joy they could catch at this; for then they stopped; and sir Basil was treated with to discover only this part, and so he should be excused from any further discovery." His lordship concluded, praying a copy of the Articles of his Impeachment, and of the Report made by the Committee to the House, which was readily granted.

THE DUKE'S ANSWER TO THE ARTICLES.

April 30. The Lords sent a Message to acquaint the Commons, That the duke of Leeds having this day put in his Answer to the Articles of Impeachment exhibited against him, their lordships have sent a copy thereof to them.

The Answer was received and read, and is as follows: "This Defendant, saving to himself all advantages of exceptions to the said Articles, humbly saith, That he is not guilty of all or any the matters by the said Articles charged in manner and form as the same are by the said Articles charged against him. LEEDS."

Upon the duke's putting in the Answer, he again declared, before God, and upon his honour and conscience, that he was not guilty, and had great wrong done him in this accusation.

May 1. The Lords sent a Message to the Commons to acquaint them, That they think themselves obliged in justice to put the House in mind of the Impeachment against the duke of Leeds, to which the Duke's Answer having been transmitted to them, the Lords desire to be acquainted when they can be ready to make good the Articles of Impeachment, to the end a certain day may be appointed by the Lords for that purpose.

Upon this, the Commons ordered, "That the Answer of the duke of Leeds, to the Articles of Impeachment against him, be referred to the consideration of the Committee, to whom it was referred to draw the said Arti-

cles of Impeachment: and that they do consider what is to be done thereupon, according to the course of parliaments; and report the same to the House."

May 2. The duke complained in the House of Lords of the delay of the House of Commons, in not replying to his Answer, alledging, that the Impeachment was only to load him with disgrace, and that they never intended to try him. And added, "That the party used great partiality towards him, and did not intend to enquire after others: that they shewed a mark of their partiality and spleen, in their Amendment to the Bill for imprisoning sir Thomas Cooke, sir Basil Firebrace and the others; sir Basil was to be bailed because he was the witness against his lordship."

This day the Commons resolved, "That the offer of any money, or other advantage, to any member of parliament, for the promoting of any matter whatsoever, depending, or to be transacted, in parliament, is a high crime and misdemeanor, and tends to the subversion of the English constitution."

May 3. A motion being made in the House of Lords, to read the bill for granting to the king a duty upon Glass, &c. the duke of Leeds rose up and told the Lords, "That it grieved him, that he, who was as much as any man for the dispatch of the Money-bills, and never opposed any, should now do it; but he hoped the Lords would consider his case, not only as his, but the case of any of their lordships; for it was in the power of a tinker to accuse at the end of a session, and one might lie under it without remedy: and since that they, by mismanagement, had delayed this Money-bill for six weeks, it would not be of mighty ill consequence if it should lie a day or two longer. His lordship pressed very earnestly, that if the House of Commons did not reply, the Impeachment might be discharged; for, if it were not, he might lie under the reproach thereof all his life. He believed the Commons would do nothing in it; for though they had appointed a Committee to meet, they met but once, and that for form, and never met more, nor would do any thing in it."

The same day the Commons, at a conference, delivered a written Paper to the Lords, signifying, "That the Commons will make good the charge against the duke of Leeds, in manner and form as in the Articles mentioned, and that the Committee who were appointed to draw the said Articles, have been daily employed in looking into evidence against the duke; and that in the preparation of the evidence they meet with an obstruction, that Monsieur Robart, who appeared by the depositions before the Committee of both Houses to be a material witness, is withdrawn since the Impeachment was carried up; which has been the reason the Commons have not yet acquainted your lordships when they can be ready to make good the said Impeachment, the Com-

mons being desirous that justice be done without any manner of delay."

The Paper being brought into the Lords House, and read, it was moved and agreed, without any debate, or any opposition made by the duke of Leeds, that an Address should be made to the king, to issue a Proclamation for stopping the ports and seizing M. Robart. The duke, in assistance to the House, told them, that it was requisite to insert the person's Christian name, and said his name was John, his surname being Robart.

The Duke of Leeds then rose up, and blamed the House of Commons, for doing an unheard-of, an unprecedented thing, to charge a man with crimes, and to say they were ready to make it good, before they had all the evidences; and now they should say they wanted a material witness, and lay it upon him to produce this witness; as if a person were obliged more to produce evidence to accuse him, than to answer such questions by which he accuses himself. His lordship then proceeded to acquaint the House, that in truth, he had sent M. Robart to see his daughter Lempster, who went into the country big with child; and ordered him to call at Minns to see his daughter Plimouth, it being in his way to his daughter Lempster's, where the messenger of the House of Commons might have known he was gone if he had asked. That his lordship, that there might be no mistake, sent a messenger on purpose for Robart. That his footman waked him about two of the clock on Sunday morning, (for which he was very angry) to let him know Robart was come, and was in the house, which was as soon as he could possibly return: That his lordship told the footman he would go to sleep, and would speak with Robart in the morning, when he usually called him; but when his lordship asked for him in the morning, the footman said he was gone; and, upon enquiry, he found Robart did not lie nor pull off his boots in his chamber: That the footman said, he asked whether the news was true, that this lord was impeached, and Mr. Bates was in prison; which the footman owned to be true; and his lordship believes that frightened Robart. That his chaplain shewed him a letter from Robart, with a desire to acquaint his lord, that he designed for his own country, Switzerland, through Holland; from whence he would write his lord a true account of all the matter of the 5,500 guineas to Mr. Bates. That his lordship knew, by the manner of his writing, by the man, and by a particular knowledge he had of him and of the thing, that he would not be seen here again in haste. "So that, my lords, (said his grace) if this man be insisted upon as a material evidence, and that my trial is to be delayed till this person is forthcoming, when am I to be tried? I humbly move your lordships, that you will come to some resolution, that if this matter be not immediately proceeded upon, so that I may be tried before the ending of this session, that the impeachment shall fall."

Upon which some few Lords cried, 'Well moved*.'

However, the lords read and passed the bill that same day, for the duty upon glass, &c. and his majesty came to the house and gave the royal assent to several bills, and among the rest to the Bill for imprisoning sir Thomas Cooke, sir Basil Firebrace, Bates and Craggs; and also to a bill entitled, 'An act for the king's most gracious and free pardon,' but with this

* "Surely that out-cry of theirs was rather a mark of scorn than approbation: for though the duke, by sending away his servant, had deprived his adversaries of that legal proof which was necessary to conviction, enough had appeared to prove him guilty in the opinion of the whole world: and if any thing could be added to the reproach which he had brought on his character, on the high office he possessed, and the government he served, it was the solemn protestation of innocence he had set out with, and the contumacious demand of a speedy trial, which he knew neither could or would take place." Ralph.

exception, amongst others; 'Except also all persons who have been or shall be impeached in parliament during this session.*'

And then his majesty commanded the lord keeper to prorogue the parliament to the 18th of June, and it was prorogued accordingly.

On the 24th of June 1701 (two complete parliaments having intervened) the House of Lords, taking notice "That the Commons having impeached Thomas duke of Leeds, of high crimes and misdemeanors on the 27th of April, 1695; and on the 29th of April exhibited articles against him, to which he had answered; but the Commons not prosecuting, order, 'That the said Impeachment, and the Articles exhibited against him, be dismissed.'"

† "Burnet, who, speaking of the act of grace, which passed at the close of the session, takes care to remember, it contained an 'Exception as to Corruption,' acknowledges 'the whole discovery was let fall: and,' continues he, 'it was believed too many of all sides were concerned in it; for, by a common consent, it was never revived.'" Ralph.

408. The Trial of PATRICK KINNYNMOUNT, for Blasphemy* and Adultery: 9 WILLIAM III. A. D. 1697. [Now first printed from the Records of Justiciary in Edinburgh.]

CURIA JUSTICIARIE, S. D. N. Regis, Tenta in Prætorio Burgi de Edinburgh, vigesimo secundo die mensis Novembris, millesimo sexcentesimo et nonagesimo septimo, per honorabiles viros, Adamum Cockburne de Ormistoune, Justiciarum Clericum, Dominos Colinum Campbell de Aberuchill, Davidem Hume de Crossrig, Joannem Lauder de Fountainhall, Archibaldum Hope de Rankeillor, et Jacobum Falconar de Phesdo, Commissionarios Justiciarum dicti S. D. N. Regis.

Curia legitime affirmata.

Intran'

Patrick Kinnymount of that Ilk.

OF this date, there appears on record a long interlocutor on the relevancy of various charges contained in a previous indictment against Kinnymount, also the following minute:

The Lords at my lord advocate's desyre, and in respect of the absence of severall materiall witnesses, who his lordship affirmes, are under

* Concerning the Scots Law of Blasphemy, see Mackenzie (Criminals part 1, Tit. 3,) who in sect. 6. mentions the case of a woman, who was fined for drinking the devil's health, which however, he says, was not held to be blasphemy. See, too, the Case of Thomas Aikenhead, p. 917, of this Volume.

Kinnymount's influence and abstracted by him, they continued the dyet as to this proces till the first Munday of December next, and ordained the pannell to be carryed back to prison, and the assysers and witnesses to attend, ilk persone under the paine of four hundreth merks, and grants certificatione and caption, against the haill absent witnesses.

The said Patrick Kinnymount, of that ilk, was also indyted and accused, at the instance of his ma'ties advocat mentioned for the crymes of blasphemy and adultery in manner mentioned in the indytment, whereof the tenor follows:

You are indyted and accused at the instance of sir James Stewart his ma'ties advocat for his highnes interest in the matter under written, viz. That where by the law of God, and the layes of this and all other weell governed realmes, the crymes of blasphemie and of wicked irreligion against God and our Saviour Jesus Christ, and the cryme of adultery are most horrible and detestable crymes to be punished will all severity; lykeas by the act of parliament Charles second, parliament first, act twenty first,* entituled Act against the Cryme

* The Act referred to is as follows:

Act against the crime of Blasphemy.

"Our sovereign lord, and the estates of parliament considering that hitherto there hath

of blasphemie, it is statute and ordained, that whosoever not being distracted in his witts, shall rail upon, or curse God, or any of the persones of the blessed Trinity, shall be processed before the cheiff justice, and being found guilty, shall be punished with death; and farther, it is statute, that whosoever shall deny God, or any of the persones of the blessed Trinity, and obstinately continue therein, shall be in lyke manner punished with death; lykeas, by the eleventh act* of the fifth session of the current parliament, intituled Act against Blasphemy, the forsaid act of parliament is not only ratified, but furder it is statute and ordained, that whosoever shall in their wryteing or discourse, deny, impugne, or quarrell, argue or reasone, against the Being of God, or any of the persones of the blessed Trinity, or the authority of the Holy Scriptures, or the providence of God, in the government of the world, shall be punished with the paines contained in the said act: Lykeas by the act of parliament, queen Mary, parlia't fifth, cap. twenty, open, manifest and incorrigible adulterers are ordained to be punished by the escheat of their

been no law in this kingdom, against the horrible crime of blasphemy. Therefore his majestie, with advice of his said estates, doth hereby statute and ordain that whosoever hereafter, not being distracted in his wits, shall rail upon, or curse God, or any of the persons of the blessed Trinity, shall be processed before the chief justice, and being found guilty shall be punished with death. Likeas, his majesty, with advice foresaid, finds, statutes, and ordains, that whosoever hereafter shall deny God, or any of the persons of the blessed Trinity, and obstinately continue therein, shall be processed, and being found guilty, that they be punished with death."

* After confirming the former Act, this Act proceeds:

"And further, his majesty, with advice and consent foresaid, statutes and ordains, That whoever hereafter shall, in their writing or discourse, deny, impugn, or quarrel, argue or reason against the Being of God, or any of the persons of the blessed Trinity, or the authority of the Holy Scriptures of the Old and New Testaments, or the providence of God, in the government of the world; shall, for the first fault, be punished with imprisonment, ay and while they give publick satisfaction in sackcloth, to the congregation, within which the scandal was committed. And for the second fault, the delinquent shall be fined in an year's valued rent of his real estate, and the twentieth part of his personal estate (the equal half of which fines are to be applied to the use of the poor of the parish, within which the crime shall happen to be committed, and the other half to the party informer) besides his being imprisoned, ay and while he make again satisfaction *ut supra*. And for the third fault, he shall be punished by death, as an obstinate blasphemer."

goods; and farther by the parliament ninth, chap. seventy fourth, queen Mary, open and manifest adulterers are punishable by death, reserving the former lawes against other adulterers; and by the act parliament James sixth, cap. an hundred and fyfth, It is declared to be nottour and manifest adultry, where bairnes are procreat or the adulterers keep company and bed together, and bed together nottoriously, or when suspect and duely admonished, they refuse to satisfie the kirk and are therfor excommunicate: Neverthelesse, that yow the said Patrick Kinnymount, shakeing off all fear of God, and due reverence to the great and dreadfull name of God and our Saviour Jesus Christ, and all regaird to his majestie's laws and authority, have presumed to blaspheme, and otherwayes to vent your wicked irreligione against the holy and blessed name of God and our Lord Jesus Christ. In soe far as frequently, or at least on ane or other of the dayes of the moneths of the years 1696 and 1697, you have presumed to vent your wicked passione and irreligion, by calling a man bougar of God, and scume of Christ; lykeas you also blasphemously affirmed that Christ was a bastard, and farther did threaten James Dewar, in Lochgellie, in Fyfe, with cutting out of his ears unles he would deny Christ his Saviour: And you have alsoe wickedly said, and which is horrible to be againe repeated, if any man had God on the one hand and Christ on the other, yow could stow the luggs out of his head, in despyte of them both, and yow would see who would say it was ill done. And farther on one or other and on severall of the dayes and nights of the moneths and years forsaid, yow being a married man to — Wallace, your spouse, did committ nottour and manifest adultery, at least adultery with Jannet Nisbet, then your servant maid, in soe much that you did keep company and bed with her openly and notoriously, for dayes, weeks and moneths, before your servants and others in your house, goeing to bed with her as avouedly as if she had been your wyffe, and have been frequently seen throwe off your cloathes with her and goe to bed together in the same chamber, and that so affrontedly, that you have had a servant lying in another bed, besyde yow and your adulteresse in the same rouse, at least yow have committed adultry by bedding and lying with the said Jannet as with your wyffe, by all which, it is manifest, that yow are guilty airt and pairt of the forsaid crymes of blasphemy, irreligione, and adultery, which being found by the knowledge of ane inqueist, yee ought to be punished with the paine of death and confiscatione of moveables, or otherwayes as the law ordaines, to the terror and example of others to committ the lyke in tyme comeing.

Sic Subscribitur,

JA. STEWART.

The lords also continue the dyet against the said Patrick Kinnymount for the saids crymes of blasphemy and adultery till the first Mun-

day of December next, and the indytment being debated *viva voce*, The lords ordained both pairties to interchange their debates, in wryting, betwixt and the said day.

December 6, 1697.

Continued till Munday next.

INFORMATIONE for his Majesties Advocat, against Patrick Kinnymount, of that ilk.

Patrick Kynnymount of that ilk having from his youth bein louse, debauched and profligat, as is nottour, and being accused in another lybell against him of severall extravagant and wicked deeds of violence, hath added to all his wickedness the crymes of horrid blasphemy, and of nottour, at least of manifest simple adultery, as is particularly represented in the lybell raised theranent.

As to the relevancy of which lybell, in soe far as concerns the blasphemie, nothing is or can be objected, the words lybelled being manifest railleing against God and the Lord Jesus our Saviour, which by the act of parliament is justly made capitall, without the necessity of adding the quality of the pannalls obstinately continewing therein, which is only a qualificatione requyred by the act of parliament, as to the denying of God or of the persones of the blessed Trinity, which may proceed from wretched error. Whereas, railleing being a cryme of pure and devilish malice, if once committed, renders the committer absolutely guilty; but the only thing alleadged against this lybell, was that the condescendence upon the tyme, viz. on one or other of the dayes of the moneths of the yeares 1696, and 1697 years, was too laxt; and that the place was not at all marked; as to which it was answered, that the blasphemy hath bein indeed habituall to the pannall, soe that it is lybelled as such, or at least, or ane or other of the said dayes.

2. That in crymes of this nature, neither tyme or place are soe materiall and commisable at any tyme or any where, and are not lyke other crymes, as of manslaughter, mutilatione, or the lyke, which leave visible effects, and therefore may have both tyme and place more easily marked.

3. But 3rdly, The witnesses will condescend, and upon the condescendence if the pannall be admitted to give in his exception of *alibi* or the lyke, it may then be considered; and this in effect is sufficient in lybelling any cryme, wherein the day or place make not a speciall aggravatione.

4. But 4thly, His majestie's advocat is content if need beis, that the lybell be restricted to the four or five last moneths of the year 1696, and the two or three first moneths of the year 1697. Secundo, it was objected that the adultery lybelled, had not all the qualifications requisite by act of parliament to incurr nottour adultery, and therefore noe pain of death: To which it was answered, that the qualificationes in the act of parliament are alternative, viz. either bairnes procreat or nottour converse at

bed and board, or willfull converse after prohibitione be the church, which qualificationes are requyred disjunctively and not joynly, and are also soe lybelled: lykeas the lybell subsumes upon the second member, viz. nottour converse at bed and board, secundo, the lybell doeth charge not only nottour adultery, but in case nottour adultery should not be found, then simple adultery, which is at least relevant for the pains of law.

Defences for Patrick Kinnymount of that Ilk.

Against the lybell raised and insisted on against him by his majestie's advocat, in answer to the informatione given in by his lo'p relative thereto.

Severall malicious persones having conceived a deadlie prejudice against Kinnymount, and finding no imaginable way to vent their malice, they did at last fall into this damnable contrivance, viz. to informe his majestie's advocat, that the said Patrick Kinnymount was guiltie of, and had committed severall atrocious crymes, whereof some were capitall, and did soe clamour upon and importune his majestie's advocat, that at last they did impetrat from his lordship ane warrant summarly to apprehend and imprisone him, and Kinnymount being imprisoned, he did, after severall bills presented to the lords of privy counceill, at last obtaine a delyverance, ordaineing my lord advocat to give him ane indytment, and insist against him before your lop's of justiciary; and Kinnymount being accordingly indyted, and having compeared and proponed his legall defences against the said indytment, the same as to the relevancy is fully determined by your lop's interloquitor, and Kinnymount doeth with all due submissione acquiesce in your lop's justice therein.

Dureing this dependance, Kinnymount's malicious enemies being fully convinced, and finding that the crymes lybelled in that first indytment were soe false and groundless, that it was impossible that any probatione could be had theranent, soe boundless and insatiable was their malice, that during this dependance, they, by their importunity, did prevaiill with my lord advocat to give Kinnymount another additionall indytment for alledged blasphemy and adultery; and the same being debated before your lop's *viva voce* in open court, my lord advocat hes given in ane information against Kinnymount, wherein by way of preface his lo'p accuses Kinnymount as guilty of gross debaucherie and profligateness, and of extravagant wickedness, and deeds of violence from his youth; but Kinnymount knoweing that this proceeds only from my lord advocate's malicious informers more than from himselfe, and that your lop's are soe just, that neither clamour nor calumny can have the least influence upon your impartiall justice, doeth therefore forbear to make any further answer than to deny the same as absolutely false in every poynt.

My lord advocat having thereafter insisted upon the horrid expressions lybelled and alleadged, that the same was simply capitall, without the necessity of adding, that the pannall did obstinately continue therein.

It was answered for the pannall, that he did not only deny the haill expressions lybelled, but utterly from his very soall and heart did detaste and abhorre the same, nor can the pannall be persuaded that ever any such expressions did escape him; and ingeniously declares, that from his very heart he abhorrs to hear such expressions laid to the charge of any Christian; and if he were conscious to himselfe of any such guilt (as truely he is not) he would rather throw himselfe upon his majestie's mercy, than offer to propone any defence ther against, but being conscious to himselfe of noe such guilt, and only apprehensive of debauched and suborned witnesses, his defence against the said indytment is shortly this, viz.

That the said indytment as to the blasphemy lybelled, is no wayes relevant, in respect it does not condescend upon the place where the expressions lybelled are alleadged to have been uttered and spoken by the pannall, and all criminall lawyers that ever wrote doe unanimously agree in this, that in all criminall lybells *Locus delicti* ought necessarily to be lybelled, because by and attour the common brocard, that *dolus latet in generalibus*, no criminall lybell ought to be sustained in *capitali crimine*, which is contrived of purpose to preclude the pannall from the benefite of any defence competent and allowed to him by law, such as *alibi* as to the pannall himselfe, or *alibi* as to one or more of the witnesses adduced against the pannall.

2. As this lybell doth not bear the *locum delicti*, soe neither doth it condescend upon any definite tyme, but allennarly beares the expressions lybelled to have been spoken by the pannall upon one or other of the dayes of one or other of the moneths of one or other of the yeares sixteen hundred and nyntie six and seven, which is in such generall termes, that it is truely admired how my lord advocat can contend or pretend that such a generall lybell as to the tyme either can or ought to be sustained before any court of the kingdome, farr less before such a soveraigne court where none but persones weill knowen in criminall lawes doe sitt as judges.

And whereas my lord advocat in his information pretends that he opposes the lybell, bearing that the pannall used the saids expressions frequently, at least upon one or other of the dayes of the saids two yeares: Secundo, that he is content to restrict his lybell to one or other of the dayes of the four last moneths of the year sixteen hundred and nyntie six, and three first moneths of the year sixteen hundred and ninety seven: and Tertio, his lo'p pretends, that there is noe necessity to condescend upon tyme or place in the cryme of blasphemy as in other crymes of mutilatione or manslaughter, which leave visible effects, and

therefore may have tyme and place more easily marked: Quarto, tyme and place make noe difference as to the cryme of blasphemie and the witnesses will condescend upon both when they depone.

To all which it was replied for the pannall, That the former defences stood unquestionably relevant notwithstanding of the saids answers, and as to which the common law and opinione of all lawyers is repeated and opposed, and as all pursuers in criminall lybells are obliged to make their lybells relevant and to come *parati et instructi*, soe *incidia non sunt struenda pro vita hominis*: and what greater snair can be layd for the lyfe of a man than to sustaine such ane indytment as this, by which the pannall is absolutely precluded from his competent defences of *Alibi*, both as to himselfe and witnesses, and is also precluded from adducing other witnesses who might have been present at the tyme, and might have clearly exculpate the pannall as to what the witnesses adduced against the pannall, (and who are all knowen to be persones most suspect) might happen to depone against him. Secundo, the pannall having subjected himselfe to a legall tryall, and ventured his lyfe upon the issue of this indytment, ther is in effect a judiciale transactione betwixt the pursuer (both as to the relevancy and probation) and the pannall, for he being informed by his lawyers that the said indytment was unquestionably irrelevant as not condescending upon the tyme and place, hath thereupon subjected himselfe to tryall by your lo'p's justice, and repeates and opposes his former defences as to tyme and place against the relevancy of the indytment; neither can my lord advocat be allowed to alter, qualifie or restrict the indytment in prejudice of the pannall, but the relevancy therof as it stands must be determined by your lo'p's interloquitor, *in jure quia in criminalibus non licet vagari*. Tertio, If in the crymes of murder and mutilatione, the tyme and place be necessary to be condescended upon (as my lord advocat himselfe acknowledgeth) then *multo magis* ought the same to be condescended upon in the cryme of blasphemie, *ubi non extat corpus delicti*, nor any mark or vestige of the cryme remaining, and noe difference or reasone can be assigned why tyme and place ought not to be lybelled in the cryme of blasphemie as weell as in others. Quarto, the pannall hes ventured his life upon the issue of this lybell as it is lybelled, and repeates his former defences against the relevancy of the same.

And as my lord advocat cannot be allowed to alter or qualifie the same from what is lybelled, soe neither can his lo'p be allowed to qualify the same by depositiones of witnesses, because therby the pannall would be precluded not only from the benefite of your lo'p's predetermining the relevancy of the qualificationes to be depone upon, and soe run the hazard of suffering probatione to be led upon matters that possibly in themselves are not relevant, but also to be precluded all possibility of exculpating

himselfe against any such matters. It being impossible for him to adduce probatione befor the assyse proceed to advyse and give their verdict, they being by the law oblidge*d ex in-continenti* to proceed to the advyseing, but the pannall oppones his said defences against the relevancy, and noe man will pretend that witnesses are receiveable upon ane indytment soe irrelevant in itselfe.

The pannall adhereing always to the forsaid defences against the relevancy of the lybell, and humbly intreating *ante omnia* your lordship's interloquitor in *jure* therupon, doth in the next place, ingeniously declaire befor Almighty God that he abhorres and trembles, to hear any such expressiones as these lybelled charged upon any Christian, farr more to have them laid to his own charge, neither will the pannall allow any of his lawyers either to palliat or extenuat the haynousness of the words lybelled in any sort, but doth simply and absolutely deny the same in every poynt and article thereof; and as he utterly abhorres the same, soe he will propone noe defence which may in the least seem to justifie or vindicat any such expressiones as these lybelled, and denys that ever such escaped him, and in caise that ever any of the expressiones lybelled did escape the pannall (which he absolutely denyes and abhorres) the same hes certainly bein when the pannall hes bein excessively drunk; and it is weell known that men in drink and after cups are mad and furious, and the pannall humbly conceaves that if any such villanous expressiones when he was soe madly drunk have escaped him (which he absolutely denyes, detastes and abhorres) yet the same can never be sustained to inferr against the pannall the paines lybelled. Because, Primo, by the twenty first act parliament first king Charles the second, the punishment therein contained is only appointed to be inflicted upon persones not distracted in their witts, and if any such expressiones as are lybelled did ever escape the pannall, it is offered to be proven positively that the pannall was absolutely furious and distracted at that tyme. Soe that the forsaid act of parliament can never be extended against the pannall as to any expressiones uttered by him when he was madd and furious; as said is, and the other act of parliament lybelled upon, viz. the act sixteen hundred and nyntie five, appoints allenarly the third cryme to be capitall, and this is the first tyme that any such villanous cryme as this was charged upon the pannall, and consequently he can never be said to have incurred the certification therein contained. But the pannall doth utterly deny and perfectly detest and abhorre all the villanous expressiones contained in the lybell.

In this indytment, Kinnymount is lyke-ways accused for alleadged adultery with Jannet Nisbet, and the pannall having alleadged that denying that pairt of the lybell, the act of parliament did militat only against nottour adultery, and nottour adultery could not be inferred from any of the qualifications lybelled;

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and my lord advocat having restricted his lybell to simple adultery, by offering to prove the pannalls frequent goeing to bed with the said Jannet Nisbet, the pannall did absolutely deny the same; and it was further alleadged for him, that albeit their goeing to bed together, were proven (and which the pannall denyed) yet the same could never be sustained to inferr against the pannall the crymes and paines lybelled; unless carnall dealing were lykwayes proven, but the most that the same could amount to was a scandall, which is only proper to be remitted to the Kirk session, to be cognosced by them. In respect whereof,

December 13, 1697.

Intran' Patrick Kinnymount, of that ilk.

Indyted and accused for being guilty, actor, airt and pairt of severall murders, abuses, hamesuckens and insolencies, committed upon severall of his majesties leidges, conforme to his indytment recorded 11th of August last.

Pursuers.—Sir James Stewart, his maj'ts advocat; Sir Patrick Hume, his maj'ts sollicitor.

Pro'rs in Defence.—Sir David Thiores; Mr. Thomas Skeine.

The lords commissioners of justiciary, with consent of his majesties advocat, desert the dyet simpliciter against Kinnymount, as to the hail crymes lybelled in the said indytment.

The said Patrick Kinnymount of that ilk, being also indyted for the cryme of adultery with Jannet Nisbet his servant, and for horrid blasphemy. The lords commissioners of justiciary, deserted the dyet off consent of his maj'ts sollicitor, as to the said article of adultery, simpliciter; and did proceed to give their Interloquitor upon the article of blasphemy, whereof the tenor followes:

The lords commissioners of justiciary having considered the indytment pursued at the instance of his majesties advocat, against Patrick Kinnymount of that ilk, for the cryme of blasphemy (which is the only article now insysted in) with the debate therupon. They find the said indytment as it is restricted by his majesties advocat, to have bein committed in the four or fyve last moneths of sixteen hundred and nyntie six, or two or three first moneths of sixteen hundred and nyntie seven; relivant to inferr the paines lybelled, and finds the defence that the pannall was furious or distracted in his witts relivant in the termes of the act of parliament, but repells the alledgiance of fury or distractione, aryseing from drunkenness, and also repells the hail other defences proponed for the pannall, and remitts the poynts found relivant to the knowledge of the assize. *Sic Subscribitur,*

J. FALCONAR, I. P. D. C.

Efter pronouncing of the which interloquitor, my lord advocat consented to the deserting of the dyet, and accordingly the lords commissioners of justiciary deserted, and be thir presents deserts the dyet, as to the cryme of blasphemie simpliciter. *Sic Subscribitur,*

J. FALCONAR, I. P. D. C.

409. The Proceedings in Parliament upon the Bill of Divorce between his Grace the Duke of NORFOLK and the Lady MARY MORDANT :* 12 WILLIAM III. A. D. 1700.

PROCEEDINGS IN THE HOUSE OF LORDS.

February 15, 1700.

UPON reading the Petition of Henry duke of Norfolk, praying leave to bring in a bill to dissolve his marriage with the lady Mary Mordant, and to enable him to marry again, he having certain proof of his wife's living in adultery with sir John Germaine: it is ordered, that the said Petition be taken into consideration to-morrow.

February 16.

Read the first time, 'An Act to dissolve the duke of Norfolk's marriage with the lady Mary Mordant, and to enable him to marry again:' In the words following;

'Humbly sheweth; and complaineth to your most excellent majesty, your true and faithful subject Henry duke of Norfolk, and earl-marshal of England, That he did, some years since, marry the lady Mary Mordant, his now wife; and, that she hath, for divers years, lived in separation from the said subject, and hath had unlawful familiarity and adulterous conversation with sir John Germaine, bart. and is guilty of adultery on her part, and hath broken the bond of matrimony. Forasmuch therefore, as your said subject hath no issue, nor can hope for any other than spurious issue to succeed him in his honours, dignities, and estate, unless the said marriage be declared void, and annulled by parliament, and your said subject be enabled to marry any other woman. May it please your most excellent majesty, out of your princely goodness and compassion to your said subject's misfortune and calamity, and for the future support and comfort of himself and family, that it may be enacted: And be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and of the commons in this present parliament assembled, and by the authority of the same, that the said bond of matrimony being violated and broken by the manifest open adultery of the said lady Mary Mordant, be, and is hereby enacted, declared, and adjudged to be from henceforth wholly dissolved, annulled, vacated, and made void to all intents, constructions, and purposes whatsoever: and, that it shall and may be lawful to and for the said Henry duke of Norfolk, at any time or times hereafter, to contract matrimony, and to marry (as well in the life-time of the said

lady Mary, as if she were naturally dead) with any other woman or women with whom he might lawfully marry in case the said lady Mary was not living: and, that such matrimony, when had and celebrated, shall be a good, just, and lawful marriage, and so shall be adjudged, deemed, and taken to all intents, constructions, and purposes; and, that all and every child and children, born in such matrimony, shall be deemed, adjudged, and taken to be born in lawful wedlock, and to be legitimate and inheritable, and shall inherit the said dukedom of Norfolk, office of earl-marshal of England, and all other earldoms, dignities, baronies, honours, and titles of honour, lands, tenements, and other hereditaments from and by their fathers, mothers, and other ancestors, in like manner and form as any other child or children born in lawful matrimony shall or may inherit or be inheritable, according to the course of inheritances used in this realm; and to have and enjoy all privileges, pre-eminencies, benefits, advantages, claims, and demands, as any other child or children born in lawful wedlock may have or claim by the laws and customs of this kingdom. And be it further enacted, That the said Henry duke of Norfolk shall be entitled to be tenant by courtesie of the lands and inheritance of such wife whom he shall hereafter marry; and such wife as he shall so marry shall be entitled to dower of the lands and tenements whereof the said Henry duke of Norfolk shall be seized of such estate whereof she shall be dowable, as any other husband or wife may or might claim, have, or enjoy. And the child or children born in such marriage shall and may derive and make title by descent or otherwise to and from any of their ancestors, as any other child or children may do, any law, statute, restraint, prohibition, ordinance, canon, constitution, prescription, or custom had, made, exercised, or used to the contrary of the premises, or any of them, in any wise notwithstanding. And be it further enacted by the authority aforesaid, that the said lady Mary shall, and is hereby barred and excluded of and from all dower and thirds, and of and from all right and title of dower and thirds unto or out of any of the honours, manors, lands, or hereditaments of the said duke; and, that all conveyances, jointures, settlements, limitations, and creations of uses and trusts of, into, or out of any honours, manors, lands or hereditaments, at any time heretofore made by the said duke, or any of his ancestors or trustees, unto, or upon, or for the use or benefit of the said lady Mary, or any

* See vol. 12, p. 883 and 927, for two former Trials relating to this affair.

the issue of her body, or for easing, discharging, or counter-securing any the manors, lands, or hereditaments of the said lady Mary, or any of her ancestors, shall be from henceforth, so far as concerns the said lady Mary, or any issue of her body, or any interest for her or them, utterly void and of none effect; and all and every the said honours, manors, lands, or hereditaments of the said duke, or any of his ancestors or trustees, shall from henceforth remain, and be to and for the use and benefit of the said duke, and such other person or persons, and for such estates and interests, and in such manner and form as if the said lady Mary was now naturally dead without any issue of her body. And also, that all limitations and creations of any use, estate, power, or trust, made by any of the ancestors of the said lady Mary, unto or for the use or benefit of the said duke, his heirs or assigns, out of any the manors, lands, or hereditaments of any the ancestors of the said lady Mary, shall be from henceforth void, and of none effect. *And be it further enacted by the authority aforesaid, that the said duke of Norfolk, his heirs, executors, administrators, or assigns, shall, on or before the 25th day of March, 1701, pay, or cause to be paid, unto the said lady Mary, or her assigns, the sum of 10,000*l.* of lawful money of England, which was the portion in money paid on her marriage with the said duke; and on default of payment of the said sum of 10,000*l.* on or before the said 25th day of March, then, and in such case, she the said lady Mary, and her assigns, during her natural life from the decease of the said duke, if she shall survive him, shall be entitled to, and shall and may have and enjoy such jointure and other advantages as she might or may have or claim by virtue of a certain indenture, Quinquupartite, made upon and in consideration of the said marriage, bearing date the 13th day of June, 1677, and made, or mentioned to have been made, between Henry late duke of Norfolk, then earl of Norwich, father of the said duke, and the present duke, by the name of Henry lord Howard of the first part; Henry earl of Peterborow and the said duchess, by the name of the lady Mary Mordant, sole daughter and heir apparent of the said earl of Peterborow, of the second part; Henry marquis of Worcester, William earl of Powis, and Henry lord O'Brian, of the third part; Arthur Onslow, esq. and Thomas Dalmatroy, esq. of the fourth part; Simon Fox, esq. and Thomas West, gent. of the fifth part: And by virtue of the agreements contained in certain articles bearing date the 28th day of April, in the year of our Lord 1694, made, or mentioned to have been made, between the said duke of the one part, and the said Henry earl of Peterborow on behalf of the said duchess; and the said duchess

of the other part, according to the true intent and meaning of the said Quinquupartite indenture and articles; and also, during the joint lives of the said duke and duchess, shall and may enjoy 500*l.* per annum, by virtue of an indenture Quadrupartite, dated the 15th day of June, 1694, made, or mentioned to have been made, between the said duke of Norfolk of the first part, the said earl of Peterborow and the said duchess of the second part, William lord Lemster of the third part, and sir John Mordant, knight and baronet, and William Longueville, esq. of the fourth part. And then, and in such case, the said duke of Norfolk, his heirs, executors, and administrators, is and are discharged of and from the payment of the said sum of 10,000*l.* any thing herein contained to the contrary thereof in anywise notwithstanding. But on payment of the said 10,000*l.* in manner aforesaid, she the said lady Mary shall be wholly barred and excluded from her said jointure, and of and from all other advantages out of the real and personal estate of the said duke, as aforesaid.

Ordered, That the duchess of Norfolk may have a copy of the said bill; and that his grace the duke of Norfolk shall be heard by his counsel, to make good the allegations of his bill, on Tuesday next; and that the duchess may have counsel to attend at the same time, if she please.

February 17.

Upon reading the Petition of Mary duchess of Norfolk, praying to be heard by her counsel before any further proceedings be made on the said bill, it is ordered that the duchess shall be heard by her counsel as desired, on Tuesday next.

February 20.

After hearing counsel, upon the Petition of the duchess of Norfolk, as also counsel for the duke of Norfolk, the following order was made: It is ordered, That this House will hear witnesses for the duke of Norfolk, only to matter of fact, since the rejecting of the first bill, except only Mr. Daniel Germaine, Mr. Simon Briane alias de Brienne, Mrs. Anna-Maria Briane or de Brienne, Mrs. Judith Possette or Persode, Mrs. Elianor Vaness, who are at liberty to give evidence to matters of fact before that time, which were not then before the House; and are hereby required to attend this House, as witnesses on the behalf of his grace the duke of Norfolk, to-morrow morning. Also, That to-morrow this House will proceed to hear counsel and witnesses for the duke of Norfolk, to make good the allegations in his bill; at which time the duchess of Norfolk's counsel shall be present.

February 21.

The counsel being called in, they for the duke having opened the nature of their evidence, Mrs. Elianor Vaness was sworn; and being asked some questions by the duke's counsel, she appeared to be a Dutch woman, and could not well understand English; and an in-

* This clause was added after the bill was brought into the House of Lords.

terpreter being offered by the duke's counsel, counsel withdrew, and the House agreed, that the duchess's counsel should have an interpreter also; and the counsel being called in again, were told so by order of the House, and that they might proceed to any other witness. The duke's counsel desired that they might begin with Mrs. Vaness, and withdrew.

Then the following orders were made: viz. That the agents for the duke of Norfolk do forthwith deliver a list of the witnesses they intend to examine on the behalf of the duke to the duchess of Norfolk or her agents: That to-morrow this House will proceed to hear counsel and witnesses for the duke of Norfolk, to make out the allegations in his bill; at which time the duchess of Norfolk's counsel shall be present. That Daniel Germaine, Simon Briane alias de Brienne, Anna-Maria Briane alias de Brienne, Judith Possette alias Persode, — Goutaken, — Pontack, Susannah Barrington, — Hugonee, Mrs. Keemer, Joseph Berger, William Lane, John le Fontaine, Jonathan Browne, — Hatter, and — Welburne do, and are hereby required, to attend this House to-morrow as witnesses to be examined on the behalf of the duke of Norfolk. That William Allen and John Maitland do, and they are hereby required to attend this House, on service of this order, as witnesses to be examined on behalf of the duke of Norfolk.

DEPOSITIONS OF ELIANOR VANESS.

February 22.

Elianor Vaness sworn, deposeth as followeth, viz.

Q. Do you know sir John Germaine and the duchess of Norfolk?—A. Yes.

How long have you known them?—Two years.

When did you first come acquainted with them?—Sir John Germaine's sister hired me for a cook-maid the summer after the king came for England.

In what month of that year?—In May.

Did you live with either of them as a servant maid?—I lived two months with my lady duchess, in sir John Germaine's house.

How long did you live in the house with them?—Till they went to Vauxhall.

How long was the duchess in the house before they went to Vauxhall?—Two months.

Where was that house?—Just over Spring-garden.

At the time when the lady duchess lived with sir John Germaine, what company and conversation did they keep with one another, and in what manner?—Like man and wife.

Where was it the lady duchess lived when you came first into England?—In sir John Germaine's house.

Where did she live then?—The duchess lived there then.

How long continued she there?—About two months.

How did they live together during that time?

—Like man and wife.

Saw you them in bed together at any time, at that place in the Cockpit?—Yes.

How often?—Many times; as often as man and wife she saw them in bed, but did not put them in bed in those two months.

Did you think any otherwise, but that they had been man and wife?—She did not at first, but afterwards she did; and then they kept her within doors, for fear she should tell it.

Whither did the duchess go after that two months?—To Vauxhall.

How long did she live there?—About two years.

Did sir John Germaine use to come and keep company with the duchess there?—Yes; he used to come and dine with her sometimes; and he lay there sometimes.

What conversation had sir John Germaine with the duchess at Vauxhall?—They conversed together as man and wife.

How long?—Sometimes one night, sometimes two.

How often did he use to come thither?—Sometimes twice, sometimes three times a week, and sometimes but once.

Had they one bed, or two?—But one.

What name did the duchess go by at Vauxhall?—By the name of the lady Beckman.

What kin was sir John Germaine pretended to be to the lady duchess?—Her brother: my lady duchess said so.

Did you go with them to Vauxhall, or not?—She went with the lady duchess.

Whose servant was you there?—Lady duchess's.

How long did you serve the lady duchess?—She staid with her till she went to Millbank.

How came you to leave their service?—They sent her away upon the account of the late trial.

Who went with you?—Mrs. Susannah, chambermaid to the lady duchess; and Mr. Nicholas, that was gentleman to sir John Germaine.

What is his name?—Nicholas Hosier.

Who took care of your passage?—Nicholas Hosier.

Whither was you ordered to go?—To Holland, to the Hague: they paid her in full, and promised fifty livres besides.

Was any part of it paid? and by whom?—She received it in four quarters, from his brother Philip, at the Hague.

Whose brother?—Sir John Germaine's brother.

Who hired you when you came to England?—Mr. Briane's wife.

What kin is she to sir John Germaine?—His sister; and they promised, if matters did not go for the duchess, she would come to Holland herself, and take her into her service again.

Have you seen sir John Germaine and the duchess in bed together at Mill-bank?—Once or twice.

How long had the lady duchess lived at Mill-bank ere you left her service?—Nine or ten weeks.

How came you to see them in bed together?—By reason none was suffered to come into the room, the bed-chamber, but she and another maid, to bring necessaries, as water to wash their hands, and to clean the room.

Did you see them at their undressing, when they went to bed?—She undressed them herself, and saw them in bed.

Give an account how you two came to be admitted into the chamber, and what you saw there?—She helped them to bed, and saw them go to bed together.

Saw you them next morning?—Yes.

On what occasion came you into the chamber in the morning?—She came with chocolate, and water to wash their hands.

Did you ever see Mr. Nicholas Hosier there?—Yes; he did the business that she did when she could not be present; he was valet de chambre.

Was he valet de chambre to sir John Germaine, or to the duchess?—He belonged to the duchess at Vauxhall, and afterwards to sir John Germaine.

Came he to sir John Germaine before the lady duchess went to Vauxhall, or not?—The duchess was at Vauxhall when he came to sir John Germaine.

Who lived with the duchess at Vauxhall?—Sir John Germaine's sister.

Who hired you?—Mrs. Briane, Mr. Briane's wife.

Was there no other relation of sir John Germaine's that lived there besides?—Mrs. Judith.

What Mrs. Judith? What is her name?—She does not know.

What kin was Mrs. Judith to sir John Germaine?—His sister.

Did the duchess use to go to no other place?—None but to the neighbouring gardens, to gather flowers.

When you were at Mill-bank, did you ever see the duchess's father?—She hath been several times at the duchess's father's, and the lady duchess told her father and mother, that she brought her from Holland; she dressed three dishes of meat by order of the duchess.

Who was the lady duchess's father? Where did he live?—He lived at Mill-bank, but could not tell his name; the lord Peterborough, she says, but could not think on it before now.

When she lived with Germaine at the Cockpit, was there no other that lived with them at that time?—Nobody.

Did sir John Germaine's brother-in-law or sister lie in the house, at any time?—Yes; when they came first to England they used to lie there.

Name them?—Mr. Briane, and his wife.

Did you see any of sir John Germaine's relations, at any time, in the room during the time that the duchess was in bed with him?—Yes; Mr. Briane and his wife.

Was sir John Germaine in bed at that time with the duchess?—Yes.

Elleanor Vaness cross-examined.

Q. Was it at Vauxhall that the lady duchess said, that Germaine was her brother?—A. Yes.

Did the duchess tell you, that sir John Germaine was her brother?—She gave it out among the neighbours, but never told her so.

Was you cookmaid?—She was hired for cookmaid.

Did you continue to act as cookmaid?—Yes, at Vauxhall.

Was you at the Cockpit?—She used to clean the rooms, and nobody was suffered to come into the room but she, Mrs. Susannah, and Nicholas.

Was there no other woman in the house but you?—Yes, Mrs. Susannah.

Where did you see sir John Germaine and the duchess in bed?—At Vauxhall.

When came you from Holland?—About five or six weeks ago.

Where have you been since?—She does not know no place nor street in London.

How came you over?—About a year and half ago she met Nicholas at Amsterdam; she asked him how he did, and if he had got a place. He answered, No; but he believed he should very soon have one in England.

Who sent for you, or brought you over from Holland this last time?—She met Mr. Nicholas about a year ago, and said, she had a great mind to go and live in England again; and he said, he would get a place for her.

Who sent for her?—Does not know.

When you came over, who paid your passage, and first took care of you?—Nicholas hath given her what she spent since.

Who brought you to town? And who furnished you with money? And where did you land? What house did you first come to?—She landed at Gravesend.

Who received her there; or, when she came to town, brought her to any place to lodge at?—Nicholas brought her to a place where she was secure.

What place is it?—She does not know, she never was in London.

Did you not live at Vauxhall, and at sir John Germaine's house in the Cockpit?—She was no further than those houses; she means, she was never in the city of London.

Where is the house she has been at these six weeks?—She cannot tell whereabouts it is.

Was you not sent for back from Holland to be a witness?—No, knew nothing of it till about — now about eight or nine weeks ago.

In what street is the house you have been at?—I cannot tell.

How long is it since you went into Holland, since you left the duchess's service?—About eight years ago.

Did you never tell any body the occasion of your going over?—Yes, in Holland, but not here.

To whom did you tell it?—To a great many.

Know you any of those to be in England that you did tell it to?—Does not know any.

Did you ever discover this matter of your own accord? or, was you asked to do it?—I said, I would tell the truth if I were asked.

Can you name the person that asked you?—Mr. Nicholas.

Had you any discourse about this matter about eight weeks ago?—When I asked Mr. Nicholas if he could get me a place in England, I told him, I would say the truth.

What discourse had you with Mr. Nicholas about it?—I asked Mr. Nicholas, whether there was any danger of any such thing?—He said, he knew nothing of it.

Did you ever discover that you were sent out out of the way into Holland?—No.

Whether you and this gentleman that interprets have not talked most of this matter before you came hither?—No.

Who have you talked to about this matter, since you came into England, besides Nicholas?—Nobody.

Are you a single woman, or a married woman?—A single woman.

The Duke's Counsel.

Q. Was it your business to look after the chamber, to keep the door constantly, or on what occasion?—A. I used to wash the duchess's cloaths, and bring them to sir John Germaine's house, and keep the upper rooms clean, where sir John Germaine lay.

Did Susan go over with you into Holland, and come back with you?—Mr. Nicholas brought me into a room where she was kept, and I stayed a while with her.

Did Susan go with you, and come with you again?—Nicholas, and Susan, and I, were in a room together, and Mr. Germaine came every night, when the house was broke up, and told us what passed.

Did Susan go to Holland with you? Whether did you go before Nicholas, or with him?—Sir John Germaine ordered Nicholas and she to go into Holland, and Nicholas went with her.

(Signed) ELIANOR VANESS.

DEPOSITIONS OF NICHOLAS HOSIER.

February 22.

(*Nicholas Hosier sworn.*)

Q. Whether he knows sir John Germaine and the duchess of Norfolk?—A. Yes, Sir, I understand, I know both.

How long have you been acquainted with sir John Germaine, and upon what occasion?—The first he came to know him was in Suffolk-street.

Whether ever he was a servant to him?—Yes; I was a servant to him there.

When was it you first came into sir John Germaine's service?—It was above half a year before king James went away.

Did you live with sir John or the duchess? With sir John Germaine.

Where did he dwell at that time?—He had lodgings at the Golden Ball.

Was you with him afterwards when he was at the Cockpit?—Yes; and I lived with him at the Cockpit too.

At that time did you know the duchess of Norfolk?—I knew her, because they told me she was so.

Was there any lady that lived with sir John Germaine at the Cockpit?—At that time there was Mrs. Briane, sir John Germaine's sister.

Was there any body else used to lodge there?—There was none there but her at first.

Was there any other afterwards?—Yes, about two or three months after he was there; but I don't justly know how long afterwards.

Who was there then?—There was his sister, by name Mrs. Judith Germaine.

Do you know any thing about the duchess of Norfolk at that time?—Yes.

What conversation had sir John Germaine and the duchess of Norfolk?—She was in the house, and they eat and drank together, and lay together.

Where was that?—At sir John Germaine's house, next the Cockpit.

How came you to know they lay together?—Because I was his valet de chambre, and helped to undress and put him to bed.

Where was the duchess at that time?—The duchess was sometimes a bed, and sometimes not, according as he came home, early or late.

How long was the duchess with sir John Germaine at the Cockpit?—She was at the Cockpit before I came there.

Whether he went from sir John Germaine's service, after he came to live there?—He left his service several times.

When was the first time he went from sir John Germaine's service?—The first time he left his service was in Suffolk street.

How long was it before he came to live with him again?—He came into his service again, the summer after this present king came into England.

What time of the summer was it?—He cannot justly tell that.

Whether the duchess was there before he came to the Cockpit, or not?—She was there before.

How long continued she there?—About fifteen days after he came to sir John Germaine.

In what manner did sir John Germaine and the duchess live there during those fifteen days?—He says he hath already explained that before, he used to undress him and put him a-bed together with the duchess.

Where did the duchess live after she went from sir John Germaine's house?—She went and dwelt at Vauxhall.

By what name did she go when she was at Vauxhall?—She went by the name of my lady Beckman.

Whether he went with her, or continued in sir John Germaine's service?—He went with my lady duchess for some time, by sir John Germaine's order; he was sometimes with the one, and sometimes with the other; sometimes one paid him, and sometimes the other.

Whether sir John Germaine went to Vaux-hall?—He came there sometimes; he has seen him there several nights.

Whether he stayed all night there?—Sometimes.

Whether he was alone, or any body was with him?—There was somebody lay with him.

Who, upon his oath?—Madam the duchess, madam Beckman.

How know you that?—Because he undressed him when they lay together.

How often was that?—He cannot justly say how often, but it was several times.

What service was he in when he went out of England, and upon what occasion?—He left sir John Germaine's service at that time when the trial was depending between the duke and the duchess of Norfolk.

By whose order did you leave that service?—He desired leave.

How came you to leave that service at that time?—Because he was afraid he should be obliged to speak the truth of what he had seen.

Whether any went with him, and who went from their service when he went?—There were two servants of the duchess's.

What was their names?—One is called Susannah Barrington, and the other Elianor Vaness.

Whither did they go?—He was ordered by sir John Germaine to hire lodgings for them, where they should be unknown and private.

What was the reason why they should be in private?—He knows no other reason, but the difference before the parliament between the duke and duchess of Norfolk; he was obliged to take the lodgings, because the wind was contrary for them to go for Holland, and took private lodgings for them by the order of sir John Germaine.

What became of Susannah Barrington after that?—She stayed about three weeks with him, and then sir John Germaine came and fetched her back again, and where he carried her he does not know.

What became of Vaness, and yourself afterwards?—When the wind favoured, we passed the seas.

What time of the year was it?—It was about Easter that he came into Holland.

What time he went from his service, and was ordered to be private?—It was about the time of the trial.

Whether he hath any paper under sir John Germaine's hand for his discharge? We do not ask it, but only to refresh his memory. [The paper was dated 8th of February, 1692, reckoning the year to begin the first of January.] Whether that was the time he left the duchess's service?—Yes, about six or eight weeks after he went to sea.

Where did you stay in the mean time?—In the Minories near the Tower.

How came you to stay there so long after you were out of service, before you went beyond sea?—Because the wind was contrary.

Who went over with him? What became of Elianor Vaness?—She went with him to Holland.

Who bare her charges thither?—Sir John Germaine gave him seven guineas to pay for the expences that he was at here, and to cross the sea.

How long after that he continued in Holland, before he came into England?—He did not stay long in Holland, but went into his own country.

How long was it before you returned to England?—The summer following.

Was he sent for over into England, and by whom?—Yes, sir John Germaine sent to him often, by himself, and by his brother in Holland.

When he came over in the summer following (in ninety-two) whose service did he come to?—He returned to sir John Germaine.

Where did he live at that time?—Where he lives at present, at the Cockpit.

Whether after he came back in the year 1692, he observed any conversation between sir John Germaine and the duchess?—Yes; he says he saw them come together at their house.

What more?—He again then saw them a-bed together.

Where?—In the house of sir John Germaine.

How often may that be?—He cannot justly tell how often.

Whether it was often or not?—No, he cannot say very often.

When was the last time he ever saw them a-bed together?—The last time he saw them a-bed was not at the Cockpit.

Where then?—It was, at the duchess's own house, where as he believes, she lives still.

Whereabout in the town?—It was upon a corner of the park, near my lord of Oxford's.

How long since he saw them last a-bed together?—He cannot justly tell the time, it was about two or three months before he went away.

Did he mean the first, second, or third time?—It was two or three months before he went away the last time?

In what year did he go away the last time? [Let him look upon any note he hath to refresh his memory.] [Accordingly he looked upon a paper.]—It is the 27th of April, 1696.

Did you go away then the last time?—Yes, he says that it was the last time he left his service.

How long before that did you see them a-bed together?—He says it was about two months and a half before he left the service.

When my lady duchess lived at Vaux-hall, whether he can name any body else that was a servant in the house at that time?—Yes, there was one Elianor Vaness.

What servant was she?—She looked to the kitchen.

Whether he has seen her in the chamber when the duchess was a-bed there?—Yes, very often.

How came she that was cook-maid to be in the chamber?—He says he cannot tell the reason or what business she had there; but there she was for one thing or other, best known to herself; he does not know.

Whether when the duchess was at Vauxhall, any relations of sir John Germaine came to her there?—Yes, they would come and see her.

Who were they?—Mrs. Brienne and Mrs. Judith; he says he does not remember that Mrs. Brienne has lain there, but Mrs. Judith has.

Where it was, and upon what occasion he met with Elianor Vaness after he carried her over into Holland?—I met her in Amsterdam.

Whether he came over into England with her, and upon what occasion?—I met her at Amsterdam; and she asked me what business I had there, whether I had a master; and I said, no.

When was that?—About a year and a half, to his remembrance.

Whether he came over with her the last time?—Yes; he came over into England with her in company, about six or seven weeks since.

Where has she been since he came into England?—She was in lodgings.

Where?—He put her into private lodgings, that she should be secure.

Why did you put her into private lodgings?—Because he was afraid, in the circumstances that he is now, that somebody might give them some affront, or do them an injury; and therefore he thought it best to be in some place of security.

What particular reason had he why he should take private lodgings, or have that fear upon him?—He says, that when he was last here, sir John Germaine came up one night in a great passion, and swore, and said, somebody would betray him.

I desire he might repeat that again?—Sir John Germaine came one night up stairs and said, that Nicholas, this rogue, would betray him.

Who was that?—He says it was one Nicholas Rushett, that served him or both, he cannot tell, but he was in his service; that he heard these words, and that he thought in these circumstances, the securest way would be to take private lodgings.

What brought him into England the last time? Whether he was spoke to to come, and for what purpose?—He says, that about two or three years ago he happened to meet with a friend, and he desired him if he heard of a good place for him in England, to let him know of it, for he would go and serve there again.

Whether he was spoke to to come over, or was Elianor Vaness spoke to, and what was the occasion?—My lord asked him if he would speak the truth, and do him any service; and whether he would bring this girl along with him.

Who was it that spoke to him?—My lord duke and my lord Howard.

When was that?—It was about a year ago.

Where was he at that time?—He was in London.

Did he go over of his own accord, or was he sent into Holland; who it was that sent him over, and for what?—It was a friend of his acquaintance, that he desired, in case he heard of a place, to send for him.

Who sent for Elianor Vaness over?—He says, that after he had promised my lord duke and lord Howard to speak the truth of what he knew, they desired him, that if he met with Elianor Vaness, to desire her to come over, and speak the truth of what she knew.

How long after did you meet with Elianor Vaness?—It is about twelve months since I met with her.

When was the first time that he spoke to Elianor Vaness about her coming over to speak the truth?—It is about a year since.

How long is it since they resolved to come over?—About twelve months.

Whether he was acquainted with Elianor Vaness before he met with her in sir John Germaine's service?—He says never.

You say you went from sir John Germaine's service in Suffolk-street, and you say when you came to him again he lived in the Cockpit; did you find Elianor Vaness there then?—He says he found her at the Cockpit.

When he waited on sir John Germaine in his chamber, who waited on the duchess in her chamber?—There was one Susannah Barrington, and Elianor Vaness.

But who waited upon her in her chamber?—Susannah Barrington did, to dress her.

Whether he had seen any of sir John Germaine's relations in the chamber, when this lady and sir John Germaine were a-bed together?—Yes.

Name them.—He says, he saw Mrs. Brienne and Mr. Daniel Germaine there.

Did you see Mrs. Judith there?—He does not remember that he saw Mrs. Judith in the room while they were a-bed together; but the other he hath seen when they were a-bed together, but at different times.

Whether ever he hath seen the duchess at any other place?—He has been at the chapel with her, and elsewhere.

Where?—At my lord Peterborough's, and in her own house.

Cross Examined.

I desire he may reduce this to a certainty, what time he went out of England, and look upon his note again. [He looked upon his note, and it was dated 8th February, 1692.

How long after this went he out of England?—He went away as soon as the wind was favourable.

Can he recollect the time?—He says it was some time before Easter, for he came into Holland about Easter.

When he told his grace the duke of Norfolk and lord Howard he would be true to them, whether he was in any service at that time?—No, he was in no service at that time.

How long had he been out of employ?—He has none yet.

But how long had he been out of employ, or service, before he make this proposal to the duke, or my lord Howard?—He says, he went away about the 27th of June.

Is it the same year his paper speaks of, that he spake to my lord duke?—No, it was not; he spake to my lord duke about twelve months ago.

But how long had he been out of service when he spake to my lord duke? When did he leave sir John Germaine the last time?—It is about three years and half ago; it will be four years in June next.

Has he been in any service since that time?—No, he has not.

How has he lived since then?—He says he has something of his own in his own country, upon which he may subsist some time.

I think he said, he saw sir John Germaine and the duchess in bed together, in the house where she now lives?—Yes.

Then I desire he will tell, if he knows any of the duchess's servants that were about her at that time?—Yes, he does.

Then, that he will name them?—Henry Keemer.

What is become of him?—They told he was dead; and there was Susan Barrington.

I desire he will tell of some of the servants that lived with the duchess at that time, besides that person that is dead, and the other which is gone beyond sea, as they say?

[Mr. Northey answered, We do not say she is gone beyond sea.]—He does not know any other.

Then, that he will tell what month he saw them in bed together?—He cannot remember the month, or the day; but if they will ask him the reason why he remembers it, he will tell it them.

If you can come to any certainty about the time of the year or the month?—He cannot say the month, or any particular time.

What servant he saw in the house, or who let him in?—He had himself the key of the lower room, and could come in when he pleased.

Whose servant was he at this time he speaks of? Whether he was a servant to the duchess or to sir John Germaine?—He was servant to sir John Germaine.

He was saying he could tell a reason to fix the time, let him recollect himself of the time?—He cannot remember the time, but he came into the room to bring a clyster, and he was desired to stay a little till my lady duchess got up.

That he may be positive whether he had a key to the lower room of the duchess's house?

—He says he had a key of the door that goes into the park, and he could come into the house by it; for it was the key of the house.

What servant was it that brought him up, for that key only let him into the lower room?—Sometimes Susan Barrington, and sometimes Henry Keemer.

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What room the lady duchess lay in?—It is a room that looks into the park.

It is not a ground room, I suppose?—No, it is up stairs.

How many stories?—He cannot tell what degree it was.

Being asked that question again upon the reading his depositions, he says he cannot tell how many stories; but, if you please, he will describe the coming into the room as well as he can.

Describe the coming into the room?—That as you come upon the left hand, there is a way to go into the duchess's room; when you have passed the little chamber-door, you go into a place full of china; and, after that, you come to the duchess's bed-chamber. On the other side, going up stairs, there is a little room, where Susan told him she lay: and afterwards you come into a room where the chimney is, as he thinks, on the right hand, and he thinks there are two windows that look into the street, he is not very certain; and in the room upon the left hand there is a door into a great room, and from that great room you can go into the lady duchess's room. It was so at that time, to the best of his remembrance.

How many rooms are there upon a floor?—There are a matter of four rooms upon a floor.

Whether he has spoke with any body that he knows is acquainted with this house since he was examined here before?—He says he has spoke to nobody since, that has given him any account of the house.

Which side of the park does the window of my lady duchess's room look into?—Towards the pond where the brass statue is.

Does the bed chamber look towards the brass statue?—He durst not go to look out at the window for fear of being discovered, but he could see the water.

Whether he knows the Horse-guards?—Yes.

Whether he knows Arlington house?—Yes.

Whether the window does look towards Arlington-house, or the Horse-guards?—He hath been there several times, but it was not his business to go to the window; but when he was in the room he could see the water.

Whether he could tell which way the window looked?—He did not live in the house, but went there sometimes upon messages; and when he was there, it was not his business to go to the window, but he could see the water when he was in the room.

Whether the window was on that side of the little door that he came in, or on the other side?—Upon the left hand coming in. He says he has explained himself as to the entering in, and he can say no more to it.

Was it one or two pair of stairs that the duchess lay?—He cannot be positive, whether one or two pair of stairs.

Who brought him up that time he brought the clyster?—Susan Barrington.

Who told him at the Cock pit, it was the duchess of Norfolk?—Sir John Germaine, herself, and the whole house told him so.

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Did he before that time know the duchess?
—No.

Did you never see other women there besides this lady?—Yes.

Did you know all the rest that you saw there?—No he did not know them all.

Whether he was not told the rest of the women were of great quality too?—He never was told so, nor did he inform himself whether they were or no.

At Vauxhall and at the Cock-pit, I think, he spake as if he undressed sir John Germaine and the duchess; whether he undressed them both?—Not the duchess.

What year was it they were at Vauxhall?
—It was before he went to Ireland, and after he came from Ireland; but he cannot precisely tell the time.

Whether he has been in any service since 1696, when he left sir John Germaine's?—No.

Whether when he came, about a year ago, into England, there was application made to him in order to make a discovery? or, whether he offered of himself to make it?—He never did offer himself.

Who was it that first asked him the question?
It was my lord Howard.

Where did you meet my lord Howard? and upon what occasion?—He says, that it was that person that he had addressed himself to, to get him into service here, that was the occasion of their meeting together.

Did you know the lord Howard before?—No.

Where was the place they met?—He called him to his house.

My lord, or that person?—He says, that person to which he addressed himself to get a place, told him he had found one.

Name that person?—Richardson.

Where does he live?—I don't know.

Were you acquainted with him before?—Yes.

Where had you been acquainted with him?
—At London; it is a woman.

Whether he can describe the room, or the furniture of the room, where this noble lady and sir John Germaine were a-bed together, where she lives now?—He cannot remember any thing of the furniture.

Was it hung or wainscoted?—He says, he cannot tell, and yet was there often.

Pray, who was the clyster for?—For Mr. Germaine.

Where was it to be administered?—A-bed.

Who was a-bed?—My lady duchess was a-bed too.

Was it to be administered at the same time as he and the duchess were a-bed together?—No.

Was the duchess there?—He laid the syringe to the fire-side, till such time as the duchess rose.

Apothecaries are exact in point of time in making their bills?—He says, I composed the clyster myself; but he did not compose it at the duchess's house, but at Mr. Germaine's.

Did you stay with sir John Germaine till all

was over?—No; as soon as he had given it him, he went home to Mr. Germaine's house.

Whether he pretends to speak of any other time he saw the duchess in bed with him at her house in Duke-street, but when he carried him the clyster?—Yes, my lord, he says he has.

Let him tell the times and circumstances.
—He says, he cannot very well remember the times, but he had sometimes business there, to bring and carry letters.

When was that time of the clyster?—It was about two months before he left them.

Was that the last time he saw them together?—That was the last time.

How long before that did he see them together?—Long before that time, in the same house.

He says, he has seen sir John Germaine and the duchess in bed together elsewhere. Did he never see them in bed together at the Mill-bank?—He has seen them there two or three times a-bed together.

When did your master order you to prepare a clyster?—He had order to come and wait for Mr. Germaine at the duchess's; and, that Mr. Germaine coming to the duchess's late, he ordered him to bring the clyster next morning.

At what time he came the next morning?—He had order to bring it at 9 o'clock, and he brought it at the appointed hour, and waited in the little room where Susan was till he was called in.

He says, he waited for sir John Germaine, by his orders, at the duchess's, until it was late; which of the duchess's servants did he keep company with?—He says, he remembers very well it was Mr. Keemer.

Whether that time that he saw Mr. Germaine and the duchess in bed together at Mill-bank, if it was after the first time he was sent out of England, when the bill was depending before the lords?—It was after.

What year did you see them a-bed together at Mill-bank?—It was a day or two before Mrs. D'Avenant died. A day or two before she died Mr. Germaine came to Mill-bank, and staid there about eight day.

NICOLA HAUSEUR.

DEPOSITIONS OF WILLIAM BAYLY.

February 25.

(William Bayly sworn.)

Q. Do you know sir John Germaine and the duchess of Norfolk?—A. Yes.

Was you servant to sir John Germaine?—Yes.

In what capacity?—Three years I wore his livery, and three years I was his steward.

When did you first come to live with him?—Three weeks before the king was crowned.

Was there any conversation between sir John Germaine and the duchess of Norfolk? Do ye know that they lived together, or kept company one with another?—No; I never knew them live together, but seen them keep com-

pany together, but never saw any incivility between them.

Where saw you them in company together?—I saw them in company in my master's house.

How long ago?—About five years ago.

Where did your master then live?—He lived then where he does now.

Did the duchess of Norfolk ever lie there?—Never to my knowledge.

What was the time she usually came there?—Commonly in an afternoon.

How often have you seen her there?—Two or three times.

At what time did she use to come? and, at what time did she use to go away?—She used to come there about four or five o'clock in the afternoon, and might stay there about two or three hours.

You are upon your oath, and pray tell whether you ever saw them in bed together?—By all that is good, I never saw them in bed together.

Did the lady duchess use to come thither masked or unmasked?—She used to come masked, but put it off when she came into the house.

Who used to come with her?—There used to come Mr. Keemer with her.

What company? Did no other use to come with her to sir John Germaine's house?—Yes, another servant, Mr. Carter.

Who was in the room with them in sir John Germaine's house?—Mr. Keemer staid commonly with them all the time they dined, and after dinner; the other servants and I were in the next room to them; and commonly, when they had occasion, they would call Mr. Keemer.

Was there no other servant but Mr. Keemer that they used to call upon?—Yes; a gentlewoman, Mrs. Susan Barrington.

Have you seen her lately?—No, not these six months.

Do you know if your master used to go to the duchess's house?—Yes, I have heard so; but I cannot say so positively.

Did you ever go with them to the duchess's house?—No; but I have gone with them as far as the Horse-ferry.

When was the last time you saw them together?—I cannot tell; I have been out of my master's service these four years.

How long before you left your master's service, do ye think it was that you saw them together?—I cannot tell, but I think it might be about half a year.

He has gone with his master as far as the Horse-ferry; pray then let him be asked where he left his master?—I left him at the Horse-ferry.

What orders did your master give you when you left him?—He ordered me to go home, and keep the house.

Do ye know whither your master was gone then?—I may judge he went to the duchess, but I cannot swear he went there.

Did sir John Germaine come home to bed

that night?—Some nights he came, and some he did not.

Did you carry cloaths to him at any time?—I have carried cloaths for him to Mr. Keemer, the duchess's servant.

Where did Keemer live when you carried cloaths to him?—In a little street going to the Bowling-alley.

Who did he live withal?—He told me he lived with the duchess; but he was a house-keeper, and had a house there.

Did you always carry cloaths to Mr. Keemer for your master?—Sometimes I carried his cloaths to Mr. Keemer, and sometimes Mr. Keemer came to me for them.

Did you apprehend that your master was then at the duchess's, or at Mr. Keemer's?—I cannot tell where he was: how can I tell? I answer as punctually as I can.

When Keemer came to you for cloaths, what account did he give you where your master was?—He gave no account.

Whether did you ever see the duchess and your master together at any other place but his own house?—Never.

When you carried the cloaths to Keemer's, did your master lie at home that night or not?—Sometimes he lay at home, and sometimes he did not: many times my master has been at the duchess of Mazarine's from four o'clock this day till twelve the next.

Repeat it again, for that is material.—My master has taken his chair at his own back-door at four o'clock on a Saturday, and not come home till Sunday at twelve o'clock.

Where has your master been at that time, when he staid out all night?—At the duchess of Mazarine's; and when he lost his gold, he has sent to me for more gold.

Did he ever send to you for any cloaths when he was there?—Never.

Do ye know where he was when he sent to you for cloaths?—No, indeed.

Do ye know Nicholas Hosier?—Yes, I know him very well; I saw him here just now.

Did you know him when he waited on sir John Germaine?—Yes, he succeeded me, and I succeeded him again.

You was footman when you went to sir John Germaine: when was that? and, what year did you leave off your livery, and serve him as his steward?—I cannot tell.

He succeeded Hosier, and Hosier succeeded him: Pray let it be asked him, at what time he came into his master's service, when he succeeded Hosier?—It was about the same time that the trial was here before.

How long was it ere Hosier returned again to serve sir John Germaine?—To the best of my knowledge, it was three years; for I received and paid money for my master, and Hosier was away all that time: Hosier will not deny it, if he were called in.

You say that you succeeded Hosier at the time when the trial was here: How long before that time did you return to your master's service?—About three weeks before the king

was crowned I came to my master, and served him three years, and wore his livery; and he was pleased, after Mr. Hosier went away, to make me lay out his money, to be caterer for him, and to keep his gold; and to the best of my knowledge it was three years before Nicholas succeeded me again.

How long was it before he came back again to serve sir John Germaine?—Before I saw him in my master's house, and that he took my place from me, it was three years.

Did you not see Mr. Hosier in England before that time that you went out of your master's service?—No; I beg your lordship's pardon, I will recollect my memory for that; as I have a soul to be saved, now it is come into my mind, my master sent for Nicholas into Holland about a year before Nicholas did come over: My master told me, before he came, that he would send for Nicholas again, and that I and Nicholas should have the charge of his house. Nicholas came over, and we had the play at our own house: Nicholas staid there some time, but he did not like his business, and so he went away again, because he could not have all the money.

About what time did Nicholas come into England, after the trial was before this House?—I cannot resolve you.

Had you no certificate of leave, or discharge, when you left your master's service?—No; my master was so kind, that he brought me immediately into the excise, as soon as I was out of his service.

February 26.

William Bayly cross-examined.

Q. When you carried the cloaths to sir John Germaine's, was it the time when you wore his livery?—A. I carried no cloaths to him when I wore his livery.

Had you no discourse with the duchess's agents since Saturday night?—No, I have not seen them, nor do not know them.

He says, he saw the duchess of Norfolk at the Cockpit, at sir John Germaine's house where he now dwells: Pray, recollect yourself, that you may be positive as to the time?—I cannot resolve you as to the year, it is so long ago; I believe it is about five years ago.

Can you be positive that it is not more?—To the best of my knowledge, it was about five years.

Can you be so far certain, that you can say it was not more?—I cannot swear it was more, but I believe it may be five years, more or less.

You say you saw her two or three times there: Was it all in one year, near the same time or month? Can you reduce it to any certainty?—I believe it might be in summer.

All in one summer?—Yes, I believe, all in one; to the best of my knowledge there was never a winter between the time that I saw her first and last.

Did you know the duchess of Norfolk before that time that you saw her in your mas-

ter's house, and took her to be the duchess of Norfolk?—I did not know her before the trial was here.

Did you know her any time after that trial, before the time you saw her in sir John Germaine's house?—I was not sure that it was she, only as I had it from Mr. Keemer.

Then you do not undertake of your own knowledge to say that it was she?—I cannot swear that it was she, but as Mr. Keemer told me: I do not know whether I should know her now or not, it is so long since I saw her: I believe it is five years, if not more.

Did you see her before or after you saw her at sir John Germaine's house?—The first time they told me it was she, I met her in her coach in the Pallmall, with two other gentlewomen with her, a little before the trial was here: I followed the coach, and the duchess went into some lady's house in Dover street, and they told me the duchess was the first woman that went out; this is the first time that ever I saw her, that I know of, till such time as Keemer told me it was she.

Whether do you know Nicholas?—I know him very well.

Can you tell how long it is since he came last into England?—No, he has been here two or three times in England since I left my master.

How long before this examination saw you him, or spoke with him?—I did not see him above these three years.

How long before you came hither as a witness did you see him?—I have not seen him these three years till I came hither to be a witness, and did admire to see him here, that a man that had got his bread under his master should appear here against him, it is so ungrateful a thing.

How came it you had so much curiosity as to follow the duchess's coach?—I had a mind to satisfy my own humour.

Do ye know how Nicholas lived since he was out of his master's service?—No; I never saw him, nor had any account of him at all, nor have seen him these three years till now.

Did you know when Nicholas and Elianor Vaness went out of England?—No, I never knew when they went, nor when they came.

Do not you know what business he went out of England about, the time you took his place?—I know not the business he went out of England upon.

Did he at any time tell you he was to get away to hide himself from coming hither?—No, I heard not one word from him at the time of his parting.

What reason had you to say upon the first sight of Hosier, that he was ungrateful for coming hither?—I should think myself ungrateful to eat a gentleman's bread seven years, and do him all the spite and malice I could.

Repeat those words?—I should think myself very ungrateful to prosecute; if I should do any harm to a master that I had served so many years, I should think myself very un-

grateful, let him think of himself what he pleases.

He added some other words.—For any thing I know, it is spite and malice.

Where did you live when you followed the duchess's coach?—At Mr. Germaine's.

This man is a witness, and so is Hosier; let him explain himself what he means, and where in there is any difference between him and Hosier, for both are witnesses?—I say, I should think myself very ungrateful, if I would do any harm to a man whose bread I did eat so long, and had got so much money under him.

What harm does Hosier do, being a witness against the duchess of Norfolk? What harm is that to sir John Germaine?—I do not know.

Do ye reckon it ungrateful to speak the truth to the prejudice of a master?—No, I would not speak an untruth for all the masters in the world.

Where is there any fault more in Hosier than in you?—I know not.

Whether did Elianor Vaness live with sir John Germaine when you lived there?—I know not who she is.

This woman that was here as a witness?—Yes, she lived there.

What time went she away from sir John Germaine's service?—I know not, I cannot tell, indeed.

(Signed) WILLIAM BAYLY.

March 5.

Counsel and witness being called in for the duchess of Norfolk (and the Duke's counsel being present) the examination of the witnesses, taken yesterday in short-hand and transcribed, were read to them, and subscribed, viz.

THOMAS HAWKSWORTH sworn, deposed as followeth:

Q. Do you know Elianor Vaness? And did you live in the duchess of Norfolk's family?—

A. I came to live with the duchess about October, 1691, and left her in September, about two years within two months: Elianor Vaness lived there when I lived there, and was cook-maid.

When did she leave the duchess's service?—About the beginning of January, or the latter end of December, 1691.

On what occasion went she away?—She was turned away, to the best of my remembrance, for keeping company with Dutchmen.

Whether used she any other office but in the kitchen? or had she access to the duchess's chamber?—Never; she was not allowed to come any higher than the first floor: she used to clean that room next the street, one pair of stairs next the door, and the back parlour even with that, but was not suffered to come into the duchess's chamber.

Who waited upon the duchess in her chamber?—Frances Knight; she was constantly in the duchess's chamber, and used to warm her bed.

You say that Vaness was allowed to come

no higher than the first floor; explain that?—The kitchen is under-ground backward; that room Vaness cleaned was even with the street, a ground-room; the laundry-maid cleaned the next pair of stairs.

What was the laundry-maid's name?—Susan; she is dead.

Do you know how long?—No.

Did you ever see Vaness in the duchess's chamber?—Never in my life; I never heard she was allowed to come there.

How long is it since you lived with the duchess?—About six or seven years, or very near it.

Do you remember the bill that was brought into parliament against the duchess, while you lived there?—I came to the duchess the October before that bill was brought in.

Was Vaness turned away before that?—She was gone a month or thereabouts before that.

Do ye remember the month?—To the best of my remembrance, it was about the latter end of December, or the beginning of January.

Was there any stir about the Dutch foot-soldiers haunting Vaness?—I never saw any, but have heard the servants say they did.

Can you say what time it was? Whether before or after the bill?—Before I heard any thing of the bill she was gone.

Cross-examined.

Where do you live now?—With sir Thomas Barnardiston.

What station were you in when you lived with the duchess?—A footman.

Do you know Hosier then?—No.

Where did the duchess live, when you came first to her?—Upon the row between the Horse-ferry and Mill-bank.

How long did you live there?—A fortnight or thereabouts; not much more.

Do you know where she lived before?—No.

Do you know sir John Germaine? and, on the oath you have taken, did he ever come to the duchess's house while you lived with her?—I never saw him in the house; I never saw any unhandsome thing by the duchess all the time I lived with her.

Did you never see sir John Germaine with her?—No, never; and I had the privilege of the first floor and the second floor, and helped to rub the rooms, and sometimes I rubbed the lodging-room.

Had you the privilege of going up stairs in the morning?—No, it was one Peacock that rubbed the room above stairs.

Did you know Vaness? Was she servant to the duchess when you lived there?—Yes, she was.

Can you be positive as to the time of her going away?—As near as I can tell, it was in the beginning of January, 1692. I came in the October before, and she went away the January following.

Were you by, when she was discharged?—No.

Who paid her her wages?—I cannot tell.

Did you never see Vaness in the duchess's chamber?—Never.

Did you attend at the duchess's chamber in the morning?—Not constantly; we took it by turns.

Did you never attend in her chamber when she was a-bed?—No.

Who was it of her women that attended in her chamber?—Susan —, Frances Knight, and Susan Barrington.

When did you see Susan Barrington last?—About five years ago.

Did she constantly attend in the duchess's chamber?—She and Mrs. Knight carried coals constantly to warm the bed.

How old was you when you lived with the duchess?—About eighteen years old.

How old are you now?—I think about 27.

THOMAS HAWKSWORTH.

JOHN PEACOCK sworn, deposeth as followeth:

Q. Did you live with the duchess of Norfolk in 1691?—A. It is six years since I left her service, last January or thereabouts; I lived two years and a half with her, or thereabouts; I came in August, and staid till January two years following, or thereabouts.

Did you live with the duchess, when the first trial, as they call it, came on in parliament?—Yes, I lived with her before and after.

Did you know Vaness?—I knew one whose name was called Lena.

What was her business?—Below stairs in the kitchen; I never saw her in any other room, but the outer room next to the street, and I was there, all the while she was there, and after she was gone.

Did you ever see her in the duchess's bed-chamber?—No; the work she was employed about was dirty work; I never saw her clean, but nasty, and could not eat the victuals of her dressing.

Was you there before Vaness?—Yes, I was in the house some time before her grace came over, to help the upholder, and to carry looking-glasses and stands.

When did she come over?—She came to Mill-bank, but I know not when she came over: My lady Peterborough ordered me to do what I did.

Was you servant there to the duchess before she came over?—I never saw my lady duchess before she came there, except some years before at Drayton, when he lived with her.

Who hired you?—I came there by the lady Peterborough's order, and had my victuals at my lord Peterborough's.

Who hired you?—I was not hired at all.

How long did you live at Mill-bank?—I lived about two years and a quarter, or somewhat more.

What was your proper business, when you lived with the duchess?—When the duchess went abroad, I went with the coach; and when she supped or dined at home, I laid the cloth, forks and spoons.

Did you ever wait above stairs?—Yes, I have waited above stairs.

Who waited upon the duchess in her chamber?—Frances Knight, one Susan, and one Susannah.

Upon your oath, did you ever see this woman, Helena, go into the duchess's bed-chamber?

I never once saw her there all the time I staid there; I rubbed the bed-chamber with a long rubbing-brush; I never saw her there, nor above stairs.

Do you know at what time it was she came to live with my lady duchess?—Yes; she came while I was there.

Did you live with the duchess before she came to Millbank?—I lived at no other place with the duchess, but at Millbank, and at Drayton.

Do you know how Vaness left the duchess's service; and why?—Yes, upon complaints of disorders, and her ill dressing the victuals.

What disorders?—There were men came to the door to enquire for her, twice, or more.

Did you see the fellows?—Yes, I saw the fellows; they came to the door in the dusk of the evening, and I acquainted the duchess with it, and told her grace, I did not think it safe for her house, because I had the charge of silver spoons and forks.

What sort of men were they?—One of them appeared to be a foot-soldier in a blue coat.

In what manner was she put away or left the house?—Upon these complaints, the duchess said she would turn her away.

Did you hear the duchess say so?—Yes.

Was that before the trial at the Lords' House, or after?—To the best of my remembrance, it was before the trial, the latter end of December, or the beginning of January, but I cannot be positive; I think it was the latter end of December.

Did she go away before the trial, or not?—I think, before the trial, but I am not sure: Yes, at the time of the trial, I remember another cook.

Are you sure of that?—Yes, I am sure of it; it was the coachman's wife, one Gosling.

Do you know Hauseur or Nicola?—No.

You lived at Mill-bank two years; do you know no such man?—I never heard his name before; I had no acquaintance with him, nor ever saw him about house.

Cross-Examined.

Q. Where do you live now?—A. Near Huntingdon; I board in a house there.

How long have you been out of service?—Ever since I left my lady duchess.

How do you live then?—I board in a house; I follow no employment, but live on my own, except to teach children, two, three or four, out of charity.

When came you to the duchess's service first?—I served her about ten or twelve years ago; but I cannot remember the precise time, it is so long since.

How long did you live with her then?—I

lived with her about half a year at Drayton in Northamptonshire; I went about November, and staid to Lady-day following.

How long was it before you came to live with her the last time?—I cannot tell.

You say you came to live with her about two years and a quarter; what time was that?—I cannot tell, but that may be easily found; I lived with her about six years ago, or thereabouts.

How long did you leave the duchess, after the hearing came on in this noble house?—I do not know; it was about a year and three quarters, or two years, I cannot be positive.

Was it after the trial began?—Yes, I think the trial began in January, and it was a year after it began.

Cannot you be positive what time you came to live with the duchess?—I came about August to Mill-bank, but the duchess was not come then; but the October following my lady duchess came.

Where did the duchess live then?—I do not know, I was at the lady Peterborough's; I helped her servants to carry things, and to get things ready.

Did you know where the duchess lived then?—No; some said she lived in Flanders, others in Holland, and some in France.

Was you never at Vauxhall while the duchess lived there?—I was never there while the duchess lived there, if she did live there.

Was you never there where she did live?—When nobody lived there I have seen the house where they said she did live.

How long ago is that?—I know not how long ago, but it was in the summer-time.

How came you to take notice of that house more than the rest of the houses in Vauxhall? Who was it told you the duchess lived there?—I think it was one that was ———

You said the duchess went sometimes by water; did you go along with her at that time?—Yes, I did, with some other company.

Was you ever sent to the house, to fetch goods from thence?—No.

Who went with you, when you went with the duchess there?—One Mrs. Boufflers, and two or three other ladies.

Do you know sir John Germaine?—I never saw him but in his coach, as he was going along the street; I never saw him in any house, or any other place, sitting or going, but in his coach.

Was you never at his house?—I never was at his house, nor any place where he lived.

You say you were at the duchess's chamber to rub the room?—Yes, I was.

Did you not see Vaness there?—No.

Can you take it upon your oath that you never saw her there?—No, I never saw her there; but I saw Susan Barrington there.

What service did Susan Barrington do there?—She helped to dress and undress her grace, and to mend linen, as I think.

When saw you her last?—It was about the 9th, 10th, or 11th of August last, at the George-inn in Huntingdon.

Do you know where she lived then?—She was at Huntingdon then, and came with the lady duchess to take a stage-coach for London; she was at the George-inn in Huntingdon, I think, about August last.

You say you lived at the duchess's house at Mill-bank, before the duchess came thither: did Vaness come with her, or was she hired after?—I think she came with the duchess.

Do you know whence the duchess came, when she came there?—As I have heard, she came from Vauxhall: when my lady duchess went thither by water the summer after, I was told, that my lady lived at such a house in Vauxhall.

Did not you know that my lady duchess lived at Vaux-hall?—I never knew my lady duchess till she lived at Mill-bank.

What account had you at the duchess's house where she was then?—People said she was in Flanders.

Do you know when Vaness came to live with the duchess?—I believe she came to live with the duchess at Mill-bank.

Do you know when she was discharged out of her service?—I think it was the latter end of December, or the beginning of January; I think so, but I don't speak positively.

Was you by when her wages were paid?—No.

Have you ever seen her since?—No, I never saw her from that hour to this.

Where have you lived since you left the lady duchess's service, and how?—have you any estate?—I have a small matter to live on; I live near Huntingdon, I was born near there; it is my native place; I have lived there about four or five years, or within seven miles of that place, or thereabouts.

Did Vaness dress the duchess's dinner, when she lived there; for it seems she was not good enough to serve you?—Yes, she did dress the duchess's dinner, but I did not care to eat victuals of her dressing.

When did you first complain to the duchess, that men followed Vaness? or that you apprehended danger by her being there?—I cannot tell.

Was she discharged immediately after that?—I think she was discharged immediately after that.

You say there were some other ladies that went with the duchess to Vauxhall; can you name them?—Mrs. Marshal, and some others; but I cannot be positive.

Did you know Mrs. Briane?—No, I never heard her name before.

Did the duchess eat always at Peterborough house, or Mill-bank-house, as you call it?—Sometimes she eat abroad, and sometimes at home.

Who dressed her victuals when she eat at home?—Lena.

What do you mean by Mill-bank-house?—Peterborough-house.

Who did you hear say the duchess lived at that house at Vauxhall?—The duchess was

going by water, and told the ladies then, that that was the house she had lived at, at Vauxhall; and walking in the garden of the said house, told them so. JONAS PEACOCK.

FRANCES KNIGHT sworn, deposest as followeth:

Q. How long have you lived in the duchess of Norfolk's family?—A. Twenty seven years, or upwards.

With whom did you live all that time?—With the lady duchess's father, the lady Peterborough, and the duchess.

Did you live with the duchess when she lived at Mill-bank?—Yes, I lived with her at her first coming there.

Have you been with her ever since?—Yes.

Did you know Vaness in the duchess's family at Mill-bank, and what employ had she there?—Yes, I know her very well; she was in the kitchen.

Did you use to be in the duchess's bed-chamber, and about her person?—Yes, I was the first in the morning there, and the last at night, constantly.

Did you know Elianor Vaness there; and did she use to come into the duchess's chamber?—She never came there.

Where used she to employ herself?—In the kitchen.

Was she well enough in cloaths, cleanly enough, and fit to come into the duchess's chamber?—No, she was not.

What time went she away; and upon what account?—My lady put her away, because soldiers came and asked for her, and sent for her to ale-houses about ten o'clock at night. I went up one morning, and complained of her to my lady duchess, and told her that the soldiers haunted her, asked for her, and sent for her to ale-houses at ten o'clock at night: and my lady duchess said, she would not keep a servant that kept ill hours.

Was this before the trial?—Yes; my lady put her away upon my speaking this.

Do you know why she was put away?—Yes, for having soldiers haunt her company.

Consider well what you say?—Yes, my lords; I speak what my conscience tells me: Here I am before the lords, I must speak truth.

How far can you recollect yourself, if it was before the trial, or not, that she was put away?—It was before the trial.

How long?—I cannot remember; I think it was about a quarter of a year; I cannot tell exactly, but it was near upon.

How near was you to the duchess? What was your employment?—I helped to get her to bed, as her chamber-maid.

Did Elianor Vaness never undress her?—No, never in this world.

Did you never know her come into the duchess's chamber?—Never, never. Oh, fie! never indeed.

Do you know Nicholas Hosier?—I don't know him: there were many asked for Mr. Keemer; but I did not know them, for he has many acquaintance.

Did you know Thomas Hawksworth, your fellow servant?—Yes, he came when my lady came to Mill-bank; Mr. Peacock came before; they were both servants together.

Frances Knight cross-examined.

You say you lived twenty-seven years and upwards with the duchess and her mother; do you live with the duchess still?—Yes.

How long is it since you lived with her mother?—After the duchess was married, I came to live with her and my lord duke.

Have you been in her service since?—Yes.

After the duke parted with my lady duchess, where did she go to live?—She lived at Mill-bank, and no where else that I know of.

Came you to live with her soon after her marriage? and have you lived with her ever since? and did she ever live at Vauxhall?—I never lived with her at Vauxhall.

Then you have not lived with her ever since?—I have lived with her ever since; I have taken my oath, and as near as I can tell you.

Where did the duchess live before she came to Mill-bank?—She lived at Vauxhall.

Did not you live with her there?—No, I broke my leg, and was brought to her mother's, and staid there a twelvemonth; Mr. Peters was my surgeon, he can tell it. I came here to speak the truth.

Do not be angry.—No.

Did you continue with the duchess till you broke your leg?—Yes, and when I broke my leg, I went home to her mother's.

When left you the duchess after she parted with my lord duke?—I left her at Mill-bank.

Do you know the question that is asked? When did you leave the duchess after she parted with the duke?—I know no such question as you ask. I speak the truth as well as I can.

Where did my lady duchess go, when you left her?—I went away lame, and could do her no service.

Where did you come to my lady duchess again, when you were well?—At Mill-bank.

Was you ever with her at Vauxhall?—I was not there, because I was lame.

Was you ever at Vauxhall?—I told you I broke my leg.

Was you ever at Vauxhall, or not?—I tell you I was lame.

Was you ever at Vauxhall at any time?—I tell you I was lame; I give you answer to your question. I tell these noble lords, that every word I speak is truth.

But you are sworn to speak the whole truth.—I speak the truth. Why should you do so?

Was you ever with the duchess at Vauxhall?—I was not able to be there with her.

Was you there with her, or not?—I was not able to go thither.

Was you never there?—I was not able to go thither.

Was you never there, or not, with the duchess?—No, I never was at Vauxhall in my life, but at Mill-bank and Whitehall I have.

[Memorandum in this interlineation was altered, upon reading over her examination, Yes, I have been there, but I did not stay there.]

Was you ever there with the duchess, or not?
—I was not there: I tell you I was not there, I was lame.

Was you never there with the duchess at any time?—No, I tell you I was lame: I was never there with the duchess.

Where was the duchess before she came to Mill-bank?—That I cannot tell.

Where was she when you broke your leg?
—I left her at Mill-bank with her mother.

Where did you find her, when you came again?—I found her at her mother's.

Cannot you tell where she was in the mean time?—No.

Was you never told by any of the family where she was at that time?—No.

Did Vaness come to the duchess when she lived at Mill-bank?—Yes.

How long did she live with her after?—I cannot tell; but a short time.

Do you know Susannah Barrington?—Yes.

When did you see her last?—About three weeks ago.

Is she not in the duchess's service still?—I will tell you the truth: she received a letter from Flanders, acquainting her that her mother was dead: she was very much afflicted with it: and when the duchess came in, I told her grace that Susan had received a letter that her mother was dead, and I did desire my lady to give her leave to go to Holland; and she is there.

Did you see the letter?—I saw it.

Was it from her mother, or from her sister?
—Yes, it was from her sister, that her mother was dead.

Was Susanna Barrington in the duchess's service when this bill was depending?—No.

How long is it since you received that letter?
—It is about three weeks ago.

How long is it since you went?—A fortnight to-day.

Did you see her any time these three weeks?
—No, no.

Did you live with her in the house, and did you not see her?—She has been gone about a week.

Do you know Mrs. Judith?—No.

Do you know Mrs. Briane?—I have heard her name, but am not acquainted with her.

Had you any discourse with Vaness, when she came to Mill-bank to live with the duchess?
—No, I never liked her discourse.

Did you ever hear the duchess say that she lived at Vauxhall?—No.

Do you know sir John Germaine?—I know him by sight.

Did you ever see him at the duchess's?—No.

Did you never see him at Mill-bank, or at her house here?—No, my lords, never.

Did Vaness come along with the duchess when she came to Mill-bank? or was she hired after her return?—She came after her return to Mill-bank.

What time went she away?—I cannot tell

the day; that is a hard question. She went away, ~~on~~ my speaking to the duchess, that she was haunted with bad company.

Did not she dress the dinner when the duchess dined at home?—Yes; but she never dined at home but very seldom.

Cannot you tell when Vaness went away?
—No.

Did you know Nicholas Hosier?—No; I know no such man. There were many people came to Keemer, lord's servants and others; I do not know such people.

You have heard that the duchess lived at Vauxhall?—Yes.

At what time did she live there?—I cannot tell you; I was sick in bed.

You may recollect about what time was it.
—I was lame in March, this month: I cannot tell what year.

Do you know what house she lived in?—Yes; it was one sir Thomas Grosvenor's, at Mill-bank.

I ask you what house she lived at at Vauxhall?—I know not.

How came you to know the duchess lived at Vauxhall?—You ask what I cannot tell you.

You dare not tell.—Yes, I will tell the truth before all the House of Lords.

You said she lived at Vauxhall?—No, I never said it.

Whence came the duchess, when she came to Mill-bank?—She came from the place she did; I did not ask her the question; I durst not be so bold.

Cannot you tell when she came to Mill-bank? nor from what place she came?—I cannot tell the day when she came. I do not ask from what place people come.

When did you know sir John Germaine first?—I saw him first with my lord duke there, at his house in the square.

Did you never know him keep company with the duchess?—No, but only with the duke of Norfolk there; I speak in the presence of God. (Signed) FRANCES KNIGHT.

WILLIAM WHITE sworn, deposeeth as followeth:

Q. Did you live with the duchess of Norfolk for some years past?—A. I lived with her since the first week of the first trial, about six, or seven, or eight years ago.

What care was there taken about the duchess's door in the park?—I generally went out the first in the morning; the door had two bolts, a cross-bar, and an iron chain besides, these I unbolted every morning, and unbarred, when I went out early.

Did you ever hear or understand that Hosier had a key to that door?—I never knew any thing of it, nor know not of what use it could have been; for he could not come in till the door was unbolted.

Say positively, whether ever you have heard, that this man had a key to that door?—I never heard of it.

Did you never see him come in at that door?
—Yes.

How? Upon what occasion?—I happened to be going out myself, and to open the door for him. His business, I was told by my lady duchess's maid, was, that she had lent money to a man in Holland, and she wrote a letter to be carried by this man to her sister, to get this money; and she sent another letter by one Bull, to carry to Holland, to get the money, as she told me.

Did you let him in?—I unbolted the door, and let him in.

Did you find that this man used to come freely to the house, at that door, by any key?—No, I never knew it.

Who did he come to?—To Susan Barrington.

Did you ever see him above stairs with her?—No; he might come in, and I not see it.

Did the duchess or servants say any thing that he had leave to come in?—I never examined that, because any body that had business had leave to come in, as tradesmen, and others.

Did they tell you in the house, that Hosier was at liberty to come into the house with a key?—No, never.

Had you ever any discourse with Hosier?—I was one day coming from Change, and met Mr. L'Estrange and this Hosier. L'Estrange told me, that he was ill of the gripes. I told him, that the best thing for it was burnt claret; and he, and I, and Hosier went to a tavern in Smithfield: and while we were together, Hosier reflected upon his master, saying, his master had used him ill, and deserved to be ill used. Mr. L'Estrange heard these and some more words; Mr. L'Estrange told me, that he spoke to that purpose, he was resolved to be revenged of his master.

What did he say of his master?—He said his master had used him very ill; he had many threatening words; he said his master was an ill man, and deserved to be ill used, and the time would come when he should repent it.

When did he say these words?—It was about Michaelmas two years ago, or a year ago, I cannot tell which.

Cross-Examined.

Q. You say you lived with the duchess the first week of the first trial: was Vaness there at that time?—A. She was gone before I came.

How long?—I cannot tell; I never saw her there, to the best of my remembrance, but have heard there was such a one in the family.

Did you know Hosier?—I see him come in at the back-door.

Whose servant was he then?—The first time I did not know; but a little after, I was told he was sir John Germaine's.

What occasion had he to come to the duchess's house?—I know not, but about the business of the letter.

How often did you see him there?—Two or three times, or more.

With whom?—With Susan Barrington.

What was his business with her? About the money, as she told me. He went along

with that woman; she sent a letter by him; and she sent letters by some other Dutchmen into Holland, about the money.

Did he ask for any other servant?—Not that I know of.

Did you see him above stairs with her?—I never saw them in any apartment but that place below, where the lumber is, near the park-door.

Do you know Susannah Barrington?—I know her very well.

Do you know where she is now?—Her mother died about the 10th of January, and then I saw her all in tears; and she went away after this account of her mother's death.

When did you see her last?—I have not seen her this fortnight or month, that I know of, that I could distinguish her from another woman, except she had a mask on.

How long before this trial saw you her?—About a fortnight: she gave me an account that her mother died the 10th of January in Holland.

When did she go away?—I did not take notice of the time she went away.

Did you know Hosier at any other place but at the lady duchess's?—Never, but as I have seen him in the park, and with Mr. L'Estrange.

Was you never with him at sir John Germaine's?—Never.

Do you know sir John Germaine?—After I had lived with the duchess some time, I was told by some in the street, that that was his coach, and his livery, and that he was the man that there was so much noise about.

Did you never see him in the duchess's house?—I never saw him in no part of my lady duchess's house, nor in no apartment; and I am the only man that goes up and down stairs.

Did you never see him in the duchess's company at any other place?—No.

Did you constantly lie at the duchess's house?—When the duchess was last at Drayton, I lay at Richmond two or three nights.

Did you lie constantly there, when the duchess was there?—I was sick near a month, and all that time I lay at my wife's; but most commonly lay at the duchess's, since she is come to Duke-street to live.

You say, you used to open the door in the park first in a morning; what time did you use to open it at?—At six, seven, or eight o'clock in a morning; there was no certain hour; but I generally opened that door.

Did you ever know Hauseur come in at any other door but that?—Yes; one wet day he came in at the street-door, before the porter and all the servants, and asked for the same woman.

Did he never ask for any other body?—I never heard him ask for any but Susan Barrington, for she was his country-woman.

If Nicholas got in at the park-door, could not he get up stairs?—If he could get in at that door he talks of, he could not get into the duchess's apartment; for there was a room betwixt that, where the plate and jewels lay, that

no key could open: that if he could get up two pair of stairs, he could not get in there.

If he had a key, and got in at any door, could not Susan Barrington, when he came in, without any difficulty, lead him round the house?—I cannot say but she might; but I never saw him, but below stairs with that woman, and then he went away without going up stairs.

Did you never see him bring any thing to the house?—No.

You named one L'Estrange, that you saw with him at the tavern, what is he?—He was my old fellow-servant at the late duke of Norfolk's.

What discourse had you with him then?—He complained to me of his being ill, and I gave him the best of my advice.

What time was it that Nicholas had those threatening words against his master?—About ten, eleven, or twelve o'clock at noon.

How long ago is it?—I cannot tell if it be a year or two years, it was a little after Michaelmas; but whether it be one year, or two years, I cannot tell?

Could not Mr. L'Estrange tell?—I asked Mr. L'Estrange, and he could not tell.

Whose servant was Nicholas then?—He was nobody's servant then: he railed against his master at that time for turning him away.

Did you not know who was his master a year or two ago?—He told me he was out of place.

Did you not know him to be sir John Germaine's servant, when he came to the duchess's?—I did not know it when I first saw him and Susan together; but some time before he went away, I heard he was his servant.

But you say you did not know sir John Germaine about two years ago?—I did not know him so as to speak to him.

WILLIAM WHITE.

MATTHEW MAC-DONNELL sworn, deposeth as followeth:

Q. How long have you lived with the dutchess of Norfolk?—A. Four years at Lady-day next.

In what manner was the door going out to the park kept? Had any body a key to it that was not of the family? Did it use to be left open?—It was not to be left open; it was very unsafe to be left open; besides, it was bolted and locked.

Was there particular care taken of that door?—Yes; I myself bolted it very often at night.

Did you often unbolt it in a morning?—Yes.

Whether or not, the time that you lived there, did you know any body, that was not of the family, come with a key to open that door?—Never.

Did you know Hauseur, or Nicholas? Had he a key to that door?—I never knew it.

Did you ever see him come in at that door?—I opened that door for him once or twice when he rung.

When was that?—In an evening.

What did he come about?—I do not know; but he asked for Susan, my lady duchess's servant.

Did you ever see him go up stairs?—I never did hear he went up in my life.

When he asked for Susan, did he go up then?—No; I called her to him, and I never saw him go up stairs.

Did you stay with him all the while Susan was with him?—No, I had no business; I went my way.

Was Nicholas, when he rung, in the park, or at the inner door?—In the park.

Cross-Examined.

Did you know whose servant Nicholas was?—I did not know, nor I asked no questions.

How often have you seen him at the duchess's?—Three times.

Did he always ask for Susannah Barrington?—One time he asked for Mr. Keemer.

Who was Mr. Keemer?—He was the duchess's servant.

Did you use to stay with him? or, did you leave him?—No, to tell you the plain truth, I thought he came to court Susan, and did not stay with him.

Did you ever see him up stairs in Susan's room?—I never saw him there.

What employment have you under the duchess?—I am her footman.

When did you see Susan last?—On Tuesday se'n-night in the morning.

Not since?—No.

Where did you see her then?—At the duchess's house.

What became of her after that?—She said, her mother died lately in Holland, and she was going there.

When did you hear her say so?—I heard her say so several times before she went away; a month, or a quarter of a year, before she talked of going to Holland.

Upon your oath, do not you know that she is at the duchess's?—I know not of her being there.

Can you take it upon your oath when she was first wanting?—I saw her on Tuesday se'n-night last, in the morning.

How came you to know she was gone, if you do not know the time when she went?—I did not know she was gone, till I went home from the house here.

Who told you she was gone?—The servants.

She was there when you came hither?—On Tuesday morning I did see her.

Has the duchess another in her station?—There is one Mrs. Cambell, that dresses my lady duchess, but she does not live there.

Did she use, in Susan's time, to come and dress the duchess?—Yes, she used to come sometimes.

Has the duchess taken any body to do Susan's work?—I know not of any.

(Signed)

MATTHEW + MAC-DONNELL.

Mr. ROBERT WELBOURN sworn, deposeth as followeth:

Q. What account can you give of Mr. L'Estrange's having notice to be a witness?—

A. I was told by the duchess, That L'Estrange had been with her, and gave her an account of some particulars between White, and him, and Nicholas; that having the griping in the guts, they went into a tavern together; that he heard White and Nicholas talk together very loud, but he told me he had the gripes, and could not so well mind what he said; but he heard him use hard words against his master, but he could not remember that he said he would be revenged upon his master; but he would recollect himself, and, if he could remember, he would say what he could: he told me, he had been bred in the Norfolk family.

Did you ask Mr. L'Estrange about this matter?—Yes: Mr. L'Estrange told me, he remembered they were together, and heard Nicholas speak very hard, ill words against his master, but he could not be positive what they were; but what he could remember he would speak, if that would do the duchess any service. He desired my lady duchess would give him notice the night before, and he would appear.

When was this?—It was Tuesday or Wednesday; I think it was Wednesday.

Cross-Examined.

Q. Did the lady duchess tell you what Mr. L'Estrange said?—A. Yes; that gave me the occasion to speak of it. He said, he heard Nicholas say hard, ill words against his master, but not that he heard him say he would study to be revenged. Perhaps, says he, there might be some other words. That he was in the kitchen, and would endeavour to recollect who was there besides; and if he had two or three days time, he would enquire.

Did you let him know you was concerned for the duchess?—Yes; and he told me he would tell me what he could say in this matter; and he should be ready to appear at any time, if that would be for the duchess's advantage.

Did he tell you he was going abroad into Holland?—Not one word.

Did you intimate to him, when the duchess was to make her defence?—I think I did, but I cannot be positive; but he took no notice to me, that he would not be there.

Do you know Mr. La Fountaine?—Yes, I know one La Fountaine.

Is he in the duchess's service?—I believe not.

Do you know whether he is at Drayton?—I have seen him at Drayton.

Did he live with sir John Germaine, that you know of?—Never, that I know of.

When saw you Susan Barrington?—I cannot be positive; but I think, not this month or six weeks.

Have not you seen her since this bill was brought in?—Positively, I have not.

ROBERT WELBOURN.

ELIANOR MONFORT sworn, deposeth as followeth:

Q. Tell the Lords if you know Nicholas Hosier, and on what account you came to know him.—A. This Nicholas lodged two or three times at my house. My husband was a Dutchman, and he was a Dutchman; they were like brothers, they loved one another.

What know you of this man, this Nicholas?—My husband told me, that this man Nicholas, (I did not know no other name he had;) my husband told me, that he had a design to rob his master, and that he knew where his gold and his jewels lay, and had made false keys, and would watch his opportunity when his master was at play, or out of town; and left the keys at her house.

Your husband told you so?—Yes, my husband bid me send for this man. These were his last dying words.

Your husband had a sad misfortune. When was it your husband told you so?—When he was in prison.

How long ago is that?—About eight or nine years ago last Christmas. I would not have your lordships think my husband was so bad a man; he was only condemned and executed for changing ten pounds of his own money.

What were your husband's last dying words?—He desired me to send for this fellow, and deliver those things he left at my house. I sent for him; he came, and had some keys in a drawer, that my husband told me he had left there. He took two or three keys, and put them in his pocket, and looked mightily out of countenance.

What did your husband say to you?—He bid me give Nicholas the keys, and bid him have a care, and keep good company.

When was that?—A week or a fortnight before my husband was executed.

Did you acquaint Nicholas with what your husband said of him?—No, and please your honours; I only told him, my husband charged me to give him those keys; but being in trouble, and having a great many enemies, I talked no further with him.

What did Nicholas say to you?—He looked out of countenance, and told me he would come and see me another time; but he never did; so that I did not see him again till I saw him in the Meuse, and then he told me that he would come to see me, but he never did, but always shunned me.

How long have you known Nicholas?—These eight or nine years. I knew him when he was footman to sir John Germaine, and I knew him when he was his gentleman. I knew him when he went, and I knew him when he came: he is like a sea-rat, he comes and goes when he pleases. I hope in God Almighty it will be considered by this House, that such a fellow's witness should not be taken in such a great concern.

(Signum) ELEANOR + MONFORT.

Then the duchess's counsel prayed that

M^r Donnel may be examined, as to the withdrawing witnesses, and that it be taken in writing: which was agreed to, and he examined.

Then the duchess's counsel proceeded to examine other witnesses, and their evidence taken in short-hand.

Then Mrs. Pitts being called for, and not appearing, William Godfrey being sworn, said to this effect:

I went to serve Mrs. Pitts on Friday morning: when I came to her house there was nobody. A woman with a pitcher of water went in: I asked her for Mrs. Pitts; she said, she was not at home. I shewed her the order, and left a copy of it upon the table. She was loth to receive it; she said, the lady would be within quickly. The woman's name was Olivet. The last night I went again, and a woman came out and said, Mrs. Pitts was not at home. Then she spake in French to me: I did not understand her. I left a note for her to attend this day.

Then the duchess's counsel prayed, that some agreements between the duke and duchess, in 1694, may be read out of the deeds executed for that purpose: which was agreed to, and read accordingly.

March 5.

FRANCIS NEGUS sworn, deposeth as followeth:

Q. I desire Mr. Negus may be asked, whether the duchess of Norfolk did not send some message by him? The words I do not confine him to; but whether the message sent by him to my lord duke was not to this purpose; that notwithstanding the articles, she desired to know from his grace in what manner she should live; and that she would be governed by his directions?

A. I think it was much about the time of the transaction of these articles the duchess sent to me. Mr. Longueville was counsel for the duke, and sir Thomas Powys for the duchess. Mr. Longueville took what care he could; and when they came to talk of their living separately, I took it only to be an apprehension and fear that my lord duke would confine the duchess to some house. My lady duchess sent for me; I waited on her, and she expressed herself very sensibly of the misfortunes of the duke and herself, that such differences should have been between them; and she was desirous to let my lord duke know, and desired me that I would let my lord duke know it, that she would avoid all company that should give him any offence, and that she would not so much as pay a visit, but where he liked. I acquainted my lord duke with something to this purpose; for she often said to me, more than once or twice, that if she happened to die before my lord duke, she would leave him her estate; and I know I have said so to my lord duke.

Whether, from that time, do you know that the duke sent any message of complaint to the duchess, to the place where she lived, that

he would have her live in any other way?—I know nothing of that matter.

Do you know whether my lord duke ever desired her to come and live with him?—I never heard of any such thing.

Did he ever send to her, to avoid any company?—I never heard of any such thing.

Whether had you any directions to attend the duke, that he would give way in a controversy between the duchess and a noble lord of this house, whether he would wave his privilege?—I have great reason to desire sir Thomas's favour in this matter; I know not what he aims at. I was called to the bar before, to speak the truth as to the matter of the privilege; I know not what he means by it.

I mean it only as an instance of a civil message between the duke and duchess, owning her as his wife, and that this was a message that bespoke a good understanding between them?—Will you have me to give an answer to sir Thomas, my lords? I confess, the duke did send for me, and asked me how the settlement and agreement were betwixt the duke and duchess, because of this matter of the privilege.

I did not mean that; but only as a late instance of the duke's owning the duchess so far?—When the duke sent for me, he would know, whether by the agreement he was obliged to let her have the privilege? I said, I understood it so; and though he had no mind to do it, but as he had waved his privilege, in the case of an uncle, he would do it for her.

What would have been the consequence, if the duke had not waved his privilege? Would not that have defended her from a suit?—That you may make use of as you please.

Sir Thomas Powys. I would only make this use of it, as an instance of kindness between the duke and duchess. FRANCIS NEGUS.

After the examination of Francis Negus, he being before sworn, the duchess's counsel declared they had finished their evidence.

Whereupon the duke's counsel desired to call a witness or two, to support Nicholas Hauseur's reputation. Then William Allen was sworn and examined.

WILLIAM ALLEN sworn, deposeth as followeth:

Q. Do you know Nicholas Hauseur?—A. Yes.

How long have you known him?—Three years.

Did you not know him before that time?—I knew him about three years ago.

Had you any dealings before that time?—I had dealings with him when he lived with Mr. Germaine.

What were his dealings?—As honest and fair as any man could desire.

What office had he under Mr. Germaine?—He was cook to Mr. Germaine, I suppose.

What! was he cook to him?—He bought in the goods, and he paid me honestly for what he bought.

Cross-Examined.

Q. What trade are you?—A. A butcher.

Then he paid you his master's money for his master's goods?—Yes, he paid me very honestly.

When saw you him last?—I saw him when I was summoned here by the order of this house, but not before of late.

(Signed) WILLIAM W ALLEN.

The duke's counsel moved for copies of the examinations and journals; which was granted, and the counsel withdrew. The following orders were made:

It is ordered by the Lords spiritual and temporal in parliament assembled, That copies of the examinations, signed by the witnesses this day, and entry in the journal, be delivered to either side; and, that the examinations taken this day in short-hand be transcribed, in order to be read to the witnesses to-morrow.

It is ordered by the Lords spiritual and temporal in parliament assembled, that to-morrow at twelve o'clock, this house will proceed to hear the examinations taken this day, read to the witnesses, relating to the duke and duchess of Norfolk, and all lords summoned to attend.

March 6.

After the examination taken yesterday, relating to the duke and duchess of Norfolk, were read to the witnesses, and they signing them, the duchess's counsel moved to have copies of the depositions taken on either side, and then withdrew.

March 5.

MATTHEW MAC-DONNEL, sword, deposeth as followeth:

I was going to Mr. Strange's house, and I saw my lord Howard of Escrick coming that way, and he went to the door and knocked. I made up to the door, and a girl opened the door. My lord asked if Mr. Strange was within, and she answered, yes. Then I went to the door, and asked if Mr. Strange was at home; she answered, no, he went away on Thursday. I asked, by packet-boat, or how? She said, by long-sea. I thought she told my lord he was within, and so I came away.

(Signed) MATTHEW + MACDONNEL.

RICHARD MAY sworn, deposeth as followeth:

Q. Do you know Nicholas Hauseur?—A. I never saw him till Sunday fortnight last.

Where saw you him then?—At my lord duke of Norfolk's. I had a command from my lord duke to take him in there.

Where?—To lodge him in my lord duke's house: I am his household-steward; he commanded me to provide for him in the house.

I don't desire you should do any thing unbecoming to my lord duke; but you are upon your oath, and you must tell the truth?—I will freely tell what I know.

Can you give me any account where he was before that time?—I never saw nor heard of him till then.

Hath he been there ever since?—Yes; I made provision for him by his grace's command.

Do you know Vaness? Where hath she been?—On Sunday was fortnight she came thither likewise, and I was ordered to take care for her.

Where was she lodged?—In my lord duke's house in St. James's square.

Has she been there a fortnight?—Yes, a fortnight last Sunday, and coming here to attend the Lords.

Had she the liberty of the house, or was she kept close?—They were kept only as they desired themselves; nobody was denied liberty to see them: They desired to be there, sooner than any place.

Do you know that those people have been sent for, and how long before they came?—I was never privy to any thing of that nature: I had no knowledge of their names, nor whence they came.

Do you know of any money issued out for their coming over?—Not one penny.

Do you know of any reward they have had, or are to have?—I know not of any reward they have had, or are to have.

RICHARD MAY.

CHRISTOPHER RAINE sworn, deposeth as followeth:

Q. Are you servant to the duke of Norfolk?—A. Yes.

Do you know Hauseur?—I have seen him, but am not acquainted with him.

How long is it since you saw him?—It is within this fortnight.

Did you not see him at any time further off?—No, I am positive of it.

Where did you see him first?—In St. James's.

In what place there?—At his grace's house.

Hath he been there ever since?—Yes.

Was there a woman called Vaness with him?—Yes.

Did they come at the same time?—Yes.

How long ago?—A fortnight; it may be, not so much.

Had they the liberty of the house, to take notice where they were?—They had liberty to go where they pleased.

Did they go abroad since they came there?—I cannot tell; not to my knowledge.

Do you know whether they went out of the house upon any occasion?—Not to my knowledge.

Who brought them there?—I do not know.

Do you know whence they came?—No.

Did you understand where they lodged before?—No, I am a stranger to them both; I never saw them before.

Saw you them when they came first?—No, I was not at home.

CHRISTOPHER RAINE.

EDWARD COTTER sworn, deposeth as followeth:

Q. Are you servant to the duke of Norfolk?

—A. Yes.

Do you know Nicholas Hauseur?—I did not know him but since this trial.

How long ago is that?—About a fortnight.

Do you know where he had been before?—

No; I knew nothing of him, where he was, nor what he was.

Came Helena the Dutchwoman with him?

—Yes, the woman came with him since the trial; I never saw them before.

Did you never know them go out of doors since they came, but to this house?—Never, no where else.

Who brought them to the duke's?—I know not.

Whence came they, do you know?—I cannot tell.

Did they never report in the house, whence they came?—No, I never heard where they lived, nor how they behaved themselves.

Do you know whether ever any reward was given them?—No.

I desire he may be asked, whether he has not known before, for some time past, within this fortnight or three weeks, more or less, meetings in Somerset house, in order to this trial?—The thing is this; I was one night at Somerset house with my lord duke, betwixt six and seven o'clock; but I cannot tell how long it is, whether it be three weeks or a month; it is no more, that I know.

What were you there about?—I went there with my lord duke.

Upon your oath, was there any thing then done there, relating to this trial?—Upon my oath, I did not know but it was concerning my lord Howard of Escrick.

Was he there with the duke?—Yes.

Did you know who they went to?—No.

Upon your oath, do not you know whether they went to Madam Pitts, or no?—They went to some house, but I do not know her name they went to.

Was there any body else there, but my lord duke, and my lord Howard?—God knows. My lord duke called me to the door, and sent me on a message; and I went and came again.

Who did you see there when you came again?—I saw none but my lord duke, and another that I did not know.

Who did you see go in?—None but my lord duke, and my lord Howard.

EDWARD COTTER.

FRANCIS HUDDLESTONE sworn, deposeth as followeth:

Q. Upon your oath, do you know of any meetings relating to this trial, that hath been within some time past?—A. For meetings, I know not any thing of them.

Do you understand the question?—I know nothing of any meetings.

Have you not been at any place where any thing has been done, relating to this trial, against the duchess of Norfolk?—I do not understand any thing of the trial. I know nothing of the duchess of Norfolk.

Pray, give a positive answer: Have you not been present, or do you know of no meeting, relating to the proceedings against the duchess of Norfolk?—I never was at no meeting.

Who do you live with?—I live with my lord Howard.

Was you ever present at Somerset-house, where my lord Howard and others met?—I have been at Somerset-house, but know nothing of any concerns.

Do you know Vaness?—I know no such person.

Do you know Nicholas?—I do not know him.

Pray, answer positively; Do you know one Nicholas, called Hauseur?—I know several of that name, but I know not who you mean.

I mean one that lived with sir John Germaine.---I know him not; I never had any conversation with any body that lived with sir John Germaine.

(Nicholas called in.)

Q. Did you see any such man as appears here, at Somerset-house?—A. I know no such man as is called Nicholas Hauseur: I know several called Nicholas, but none of the Hauseurs.

Look upon this man; have you seen him before or not?—Yes; I have seen him twice or thrice; but I knew not who you meant before.

How long is it since you saw him first?—About a fortnight ago.

Have you not seen him at Somerset-house?—Never.

Where did you see him?—In Gerrard-street.

Was that all the places you saw him at?—I saw him no where else.

Whose house did you see him at?—At captain Soames's lodging.

Did you not see a Dutchwoman there, one Helen Vaness?—There was a woman with him, I do not know her name.

Did you not see her at captain Soames's?—She was with this gentleman there.

Did you see her at no other time or place?—No.

Who else was there then?—Captain Soames, my lord Howard, and one or two more. I was but at the door. I have seen this man go in. I was but a footman waiting at the door. I knew not the others that were there.

Did you know no more that were there?—My lord Howard was in the house, but I know not if he were with them.

Did you ever see Helen Vaness before that time?—I have seen the woman since, but never saw her before.

Did you never see her any where else?—

Never any where else but at this house, going and coming.

(Signed,) FRANCIS ~~de~~ HUDDLESTONE.

The counsel being withdrawn, the following orders were made: That copies of the examination, read to, and signed by the witnesses to-day, be delivered to either side. That this House will peremptorily proceed to hear the duke of Norfolk's and duchess of Norfolk's counsel, to sum up the evidence on both sides, on Friday next, and all the Lords summoned to attend.

The Evidence having been summed up, the Lords, after a long debate, and a division of the House, committed the bill, by a majority of sixteen.

Whereupon the duchess immediately preferred the Petition recited in the Order, March 8.

March 8.

Upon reading the Petition of Mary, duchess of Norfolk, shewing, that by the Bill now depending for dissolving the marriage between the duke of Norfolk and your Petitioner, her jointure and marriage-agreements are to be set aside, and other things in the Petition mentioned, and praying to be heard by her counsel, touching the several claims and interest, and several clauses in the Bill: It is ordered by the Lords spiritual and temporal in parliament assembled, That the Petitioner shall be heard by her counsel to-morrow at eleven of the clock, at the Committee of the whole House, to whom the said Bill stands committed; at which time she is to produce her said marriage agreement and writings, as in the Petition is set forth: at which time the duke's counsel may be present, if he think fit. MATTH. JOHNSTON, Cl. Parl.

Upon which an Order was made for counsel to prepare a clause for the 10,000*l*.

The duchess's counsel having refused to join in drawing any clause, though they advised a Petition about the jointure and marriage agreement, the duke's prepared a clause, to which the Lords added a few words, and passed it as in the Bill. The Bill being sent down to the Commons, the duchess presented the following Petition:

To the Honourable the Knights, Citizens, and Burgesses, in Parliament assembled.

The HUMBLE PETITION of MARY,
Duchess of NORFOLK.

"Sheweth,

"That for putting an end to all differences between the duke of Norfolk, your Petitioner's husband, and your Petitioner, several articles of agreement were entered into, and executed in April 1694, by the said duke, your Petitioner, and your Petitioner's late father, the earl of Peterborough, whereby, and by deeds executed pursuant thereunto, the duke had his then desired advantage, and hath fully enjoyed the benefit thereof: That your Petitioner, about the time of perfecting the said deeds, signified to the

said duke by Mr. Negus, that she should always readily comply with all such orders in her way of living and conversation, as he should think fit to appoint. Notwithstanding which, and without ever signifying any dissatisfaction to or with your Petitioner, and without any manner of notice, or previous proceeding in the common and ordinary course of justice, and to take from your Petitioner that legal trial in the ecclesiastical court, which by the laws of this realm (as she is advised) she is entitled unto, did, on the 16th of February last, exhibit a Bill in the House of Peers, intituled, 'An Act to dissolve the duke of Norfolk's marriage with the lady Mary Mordaunt, and to enable him to marry again.' Upon which the proceedings were so very quick, two witnesses lately brought from beyond the seas being forthwith examined against your Petitioner; and your Petitioner charged with facts supposed to be committed many years since, and long before the date of the said articles, could not be prepared to make her defence as she would have done, if the proceeding had been against her according to the known laws of the land. The places of abode of the witnesses produced against her being yet not known or discovered to your Petitioner: And your Petitioner having notice, that the said Bill is passed the House of Lords, and sent down for the concurrence of this honourable House,

"Your Petitioner prays she may be heard by her counsel at law and one civilian against the said Bill, before any proceedings be had thereon by this honourable House: and your Petitioner shall pray, &c. MARY NORFOLK."

A day being appointed by the House of Commons for the Committee to proceed, the duke caused the Papers following to be published.

THE
DUKE OF NORFOLK'S CASE;
WITH
REASONS FOR PASSING HIS BILL.

If want either of precedent for a parliamentary divorce, before going through the tedious and ineffectual methods of Doctors Commons, or of demonstration of fact, have hitherto deprived the duke of Norfolk of that relief against his wife's adultery, which the divine law allows; the late statute made in the like case, and the coming in of two, who, while the duke's former Bill was depending, had been sent away, to prevent that discovery which they now make; cannot but be thought to remove all objections against an act of parliament, not only for the benefit of the duke, but of the public, as a means to preserve the inheritance of so great an office and honours to persons of the true religion.

And since bishop Cozens's Argument, in the lord Rosse's Case, has made it evident, that

those canons which govern the spiritual court in this matter, are but the remains of popery; nothing can be now requisite to satisfy the most scrupulous of the reformed religion, but to set the duke's proofs of his lady's adultery in a true light.

The reputation which the duchess had maintained, of wit and discretion, made it difficult for many to believe, that she could be surprized in the very act of adultery, as had been formerly proved. And though it then appeared, that one Henry Keemer lived with the duchess while she went by a feigned name, at a house hired for her at Vauxhall by sir John Germaine's brother; and that Nicola, who then lived with sir John, used to receive wood sent from the duchess to sir John's house by the Cockpit; the withdrawing of Nicola, and carrying with him the Dutch maid, equally entrusted with the secret on sir John's side; left no evidence of their constant conversation, but Keemer since dead, and Susannah Barrington, who had the like trust from the duchess.

Keemer, though very unwillingly, some years since confessed his living with the duchess at Vauxhall, where he pretended she was obliged to conceal herself for debt; and what share Susannah had in the secret was unknown, till Nicola appeared: Nicola coming into England some time since, in expectation of a service, expressed his readiness to discover what he knew, and to endeavour to bring with him the Dutch maid.

She proves, that for two months the first summer after the king came for England, sir John Germaine and the duchess lived together as man and wife, and were seen in bed together by her, Mr. Briane, and his wife, sir John's sister; and that Nicholas Hauseur, sir John's valet de chambre, used to be assisting to him; as the duchess's woman, Susannah Barrington, was to her, at going to bed, and rising.

She proves the like conversation at Vauxhall, and the duchess's house at the Mill-bank, till the duke's first bill for a divorce was depending; within which time, Nicholas Hauseur, by sir John's order, carried away her and Susannah Barrington, with intention of going for Holland, to prevent their being examined to what they knew; but the wind proving contrary, they could not go till the bill was rejected; and then sir John fetched back Susannah, who was most useful to the duchess; but Hauseur went for Holland with Ellen.

He confirms Ellen's evidence in every particular; and besides the persons mentioned by Ellen, as privy to sir John's lying with the duchess, names sir John's brother, Daniel. Nicholas having been found very trusty, his master sent for him to return to his service; and gave him the opportunity of proving the continuance of the same adulterous conversation, at several times and places, from the summer, 1692, to the 26th of April, 1696. He swears he had after his return to sir John's service seen them in bed together at sir John's house at the Cockpit, and at the duchess's

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house at Mill-bank, and where she now lives; and used to be let into the duchess's apartment by Susannah Barrington, or Keemer. Nor can any man who shall read the testimonials given Mr. Hauseur by sir John; by the last of which it appears, that he served him faithfully as his steward; reasonably question Hauseur's credit.

Another, who had been advanced by sir John from his footman to Mr. Hauseur's place, and from thence to a good office in the excise, very unwillingly confirmed the testimony of Hauseur and the Dutch maid, not only as to the time of their going from the service of sir John and the duchess; but though being no foreigner, he could not so easily be sent away to prevent discovery, and therefore was not let so far into the secret as Hauseur and the Dutch maid; yet he swears, the duchess used to come masked to his master's house; that he has gone with him as far as the Horse-ferry, towards her house at the Mill-bank; that then his master sometimes lay out all night, and the next morning he has carried linnen and cloaths for his master to Keemer's house, or Keemer has fetched them from him: and this he proves to have been since the rejecting the former bill, and about five years since, when he was succeeded by Hauseur, as before he had succeeded Hauseur.

Two other foreigners, La Fountain, who lived with sir John, and was served with summons at the duchess's house at Drayton, and Hugonee, who ran away from the lord Haversham's since summons was taken out against him, seem to have had the same trust that Hauseur had; for both declared, That nothing should oblige them to betray their master's secrets: one said, No court could dispense with an oath of secrecy; and both declared, they would immediately go beyond sea. Summons have been taken out for Mr. Briane and his wife, and sir John Germaine's brother (who are, or lately were, in town) to confess or deny what Nicola and Ellen appeal to them for; and it cannot be imagined, that sir John should abuse the honour of being thought to have to do with a duchess, before the clearing her and himself from the imputation, by bringing his relations to disprove the charge, if what is sworn to be within their knowledge is false.

And if sir John's vanity should prevail with him, at least it is to be presumed that his relations would be more just to him and the lady, than to suffer any thing to pass against them, which they could with truth and justice prevent.

But since none of them appear, the world will believe their absenting more than a thousand witnesses, in confirmation of what Mr. Hauseur, Ellen, and Bayly have sworn: whose evidence not only stands untouched by any thing offered by the duchess's witnesses, but is plainly confirmed by them in the principal parts.

This being the nature of the proofs, it is observable,

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1. That there never yet was any case of this kind, where the evidence was not liable to greater objections than can be made to this.

Though in the latest case of this kind, there was full conviction of the lady's having children, while she lived separate from her husband, and the presumption was very violent whose the children were; yet this was but presumption, and that was weakened by the presumption in law that they were the husband's; especially, since there was no direct proof of the lover's ever lying with her.

2. Though in that case, by reason of the interval of parliament, and fear of the deaths of witnesses, a suit was begun in Doctors-Commons, it was taken from thence while the suit was depending; therefore that was rather an objection against proceeding in parliament, than an argument for it.

3. In that case, several witnesses were examined at the bars of both Houses, who had not been examined at Doctors-Commons, nor any notice given of their names before their examination.

4. It appears by that case, and the present, that the examinations in parliament are more solemn and certain than those of the spiritual court; which depend too much upon the honesty of the register, or his deputy.

5. Before that case, parliaments have either broken through the rules which bind the spiritual court, as in the case of the duke of Norfolk, Eliz. where the parliament ratified the marriage, as lawful according to God's law; though protracted and letted, by reason of certain decrees and canons of the Pope's law; or else have dissolved a marriage where there had been no application to Doctors-commons, as in the case of Mrs. Wharton, who had been married to Mr. Campbell; and yet there had been no examination of witnesses, but what had been before the two Houses. 2 & 3 W. & M.

So long before, in the case of sir Ralph Sadler, upon proof before the two houses, that lady Sadler's former husband had deserted her, and disappeared for four years before she married sir Ralph, the parliament legitimated her children by sir Ralph. 37 H. 8.

Whereas some object against the passing the bill, as if it would countenance a jurisdiction in the House of Lords to examine to such matters, in the first instance or originally; the objection would be the same if it had begun, as it might, in the House of Commons; but in truth would be of equal force against most private, and several public acts, occasioned by the examination of witnesses of notoriety of fact.

Since therefore the duke has so long, and so often in vain endeavoured to be freed from a lady, publicly famed and proved to have lived with sir John Germaine, as his wife; the duke's former disappointment cannot but be powerful arguments for his speedy obtaining that justice which the spiritual-court cannot give him, their power reaching no further than

to that liberty of living as she list, some years since settled by articles: But as none of less art and oratory than her counsel, could have turned this into a licence to commit adultery, if she list, or a pardon afterwards: had there not been evidence of her acting according to such construction, the duke would have hoped she had repented of the former injuries he had received from her; but now hopes, she shall no longer continue to bear the name of his wife, and put him in danger of being succeeded by sir John Germaine's issue, or deprive him of the expectation of leaving his honours, offices, and estates to a Protestant heir.

BISHOP COZENS'S ARGUMENT,

PROVING, THAT ADULTERY WORKS A DISSOLUTION OF THE MARRIAGE.

Being the substance of several of bishop Cozens's speeches in the House of Lords, upon the Debate of the Lord Ross's Case. —Taken from original papers writ in the Bishop's own hand.

The question is indefinitely to be spoken of, Whether a man being divorced from his wife, who hath committed adultery, and is convicted of it, may marry himself to another wife or no, during the life of her which is divorced?

The place in St. Matthew the 5th, repeated again St. Matthew the 19th, has great perspicuity: If it be not lawful for a man to put away his wife, and marry again, except it be in the case of fornication (for the displacing the words, by putting the exception before the marriage, cannot alter the sense), then *e contrario*, it must of necessity follow, that if the wife be put away for fornication, the husband, by the tenour of Christ's words, is left free to marry again; which freedom is not allowed to the adulteress herself, nor any man else that shall marry her.

St. Mark and St. Luke have been opposed to St. Matthew; and it has been said, that Christ's words in St. Matthew did not properly belong to Christ's disciples, or the Christian church, as the words in St. Mark and St. Luke, which are absolute, do; which is a saying that neither I, nor, I think, nobody else ever heard of before: For Christ's sermon in the mount was spoken to his disciples, and especially belonged to Christians.

It is clear they are spoken to his disciples; for he says to them, that they are the salt of the earth, and the light of the world; and that they are blessed, 'when they suffer persecution for his name's sake;' which no man will say or apply to the Jews.

It is true, that in the 19th chapter of St. Matthew, Christ answers the Scribes and Pharisees, who came to tempt him with their question, 'Whether it was lawful for a man to put away his wife for any cause,' as they said Moses had permitted them to do. But the answer that Christ gave them, 'That it was

not lawful, but only in the case of adultery, for men to put away their wives, and marry another;’ was a rule which concerned all Christians to observe for ever after; and for that reason was recorded by St. Matthew.

The words in St. Mark and St. Luke are not to be taken absolutely, but to be supplied and understood by his words in St. Matthew, as in many other cases is clear; viz. the thief upon the cross, baptism in the name of the Father, Son and Holy Ghost, &c. whereof many instances may be brought, as the destruction of Nineveh, &c.

But for Christ’s words, the exception confirms the rule, and infers a concession, that in the case of fornication, the putting away one wife, and marrying another is allowed. It is alike with divers other his exceptions, which are found in Scripture: For brevity, I will instance in this one, viz. ‘Except ye repent, ye shall all likewise perish.’ Upon which text, if I or any bishop else were to preach, I believe we should not discharge our duty, unless we should tell the people, That if by the grace of God they did repent, they should not perish.

The exception here, *ἢ μὴ nisi*, unless, is parallel with the 1 Kings, iii. 18. ‘None were in the house except we twain;’ they two therefore were, others were not.

Such exceptions proceeding from natural equity, are tacitly implied in laws, though pronounced in general terms.

But as to the exception here, the words are not capable of any other sense, than as I have observed; for except that restraint be referred to marrying again, the sense would run thus, Whosoever puts away his wife commits adultery: which stands not with truth or reason; since it is not the dismissal that is adulterous, but the marriage of another. It is therefore the plain drift of our Saviour to teach the Pharisees, that the marriage of a second wife, after a dismissal of a former, upon any other cause, except for fornication, is no less than adultery; thereby inferring, that upon a just dismissal for fornication, a second marriage cannot be branded with adultery.

Besides, the Pharisee’s question [Is it lawful for a man to put away his wife for every cause?] was not without a plain implication of liberty to marry another; which our Saviour well knowing, gives a full answer, as well to what he meant, as what he said; which had not been perfectly satisfactory, if he had only determined that one part concerning dismissal, and not the other concerning marriage; which clause if two evangelists express not, yet it must be fetched necessarily from the third; since it is a sure and irrefragable rule, that all four Evangelists make up one perfect gospel.

The Rhemists and college of Doway urge for the Popish doctrine, Rom. vii. 2. The woman which hath an husband, is bound by the law to her husband as long as he liveth; but,

1. This place is to be expounded by Christ’s words.

2. St. Paul hath no occasion here to speak of divorce, but of marriage whole and sound, as it stands by God’s ordinance.

3. He speaks of a woman who is under her husband; so is not she that is divorced from him.

St. Paul useth this to his purpose of the law being dead, to which we are not bound.

Nor is their doctrine more favoured by 1 Cor. vii. 10. ‘Let not the woman depart;’ as being in her choice whether she would depart or not; but in the case of fornication she was to depart, or rather be put away, whether she would or not.

The bond of marriage is to be enquired into, what it properly is. Being a conjugal promise solemnly made between a man and his wife, that each of them will live together according to God’s holy ordinance, notwithstanding poverty or infirmity, or such other things as may happen during their lives; separation from bed and board, which is part of their promise so to live together, doth plainly break that part of the bond whereby they are tied to live together both as to bed and board. The distinction betwixt bed and board and the bond, is new, never mentioned in the scripture, and unknown to the ancient church; devised only by the canonists and schoolmen in the Latin church (for the Greek church knows it not) to serve the pope’s turn the better, till he got it established in the council of Trent; at which time, and never before, he laid his anathema upon all them that were of another mind; forbidding all men to marry, and not to make any use of Christ’s concession.

Bed and board, or cohabitation, belong to the essence and substance of matrimony; which made Erasmus and bishop Hall say, that the distinction of those two from the bond is merely chimerical and fancy.

The promise of constancy and mutual forbearance, if it hinders divorce as to the bond, hinders it also as to bed and board; and because the same bed and the same table were promised in the marriage contract; but the promise does not extend even to tolerating adultery, or malicious desertion; which, according to God’s ordinance, dissolves the marriage.

Our Saviour speaks of divorces instituted by the Mosaical law; but they were no other than divorces from the bond.

The form of the bill of divorce among the Jews was this, Be expelled from me, and free for any body else. To give the bill of divorce, is from the Hebrew root *קטע*, which is to break, or cut off the marriage. With this agree the ancient canons, councils, and fathers of the church.

Concil. Neocæsar. & Elib. forbid the retaining an adulterous wife. Concil. Eliber. Aurelian. & Arelatens. give liberty in such case to marry again. Clemens’s Constitution, Tertullian, St. Basil in his canons, approved by a general council, are for marrying again. Concil. Venet. If they marry in any other case than fornication, they are to be excommuni-

cated, and not otherwise. Concil. Wormat. gives liberty to the innocent party to marry after divorce. Concil. Lateran. gives leave for the innocent party after a year to marry again.

Concil. Lateran. If any one take another wife while a suit is depending, and afterwards there be a divorce between him and the first, he may remain with the second.

Lactantius, St. Hierom and Epiphanius, are for allowance of marriage after divorce. Chrysostom, Hom. 19. 1 Cor. 7. says, That the marriage is dissolved by adultery; and that the husband, after he hath put her away, is no longer her husband.

Theophylact on the 16th of St. Luke says, that St. Luke must be interpreted by St. Matthew. St. Hilary is for marrying again, as Dr. Fulk saith upon St. Matthew the 7th. The eastern bishops, in the council of Florence, are for marrying again: Justin Martyr speaks of a woman giving a bill of divorce to a dissolute husband, without finding any fault with it.

St. Ambrose says, a man may marry again, if he puts away an adulterous wife. Theodoret said of a wife who violated the laws of marriage, therefore our Lord requires the bond or tye of marriage to be dissolved.

All the Greek church to this day allow it. Erasmus, Cajetan, and other papists: The civil law, and the laws of the emperor are clear for it: and the constitutions of our own church of England, in the time of H. 8. Ed. 6. and queen Eliz.

The practice of the English church, in the stat. 1 Jac. c. 11. against second marriages, divorces are excepted; and in Canon 107. it is provided they shall not marry again; but it is not said such marriages are void, only the caution is forfeited: Neither doth the Canon speak of such separations, wherein the bond is broken, as it is by fornication.

Even the Canon-law allows marrying again, in case a woman seeks her husband's life, and in case of a bond-woman. Gratian says, in the case of adultery, lawful marriages ought not to be denied. In the case of an incurable leprosy, it was the advice of St. Gregory to Austin the monk, that he that could not contain, should rather marry. Bellarmine owns, that the bond of the marriage of infidels is dissolvable; but the marriage of the faithful, and of infidels, is of the same nature: and Justinian a jesuit, confesses, that it is simply lawful for the innocent party to marry again. And the Roman doctors allow a dissolution of the bond of marriage, if the parties should, after consummation, transfer themselves into a friary or nunnery.

The Canons* which, in the case of adultery, prohibit marrying in the life-time of the guilty person, are contrary to two acts of parliament made 25 Hen. 3. and 3 and 4 Edw. 6. wherein

no canons are allowed that be any way repugnant to the laws of God, or the Scripture, the king's prerogative royal, and the statutes of this land: thirty two persons were to review the canon-law, in which review, drawn up by archbishop Cranmer, the innocent person is permitted to marry again, according to Christ's law and concession.

We have examples of such marriages in H. 4. of France, and H. 8. of England, lord Mountjoy, lord Rich, bishop Thornborough, and divers others. And it is observable, that in the case of the marquis of Northampton, 5 Edw. 6. who had been divorced for his lady's adultery, and married another before any act of parliament made concerning it, an act which passed afterwards (only two spiritual and two temporal lords dissenting) declares, he had been at liberty by the laws of God to marry, and did lawfully marry another: where the act manifestly supposes, that whatever had obtained for law till that time, was void, as being contrary to God's law.

The most considerable men of the reformed churches, both at home and abroad, are of this opinion: Grotius quotes Tertullian, in whose time it was lawful for the innocent party to marry.

Lancelot. Instit. Jur. Can. acknowledges, that divorce is a dissolution of the marriage.

Selden, who is not likely to contradict the laws of this kingdom, maintaineth, that marriage after divorce is to be allowed; and in that particular Dr. Hammond doth not contradict him, but is clearly for it.

The opinion of Amesius deserves to be set down at large: "Marriage, says he, cannot be dissolved by men at their pleasure; and for that reason, as it is considered simply and absolutely, it is rightly said to be indissoluble, because marriage is not only a civil, but a divine conjunction; and is also of that nature, that it can, not be dissolved without detriment of either party: yet it is not so dissolvable, but it may be dissolved for a cause which God approves as just; for the indissolvability was not instituted for a punishment, but for the comfort of innocent persons; and it admits an exception, wherein God ceases to conjoin. By adultery two are made not to remain one flesh: Hence it is that a contagious disease is not a cause of dissolving marriage. By adultery the very essence of the contract is directly violated; but the contract ceasing, the bond depending on the contract necessarily ceases. It is against all reason, that all matrimonial duties should be for ever taken away, yet the bond or obligation to those duties should continue. The words of our Lord, Mat. v. 32. and xix. 9. have no distinction or limitation of the putting away, but simply and absolutely approve of putting away, therefore they approve of putting away, not partial, or to a particular purpose, from bed and board, but total."

None are against the reformed divines, but Dr. Howson, Mr. Bunny, and Dr. Prideaux.

Dr. Howson was a professed adversary to

* Ref. Leg. Eccles. Tit. de Adulteriis et Divortiis.

Dr. Raynolds, who was a great maintainer of the church of England against all the points of popery, and particularly in this.

Dr. Taylor, bishop Hall, Dr. Fulk are for second marriages; no authors against them but the council of Trent, and those of the church of Rome; whose credit is only saved by those of our church who agree with them.

Upon the difference of explication between St. Ambrose, Origen, and St. Austin, a new kind of divorce has been thought of, from bed and board; but this divorce, or name of a divorce, was unknown to the Jews and ancient Christians.

I said so much before, at the first and second reading of this bill, that I was in good hopes to have had no further occasion given me of answering any objections against it now; but seeing divers new arguments have been studied and framed against it since that time, I shall now endeavour to satisfy and clear them all.

1. The first argument against it, is, that the separation from bed and board doth not dissolve the bond of marriage. To which I must reply, as I did before, that this is a distinction without a difference, newly invented by the Canonists and school-men, and never heard of either in the Old or New Testament, nor in the times of the ancient fathers, who accounted the separation from bed and board to be the dissolution of the bond itself.

2. That first institution of marriage, that they may be one flesh, is by adultery dissolved, when the adulteress makes herself one flesh with another man, and thereby dissolves the first bond of her marriage.

3. The objection, that if the bond be dissolved, and afterwards, if the man or woman be reconciled, they must be married over again, is no necessary consequence, no more than it is in a person baptized, who may break his covenant, and renounce his baptism, and yet upon true repentance be received into God's favour by virtue of the first covenant, without any new baptism. Suppose a witch, who, they say, makes a compact with the devil to renounce her baptism, should afterwards, by the grace of God, seriously and truly repent herself of the wickedness; I do not believe that any body would take upon him to baptize her again: And if a priest should renounce his orders, and turn Turk, and yet afterwards repent him, and return into the church, he need not be re-ordained a second time. The case will be the same in marriage.

4. I said heretofore, that the Roman doctors allowed this dissolution of the bond, when the man and wife, even after the consummation of marriage, would transfer themselves into a friary or a nunnery; but because it hath been since doubted, that no authority can be shewed for this particular, I shall here shew it out of the old constitutions of the church of England.

“And,* in the case of religion, that is the

* Prov. Will. Lyndewode, sive Const. Ang. fol. 94. Ver. nulla tenus separentur.

true understanding, that to wit, either of them betaking themselves to religion before carnal knowledge, the bond of marriage be dissolved: But if both enter into religion, and make solemn profession, then such marriage is dissolved, even as to the bond.”

5. It hath also been said, that if the bill pass, it will pass against the church of England; which, I confess, I do not understand; for the church of England is within the kingdom of England; and if the laws of this kingdom be for the bill, and have declared it by the assent of the king, lords and commons, as in the case of the marquis of Northampton was heretofore declared, in the time of king Edward the 6th, that by the laws of God the innocent party was at liberty to marry again; certainly the spiritual lords, as well as the temporal and commons, are bound to admit it: And I know not why they should be called the church of England that join with the council of Trent, and plead so much to uphold it, rather than others that join with all the reformed churches, and plead against the canon of the church of Rome, which hath laid an anathema upon us, if we do not agree with them.

As to the supposed inconveniences that will follow upon marrying again:

1. More inconveniences will follow if they be forbidden to marry again.

2. The father would be in an uncertainty of the children, if they should retain the adulteress.

3. There would be danger of poisoning or killing one another, if no second marriage were allowed.

4. Where the parties should consent to new marriages for their own lusts, the magistrates have power to over-rule such practices.

5. If they be kept altogether by divorce from marrying, it would occasion the innocent party to sin.

A little before the main question about passing the duke's bill, the duchess's agents handed about this paper, among such as they thought to be her friends:

THE CASE OF MARY DUCHESS OF NORFOLK.

Upon the marriage of the duchess with the now duke of Norfolk, in the year 1677, her father, the late earl of Peterborough, paid as part of her portion 10,000*l.* and settled on that marriage lands of near 1,000*l.* per annum, the remainder of which, on failure of issue, was limited to the now duke and his heirs for ever; and the earl after his and his lady's death, secured to the duke the forfeiture of Drayton, worth 10,000*l.* more; and the duke received also, by agreement, 1,000*l.* per annum for twenty years out of the earl's estate, besides very rich jewels, plate, and other things of great value, which the duchess brought with her into the duke's family: And great debts

having been contracted for the support of the duke's honour and his service, while he cohabited with the duchess, she hath, since his separation from her, paid them out of her own estate.

That by the evil and malicious insinuations of the duchess's enemies, the duke was prevailed on to carry her, then a Protestant, into France, and put her into a monastery (where she could not be admitted without changing her religion,) and left her there, on great assurances of sending for her home in a short time; and so parted with great expressions of kindness.

That a considerable time after, by the duke's consent, she returned into England, and lived retiredly at Drayton in Northamptonshire; and at the time of the revolution she again retired to France, where she continued till she heard of her father's imprisonment in the Tower, and then came back to England, and lived privately, till her father obtained his liberty, when she came home to him.

That the 8th of January, 1691, the duke was prevailed on, by the instigation of her enemies, to exhibit a bill in the House of Peers, to the same effect with the bill now depending, and divers witnesses were examined on both sides; after which, and a long solemn debate and due consideration had by their lordships of the witnesses, and what was sworn by them, the 17th of February, they were pleased to reject the bill without a second reading.

Notwithstanding which, the duke was again prevailed on, the 22d of December, 1692, to exhibit a second bill in the House of Peers, to the same effect with his first; which, after several debates, was the 2d of January following again rejected.

Some time after this, and for accommodating all differences between them, proposals were made to the duchess, which, after long agitation, on the 28th of April, 1694, were reduced into writing, and executed by the duke and duchess; the preamble of which articles is in the words following: "Whereas diverse controversies, debates, demands, and suits of several natures have for some time since been agitated, and continued, between the said duke and the said duchess, his wife, &c. unto all which it is at last held fitting (it being conducive to their respective quiet and ease) to have an end put, and the like for the future prevented: It is therefore hereby, and by the parties to these presents, declared and agreed in manner following; whereby the duchess conveyed to the duke's use the manor of Castle Rising," &c. And also the said duchess and her trustees assigned their interest in a considerable part of the manor of Sheffield in Yorkshire to the use of the said duke; so that by these articles, and that deed executed thereupon, the duke had his then desired advantages.

That after the execution of these articles, the duchess sent for one Mr. Negus, the duke's principal gentleman, and expressed herself very sensible of the misfortune of the duke and

herself, and desired Mr. Negus to tell the duke, that she would avoid all company that should give him any offence; and that she would not so much as pay a visit, but where he liked: which Mr. Negus lately testified before the Lords, and that he acquainted the duke with it; as also, that she had several times told him, if she died first, she would leave the duke her estate.

That notwithstanding the said agreement, whereby the duke and duchess agreed to live separately, yet without his signifying any dissatisfaction to or with the duchess, and without any manner of notice, or previous proceeding in the common and ordinary course of justice, but by taking from her that legal trial in the ecclesiastical court, which by the laws of this realm she is entitled unto, he did, on the 16th day of February last, exhibit in the House of Peers the bill now depending for dissolving the duke's marriage with the duchess, and for enabling him to marry again: upon which the proceedings were so very quick, two foreigners (a French footman, and a Dutch cookmaid) lately brought from beyond sea, being forthwith examined against her, charging her with facts supposed to be committed many years since, and long before the date of the said agreement, and on which the two former bills were founded, that it was impossible for her to make her defence, as she might have done if the proceedings had been against her according to the known laws of this land.

The duchess thought herself under a necessity of complying with all the orders of the House of Peers; and accordingly, as well as she could, made her defence, though less than a week's time was allowed her for doing it; and upon examining the evidence of the duke's witnesses, many contradictions appeared, some whereof follow, as doth appear by the depositions taken in writing, and now remaining in the House of Peers.

For Hauseur the footman swears, the duchess was at the Cockpit, when, and before he came to live with sir John Germaine; and, that he continued there 15 days after; and that after the duchess left the Cockpit she went to Vauxhall.

Vaness the cookmaid swears, Hauseur came to sir John when the duchess was at Vauxhall.

Hauseur swears, That the 8th of February, 1692, he left sir John's service, when the trial was between the duke and duchess in parliament, and after lived privately six or eight weeks, till he and Vaness could get for Holland, and arrived there in the Easter following.

And yet in another place he swore, he desired leave to go; and afterwards, that he also went for Holland as soon as the wind was fair.

But note, all the evidence was closed and ordered to be summed up the ninth of February; so that he needed not afterwards to have gone. And whereas he insinuates, That he and Vaness were secreted, and kept from being witnesses:

Note, It doth no where appear, that either

he or Vaness were ever thought on for witnesses.

Hauseur swears, He returned again to sir John in summer 1692, being often sent to by sir John.

Whereas Bayly, another of the duke's witnesses, swears, he did not return again to sir John in two years after he went away, Bayly the witness being all that time, and three years before, a servant in the house.

Note also, That this very summer, 1692, to wit, in Easter term, the duke brought his action against sir John, which was tried Michaelmas term 1692; at which time it had been more likely, if sir John had believed he could have done him any harm, he should have kept him in Holland, rather than have sent for him over, especially considering that this fellow afterwards swears sir John swore in a rage this fellow would betray him.

Hauseur being asked, who sent for Vaness over?

He answered, that after he had promised the duke and lord Howard to speak the truth of what he knew, they desired him, if he met Vaness, to desire her to come over, and speak the truth of what she knew.

And being asked, how long after he met Vaness? answered, about twelve months since.

And being asked, when was the first time he spoke to her about coming over to speak the truth? answered, it is about a year since.

And being asked, how long it was since they resolved to come over? answered, twelve months.

Vaness being asked, whether she was not sent for from Holland to be a witness? answered, she knew nothing of it till eight or nine weeks ago.

Vaness swears, she was sent away on account of the trial.

Whereas Peacock, Hawksworth and Knight, three servants of the duchess's, swore the duchess turned her away before the trial, for keeping company with Dutch soldiers; and they do swear a new cookmaid before the trial.

Hauseur swears, he had a key of the door going into the Park, and could come in when he would.

And yet owns he knew but two of the servants, one whereof is long since dead.

And also the duchess's servants swear, they never heard any body had a key; and that if any key had been, they must have known of it. They also prove the shutting up, bolting, and chaining the door every night, and opening it every morning; and but one of the servants remembers ever to have seen him at the door, and then he rung the bell; but came only to see a countrywoman of his, and to carry letters to Holland, and brought answer back to her, but was not admitted beyond the passage.

Hauseur and Vaness swear, they saw the duchess and sir John in bed together at Millbank.

The duchess's woman swore, she has put the duchess to bed, and taken her up every

night and morning several years, and never saw him in the house. And two others swear, they were constantly in waiting night and morning, and positively deny any knowledge of any such thing, and say, they never saw Hauseur there; and that Vaness was never admitted up stairs, she was so dirty a creature, much less to dress or undress the duchess, as she pretended often to have done.

Vaness swears, she could not tell the places she has been at these six weeks last past. Whereas,

Mr. May, and two other of the duke's servants, swear, she has been fourteen days in the duke's own house, with the full liberty of the house.

Vaness being asked, whether she ever told any body of the occasion of her going away? she swore, yes, she told it to a great many in Holland, and not here.

Yet being afterwards asked, whether she ever discovered that she was sent out of the way? she swore directly, no.

These are some of the many plain contradictions and disproofs of these evidences, besides the great improbability in their own nature, in several things sworn.

But it is also to be noted, that Hauseur left sir John's service in a disgust; and so it is proved by Bayly, another of the duke's witnesses, and that what Hauseur swore could be nothing but spite and malice: Yea, it is proved on the duchess's part, that he swore he would find a way to be revenged of him, and that perhaps it might not be long first: and Mr. Strange, Mrs. Pitts, and her two maids, who could have deposed very materially for the duchess, refused to appear, though often summoned, being persons not in the duchess's interest or power.

This Hauseur has been out of place ever since he left sir John's service, April, 96, and is so still, as he swears, and so in consequence likely to be necessitous.

Note also, that Hauseur swears, sir John gave him seven guineas to pay the charges of himself, Vaness, and another, which were ordered to be kept private till they could be shipped off, and also for their passage into Holland, which was in time from the 8th of February, 92, till Easter.

Which does not look like a bribe for a secret of this nature, being hardly sufficient to maintain three people, and pay their lodgings, for two months.

Hauseur would be thought a mighty confidant, so as to have a key to the duchess's house, to come in and go out when he pleased, and yet, as well acquainted as he pretended to be with the house, and the duchess's bed chamber, he could not tell on what floor it was, nor what furniture it had, nor whether wainscoted or hanged: And when he was asked, which way the windows of the bed chamber looked? he trifled in that question, and concluded, he could see the water, but was afraid to go near the window, for fear of being discovered; and

yet had no scruple of coming into the house with his key, at any time.

These things being observed, it must be considered, that the facts now in effect charged against the duchess are suggested to be done many years since, and were debated and considered before the peers, before the rejection of the two first bills, and long before the agreement for putting an end to all controversies and debates. Now it is very hard to put the duchess to account again for those very facts, considering, that after eight or nine years many people are dead, others dispersed, and not in a little time to be found out, and circumstances of times and places (which in the nature of all these cases is almost all that is left to discover a falsity) forgot.

The duchess is also under the unavoidable necessity of proving a negative against downright swearing, and that without any matter introductory; and also by two mean servants, the one turned out of her place for keeping company with foot soldiers, and the other leaving his place in disgust, because he could not have the play money.

Masters are already too much in the power of their servants: and if they charge their masters with adultery, felony, and even treason, it is not easily in the power of the master to defend himself against downright swearing; servants having those opportunities of the knowledge of times, and places, and company, which cannot be denied or avoided, and which others have not; whereupon they may frame and build false evidence, and many times are of ill principles and desperate fortunes, and of tempers very revengeful; so that whoever turns away a servant, he is in his power for his estate, honour, and even life itself; and therefore, for the safety and freedom of families, in other countries, they are not permitted to be evidence against their masters, in any matter criminal whatsoever.

Note also, that the duchess thinks she, as an English subject, has, by Magna Charta, the same right to a trial in the legal and ordinary way of justice, as the rest of the king's subjects, especially considering that there never yet was in England one precedent of a bill exhibited in parliament to dissolve a marriage at the first instance, without any previous proceedings in the ecclesiastical courts, (which in these cases is the law of the land) and not above five or six bills in above 600 years ever passed to dissolve marriages, or make second marriages good, even after there had been a divorce in the spiritual courts, and those bills too in cases generally where the husbands were without any recrimination.

No impediment appears why the duke should not have endeavoured a divorce at law before he had attempted a bill to dissolve the marriage; for any application to the legislature for trial of matters of private right is improper, because there are proper judicatures that give that remedy the law allows.

To ask any thing of the legislature, in private

causes between party and party, beyond what the known laws in force give, seems to be improper; because,

1. It is to make a law in one person's case, which is not the law in another's.

2. It is to retrospect actions, and after the fact, to augment or alter the penalty. Our laws are certain and known, that persons may conform their actions to them.

3. The courts and forms of law are equally the subjects right with the law, and the application to the legislature takes away all that right of form and charging; whereas a certainty in time to answer, and exceptions to witnesses, and other legal defences of the fact, cannot be denied the meanest subject.

The consequence that short and summary ways of proceedings may have on the settlements of estates and families, may be very dangerous; and though the duke of Norfolk's bill passed the House of Peers, yet a great number of the Peers both spiritual and temporal, entered their protest against its passing, and their reasons for it.

It ought to be no prejudice to the duchess, that the next heir presumptive to the duke doth not yet appear to be a Protestant; because when a bill, which hath lately passed both Houses, is become a law, it is not likely that noble family will be without a Protestant at the head of it.

If any of the witnesses formerly examined on the bill in 1699, be now again produced, it is humbly apprehended, that as the validity of their testimony they then gave was totally overthrown by a greater number of witnesses, so it will be again, though under the disadvantage of the great distance of time.

PROCEEDINGS IN THE HOUSE OF COMMONS.

March 19, 1700.

The reading the bill, for dissolving the marriage of the duke of Norfolk, the second time, and hearing counsel as well on the behalf of the duchess against the bill, as on behalf of the duke for the bill, being the order of the day, before the counsel was called in, to prevent the inconvenience of people crowding into the House, the House made an order, "That none but the counsel, solicitors, and parties should be called in, and that the witnesses should have notice to attend without, ready to be called in, if the House should think fit.

It was also intimated, That if the duke and duchess did think fit to come into the House, they should be accommodated with chairs, that being a respect shewed to the nobility when they come into the House.

And then the counsel, and solicitors, and parties of both sides were called in: and first the bill was read to them.

And then the lady duchess's Petition was read.

The counsel that appeared were, sir Thomas

Powys, Mr. Dodd, Dr. Pinfold, for the duchess. Mr. Serj. Wright, Mr. Northey, Mr. Atwood, Dr. Oldish, for the duke.

And Mr. Speaker then spake to this effect :

Mr. Speaker. You are here, I see, counsel on both sides. The House have ordered, that my lady duchess should be heard according to the prayer of her petition ; and my lord duke had likewise an order to be heard to make good his bill. I think the petitioner is to be heard first, to make good the allegations of her petition ; and when the House have heard you both, as to that, they will consider whether they will proceed to hear the allegations of the bill made out.

Sir Thomas Powys. Mr. Speaker ; with your favour, Sir, I am of counsel with the petitioner, the duchess of Norfolk, against this bill that is now before you ; and I believe I may say with some assurance, that this bill in the manner it is now brought before you, is the first that ever was attempted in this honourable House. It is Sir, true, that several years ago this bill, or another of the same nature, was attempted twice in the other House, and as often rejected ; but it is as true, at last it does come from thence hither, but not without a protestation there ; and I humbly hope that you will take notice, that this is a bill of divorce in parliament, in the first instance without a previous prosecution to examine the fact in any of the ordinary courts that have authority in these matters.

It is a bill not only to divorce the duchess upon a very short warning, who hath been a wife twenty-three years, but to render her infamous to all posterity by act of parliament, which I account to be the greatest misfortune possible to befall any person ; and at the same time it takes from her the legal trial of the fact whereof she is accused, and which she hath a right to by the laws of the land, sure as much as the meanest subject ; and which we don't apprehend she has in any wise forfeited ; nor is there any reason assigned, why his grace has not been pleased to proceed in the ordinary course. I hope, Sir, you will take notice also, that this is, in truth, nothing but a suit between party and party. It is merely a cause matrimonial between husband and wife, began originally in the House of Peers ; and as hitherto the beginning of causes between party and party, in that House, hath been strongly opposed, so I hope it will be thought reasonable to do so always, because it deprives the subject of that legal defence due to him by the law of the land. If this was always complained of, when the proceedings were in a judicial way, surely it is a great deal worse to begin there a private cause between party and party in the legislative way. I can see no manner of difference with respect to the loss of those great advantages the party is intitled to, only this seems rather to be the most against reason.

Sir, this is a summary proceeding with a witness. It began but the 16th of February, and but a week's time given to the party ac-

cused of so high a crime, and of so great consequence to the party accused, to be heard to it ; and though perhaps we may with reason enough find fault with the tedious proceedings in some courts, where appeals and writs of error are justly due, as where property is well fixed, it must needs be reasonable : I say, from various causes, though suits in the ordinary courts are very tedious ; yet I am sure a summary way of proceeding without due warning, or any certain way of making defence by any known rules, and without oath, as here without appeal, without any possibility of retrieving the matter again, with great submission ; and if this must be for all that one has in the world, such a summary way is a very terrible thing.

I would be glad any one would make it his own case, and think with themselves how they should like it, if their life, estate and all they had, were put upon such a summary way of proceeding. It is true, in some kingdoms, where the government is arbitrary, the proceedings are summarily, and most commonly they go together : and if we were in a place where the judges were infallible, and there were no false witnesses, and truth could be discovered at an instant, a summary way would be best ; but since men are fallible, since there is passion and partiality in the world, since oftentimes there is notorious detections of perjury, and several things are difficult to be disclosed, and require a reasonable time for examining into facts ; from thence it is that there are settled courses for determining all questions in England between party and party ; and there are known rules and good methods for the relieving against any ill judgment that is given.

Whatever you may think of this particular case of the duchess of Norfolk ; the example is of mighty consequence to all parents, that perhaps make hard shift to give their daughters considerable portions, and may think they have married them well, and made provision for them and their children : I say it will be hard, if their daughters should be sent home to them upon a fortnight's warning, and that witnesses should be examined against them without their having notice so much as of the places of their abode ; and a thing should be determined before the witnesses can be well known : and it must be agreed to be of great consequence to all collateral heirs, if marriages are so easily and suddenly set aside for want of issue ; which I find to be one of the causes assigned for this bill, and that it might be in a summary way, perhaps before they can well hear of it. I am sure, this is a matter of too great temptation to be put upon men that may grow weary of their wives, and desire a better fortune, or desire change, or may be moved by a thousand reasons we cannot think of, to revive old quarrels, and think of things long since passed, if you will see such a precedent of divorcing in such a summary way.

This is sure of infinite concern to us in higher matters. A bill of divorce of a woman

in parliament, without a legal trial, is just the same thing as a bill of attainder against a man for treason; the one forfeits the estate, corrupts the blood, and takes away his life, and the other does very little less: for I find, according to the bill, it is to forfeit her jointure, to defame her person, corrupt her reputation; and though it leave her life, it is left with infamy, which is worse than death; and in a case of this high moment, sure you will be careful how you alter the course of trials. I beseech you, Sir, will not the reason be the same, that a bill of attainder may be brought against a man, and that witnesses against him may be fetched from beyond sea, which he had formerly discharged from his service, and put the other side to prove what is always very difficult, the negative, to make his defence, which must needs require a reasonable time for the making out of circumstances, and laying evidence together? Where will be the difference between proceeding against a man for his life without a trial, and proceeding against a woman for her jointure, where her name, family, and reputation is concerned, and perhaps her children, the legitimacy of whom must come in question; and in a case, where the person by no behaviour of hers hath forfeited such a trial, nor the person that prosecutes this bill, cannot shew, that he hath been obstructed in his proceeding in the ordinary way? I need not take notice of what every body knows, that we have a happy constitution if we can keep it; every man can call his wife his own, and his estate his own, because it cannot be taken away but by legal trial; but if you will go into these extraordinary resorts, when the courts and the law is open, without any previous preparations for that matter, by having a fair examination, that the party cannot say there is a surprize, I know not where it will end; and though in one case it may be desirable, that there should be an extraordinary relief: but will this go no further? Can any body say that?

That which we find in Magna Charta is not to be forgot, where there is so much care in the several instances of it for the preserving of property, and the right of trials, '*Quod nullus destruatur, nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium parium suorum vel per legem terræ.*'

Why, in this case the ecclesiastical law is *lex terræ*. And if that be to be taken away without any reason, why may not the law in any other case?

We have, perhaps, in time of great emergency and public difficulties, had some extraordinary laws grounded on extraordinary reasons; but now we are in a time of settled peace, when there may be a just determination according to the law of the land, I cannot see any reason for this proceeding, no, not in this particular case.

I would, Sir, with your favour, take notice of those few instances of this kind, that have been in England by act of parliament, and in what manner they have proceeded.

There have not passed hardly six in six hundred years; I think I may challenge them on the other side to shew so great a number, but those I have I shall quote: but they proceeded in another manner than this has done.

It is true, where persons have had a fair trial in a proper court, and witnesses have been examined, and sentence final been pronounced, and where the party as to the fact hath been concluded according to the law of the land; when all this hath passed, some instances there have been, that afterwards an act of parliament has passed to strengthen the sentence, and to carry it farther than the ecclesiastical court will allow, even to the dissolving the marriage, and enabling the innocent person to marry again; but you will find all those acts are founded and built upon the sentence of those courts, and recite those sentences as a great inducement to the passing of those acts; and I crave leave just to take notice of those. The first we find, is that made in the case of the marquis of Northampton, which was in 5 E. 6. He was married to a daughter of the earl of Essex, and she eloped from him, and was prosecuted in the ecclesiastical courts, and there was sentence against her of divorce. The marquis, from hence, took upon him to marry a daughter of the lord Cobham; and after four years marriage of her, he obtained an act of parliament to ratify the second marriage; which act recites a settlement of divorce in the ecclesiastical court.

This took its rise from examination according to law; and that act of parliament is grounded upon it, and recites it as a previous matter necessary to induce that act.

The next that follows was the famous case of the lord Ross, afterwards earl of Rutland, though there perhaps was as great a notoriety of fact as can be pretended in this case, and he did not stand impeached of any immodest behaviour; but even in that case the divorce by the act, followed a divorce in the ecclesiastical court, and that passed with such difficulty, that it was four years in hand; it began in sixty-six, and was not passed till seventy: I have a copy of it, and it says, That forasmuch as Mannors, commonly called lord Ross.

And it proceeds thereupon to enable him to marry again; but this, Sir, could not be but by two acts of parliament, besides the sentence in the ecclesiastical court; for he first got that court to declare the children illegitimate, and then in the year (70) the parliament passed this act.

I know of no other, till we come to a case that happened within our memory; it is the case of a person of great worth, and I hope it will give no offence when I cite the precedent.

It was the case of Mr. Lukenor, who had been grossly abused by his wife, by elopement and open adultery; but the act he obtained went no farther than to disable the children born while she lived in open adultery; and that act recites a sentence of divorce: I have a copy of it, and I crave leave I may read a few lines

of it; it recites that Mr. Lukenor's wife had eloped from her husband.

There was indeed a famous case not long ago, of a lady that was taken away by force, and pretended to be married, and an act of parliament came afterwards to declare that marriage null and void; but even there was a proceeding at law with a witness. The person that had been concerned, was actually indicted and executed; it was not there to make a divorce, and so it had been a vain thing to have gone into the spiritual court, where there was no marriage; for it was only a law after the fact declaratory by way of caution, to give the more satisfaction that that marriage was null and void.

Sir, the last I know of (and it may be proper for you to observe how quick these people come after it) was that of a noble earl, that did obtain last parliament an act for divorcing him and his lady: it is the case of the earl of Macclesfield; but in that case it will be proper to take notice to you, that there were previous proceedings in the ecclesiastical court; there was a libel exhibited against her, a charge upon her, and witnesses examined, and she had a fair opportunity of making her defence; there was a regular and a long proceeding against her, and a prosecution of her, in order to a sentence of excommunication; and then there came the earl's petition into the House of Peers, setting forth, that there had been such a proceeding as this, and that she stood in contempt, having been prosecuted as far as that court could go: After an examination of witnesses, in all the cases I have heard of a divorce by act of parliament, there have been proceedings in the ecclesiastical court; this was the way of former time, but now we are beginning where the matter ought to end.

And now the first application is to that place, wherein all these instances (as I think it ought to be) was the last resort. It is true, this method may not please the duke, for we know his grace is in haste for cutting the knot asunder at once, by the legislative power; but I hope, upon these precedents, you will think it more reasonable it should be at first untied, or at least loosened by a judicial proceeding. If you will, I do not see how in justice the parliament can deny the like remedy the next sessions to any other that may be in the like case; it may be in worse, for here is no pretence of any spurious issue. Can the parliament of England, whence we take our measures of justice, deny the like remedy in justice to any others that are in the like case? What is it that guards you from an infinite application of this nature, but requiring persons to take the ordinary course first, and to come round about to the parliament, as the last remedy, to carry the sentence perhaps farther than the ecclesiastical court can do: but if persons can come up directly hither, I am apt to think your lobby will be crowded with petitioners of this nature the next sessions; though the sessions now are long and frequent, this single business may be so great as to obstruct all other business; I am sure a commit-

tee for adultery would have a full employment.

Let it be considered how strange it would be, if some poor man, upon this precedent, shall come and make application, and tell you he stands in need of such a bill from the condition of his family; that his wife plunders his house, sells his goods, and lives in adultery, and prays this matter may be examined in a summary way, because he is not able to go through the costly course of ecclesiastical courts, and be favoured with a divorce; would not this poor man's case seem to have the like justice, or possibly more? And yet if such a mean man should come with such a petition, perhaps it would look strange; but yet in justice there is no respect of persons; the law in England is, 'unum pondus et una mensura;' and if this should be done in the case of a great and rich man, and not for a poor man, they may say what has been said by some, 'That our laws are like the spider's web, which only hold the lesser insects.'

Shall those that expect the best fortunes and greatest advantage by marriage, not undergo the bad fortune of marriage too? I am sure if this be so, it is a privilege of peerage never thought on before.

You may see, Sir, by this bill, how precedents grow upon you; at first in the case of the marquis of Northampton, it was hard to get an act after a divorce: so it was in the case of my lord Ross; the last sessions in the case of the earl of Macclesfield; it went farther there, because there had been a previous proceeding in the ecclesiastical court, and his lady had obstructed that sentence, that act passed before sentence; but now we are come to have it done without so much as a trial to get a divorce in the ecclesiastical courts; to have all passed at once in a summary way, it will be but to petition the parliament, and all shall be determined without a possibility of being re-heard.

I know nothing can be said on the other side with good reason (unless that which I heard in another place), why they should not go to the ecclesiastical court, which is, that those courts cannot divorce *à vinculo* matrimony; therefore it would have been a vain thing: this may be a good reason for them to come to you afterwards, but it is no reason for them to come here at first, unless they would say at the same time, that every thing ought to be begun in parliament, because it is possible every thing may be brought to the House of Peers at last: will they say that all ejectments ought to be begun originally in the House of Peers, because after the parties have been at great charge and trouble in the courts below, they may be brought thither by writ of error at the last? This would have been a good expedient, in a cause lately where a deed was tried over and over, if the persons concerned in so many verdicts, had once thought of having begun in parliament to have had it settled, whether it was a just deed or no; if this be the rule, it would be well it were known, and made to be the law of the kingdom; for that law will be always

reckoned hard which is made in one case, if it may not be had in another; the law of England does go throughout, and if it be law for one it is for another. I have but one thing more to lay before you, and that seems worthy of your consideration, besides all that I have said.

You observe the bill is general, without restraint of time and place, or description, or circumstances relating to the fact: now, Sir, I must take leave to acquaint you, that so long ago as April 1694, his grace the duke, who complains of this matter, as if some misfortune had befallen him, having made former complaints and attempts for obtaining what he now desires, did at last in April 1694, not suddenly, but by advice of counsel, with his friends about him, after a long time of agitation, come to articles with his wife the duchess; of which I crave leave only to read the preamble.

The articles are between his grace the duke of Norfolk and the Earl of Peterborough, and recites, &c.

It is therefore determined by the parties, and agreed as followeth; and thereupon the articles proceed to settle every thing between the duke and duchess to his own satisfaction, and according to his own desire: his grace hath reaped the benefit of those articles, by having received a great sum of money; and the duchess parted with her interest in that great and noble manor of Sheffield; his grace hath had all that he on his part was to have, and hath executed abundance of deeds, pursuant to his agreement. Now if, after all this, there be a prospect of farther advantage by another marriage, that will not move you to give him a liberty for a departure from so solemn an agreement; in what a condition are people that have purchased their peace as the duchess has, if they may have liberty to go back beyond this, for the bill has no stint? Surely all reconciliation between men and their wives, and all acts towards them, and all acts of kindness, are to be favoured; and matters of a divorce are of an odious nature, and not to be encouraged after such composure of differences, and reconciliation. We have instances of some that have taken their wives again, and lived comfortably afterwards; surely it shall not be in their power to go back and say, Pray let us be divorced; it is contrary to the use of all acts of pardon. What is the end of all acts of parliament of general pardon, and all statutes of limitation, but to ease people in such a case? For it is impossible that any person can be able to defend their actions nine or ten years ago; they cannot keep their witnesses alive, and therefore the law hath often limited a time, beyond which persons shall not go back: and this, we think, the duke hath done by articles, and surely they are conclusive both before God and man.

I shall say no more, but that I do not apprehend the nation will be in any great danger, if the duke do, betwixt this and the next session, proceed in the ordinary course, and prepare

matters against another session; I am sure it is of great consequence: no man can deny but we have a good constitution; but if it is in the case of a particular person to be broken, such a breach in this constitution may not be very easily recovered.

I hope this cause, that is precipitated here out of time, and before those preparations were made that have been in all other cases, shall be remitted to its proper place, where her grace will give the duke a meeting, if they be not before that time reconciled.

Mr. *Dodd*. Mr. Speaker, I desire the favour of a word of the same side. These bills are not common; I think there are not above three instances to be found in the records of this kingdom.

This bill is to dissolve a marriage after twenty-three years continuance, and that not upon so many days notice as there has been years of the marriage, for to serve the particular purposes of one person: It is a law after the supposed fact committed; the law should go first, and the fact follow; it is not a general law for all the people of England; as such, it would have been another consideration: there is no occasion for a particular law, it is a bill from the Lords, and in a little time, for what I know, the Lords will prescribe to it. There is not one of these bills for a commoner, unless in my lord Ross's case, who was of a noble family.

It is not pretended by this bill, that the duchess hath had any spurious issue, though that was the circumstances of one of the bills that did pass, and that was a material circumstance in the case; and that is not alledged here. These bills are not to be made use of, but upon extraordinary occasion, and the utmost extremity, and till then I hope such bills shall not be made use of; and we think the proceeding upon this bill in this case, will appear much harder; for it is the first instance of this nature, when there has been no proceeding in any court whatsoever, to convict the duchess of this offence, no citation all this while in the ecclesiastical courts, where the duchess might have an opportunity to make her defence.

If those courts have jurisdiction in any one thing, it is in case of matrimony: If this was brought into those courts, the duchess would be allowed to make her defence, not only by way of recrimination, but examination of witnesses; a commission might be had to examine witnesses beyond sea, if she had any witnesses there, or in the country; she might appeal to a superior court, and thence to the delegates: These are all proper defences that the law allows, that there may be no surprize upon the party; and if injured, he may be righted in another place: These proceedings we think are necessary to go before a bill of this nature, for then the fact would be plain; and if the duchess had been convicted in this manner, as to the fact, we must not have opened our mouths against it.

By the same reason that a bill is brought to dissolve this marriage, in a little time you may

have a bill to marry people: Be it enacted for such and such reasons, such persons shall be married. This would be a much readier way in case of contracts, than any proceedings in the ecclesiastical courts. And though they may say the law of England takes notice of contracts of matrimony, as well as any other acts, that is no answer; for the fact is, whether there is any contract of matrimony, or no; and so it is here, whether my lady is guilty of the crimes charged here in the bill; and for this she ought to have a proper trial, and ought to be called to an account in the ordinary methods of the law; and then it might be proper to carry the sentence farther than those courts can. I hope you will be very tender of making a new precedent; and I do not know of any bill before this, to convict a woman of a supposed crime; then this is the first bill of this nature, and you will consider, whether you will make a precedent of it or no. Though this before you is the case of a great and honourable person, yet your justice will be the same if it should happen that any other man in the kingdom should be in the same circumstances, and willing to slip over all trials, whereby the person accused might have an opportunity of making her just defence, as is the case of this noble lady, who is hurried on after twenty-three years marriage to a determination in as many days in this extraordinary manner.

I hope therefore you will not proceed in a bill of this extraordinary nature, of which there is not one instance to be given, where you have begun to examine a supposed crime, but you have always left it to the determination of the law in the ordinary course; and we think it ought rather to be so in this case, because it is not pretended by the bill, that there is any stop put to their proceedings there; there is no absence of witnesses, no incapacity, but his grace may proceed there to convict this lady of the crime he supposes her guilty of, and she will there have her just defence; and till then there is no crime for you to judge upon, and I hope you will think fit to reject this bill.

Dr. Pinfold. Mr. Speaker, I desire to speak a few words as to the ecclesiastical law, which is a part of the law of England as much as any other, for our law does not receive '*majus et minus*;' and the ecclesiastical courts have been settled for several ages, and are governed by such rules which every subject has a right to. Sir, this bill is to dissolve the bond of marriage, and to give leave to marry again; and I crave leave to shew the House what our ecclesiastical constitutions are in that case, and how tender they have been in that point, and how those constitutions are grounded upon the canons and decrees of councils.

The cases where the bond of marriage is to be dissolved are but few, and they arise before marriage; it is in the case of a precontract or nonage, or consanguinity, and there the bond is broken by the sentence of the judge, and the person hath liberty to marry again; but for what comes afterwards, whether it be the case

of adultery, or any thing else, the law ecclesiastical, which, as I said before, is part of the law of England, hath been very careful not to dissolve the marriage.

The 48th canon says, if any layman shall put away his wife, and marry another, he shall be excommunicated: That was the sense of those early days; and sure they did not think it an indifferent matter because they punished it with so heavy a punishment. So it was in the council of Arles, 314, and there it was decreed, that if a man took his wife in adultery, he should be forbidden to marry. There what was to be done? Counsel should be given him not to marry while she lived, though she was an adultress.

And in the council 402, the Neapolitan evangelical, apostolical council, it was decreed, That if a man was divorced from his wife, or a wife from her husband, there they were not to marry, but should remain unmarried, or be reconciled.

And in the African council, canon 102, there it was provided, That they who were divorced, whether it was a husband from his wife, or a wife from her husband, they should remain unmarried. This was the sense of the ancient canons and councils, and this is received into our ecclesiastical constitution. In the 15th year of the reign of queen Elizabeth, in the chapter of divorces, it is said, That upon a sentence of divorce there must be an admonition, and a prohibition, that the party shall not marry again.

And in the year 1602, in the beginning of king James's reign, there was a farther provision made to keep them from being married again, and that was this, That they should give bond and security that they should not marry again; this is certainly our ecclesiastical constitution, and grounded on the sense of the ancient canons.

Now it remains to shew some advantage this would have had: If she had had the trial which of common right is due to the meanest subject, she would have had the advantage of challenges, which she cannot have here; for here the evidence must drop from the witnesses' mouths, who are foreigners, and have been long absent; there they must give an account of themselves, which here hath not been done by any body. The lady might have given her exceptions to those witnesses, and had a commission into Holland, to have examined how these witnesses behaved themselves, and whether these persons were to be believed and credited: here she would likewise have liberty to give an account how this design began. I do now speak with respect to the duke, but I do say it does seem to have begun a year and a half ago. She would likewise have had the advantage of a thorough reconciliation: and here are some deeds in 1694, between the duke and the duchess, which I hope, if the House will take an account of, will have its due effect; she would likewise have had the advantage of an appeal, the common right of the subject, and grounded

upon good reason; and in case there had been a neglect in the first instances, the party may be righted in another place.

By this bill she is debarred of the advantage of recrimination, to which she hath a right, for the text law is—

And the text law, *de divortijs*, were the charge most true, which we do not admit; yet if she can prove the same thing against her husband, the fault of one must be set against the fault of another, and he cannot have the advantage of his prayer.

I shall repeat only one thing more, and that is the case quoted already of the earl of Macclesfield; but in that case the lady withdrew herself five or six days before sentence; yet there the lord Macclesfield had all her defences, and even her recrimination, and had a time to prove it; there was publication, and a day set down for sentence; but she spun out the time till the parliament was ready to rise, and then my lord's friends advised him to begin in parliament; and when the Lords were acquainted of my lady Macclesfield's standing in contempt of the court, and she was prosecuted so far, that she was almost ready to go to prison for her contempt, then the House of Lords did think fit to receive my lord Macclesfield's bill, and not before; but before my lord Macclesfield brought his bill in parliament, there was nothing remained to be done in the ecclesiastical courts but sentence: and I hope for all these reasons, you will not proceed upon this bill.

Mr. Serj. Wright. Mr. Speaker, I am of counsel for the duke of Norfolk, who is your suppliant for this bill, for redress against the highest injury that can be offered; the rights of his marriage-bed have been invaded, and he comes for that relief here, which no other court can afford him; for the learned doctor on the other side tells you plainly, from the canon law, that there can be no divorce *a vinculo matrimonii* in their courts: now to send us to a court for relief, that they tell us before-hand can give us none, is in effect to tell us we shall have none at all.

The bill is founded upon the suggestions contained in the first three or four lines of the bill, that the duchess of Norfolk hath, for divers years, lived in separation from the duke her husband, and hath had unlawful familiarity and adulterous conversation with sir John Germaine, and is guilty of adultery on her part, and hath broken the bond of matrimony: those are the reasons for which the duke desires this bill may pass; it is for the adulterous conversation of the duchess, not for one single act, but a continual series of the like acts for many years; for we shall not give only one single act or instance in evidence, but prove this conversation for several years, beginning in 1687, and carried on to the latter end of 1695.

It hath been objected, that this is the first instance of a divorce, the first bill of this kind, where there has been no proceedings in the spiritual court: that it is the first bill of this

kind we deny; but that there have been no proceedings in the spiritual court, we own; for the earl of Macclesfield's was the same, to all intents and purposes, as this is; for though it is true, they had been in the spiritual court, yet it is as true, they came here into parliament before any sentence in the spiritual court: now to what purpose is it to go into the spiritual court, and not to stay for the determination of that court, if the judgment of that court is to have any weight in the case of the earl of Macclesfield? It is true, they had been there and examined witnesses on one side with all precipitation, yet would they not stay for a sentence there, but quitted their own proceedings, and came to the parliament. Now I do take it, that they had better never been there, than to have come away before sentence; for when they were in the spiritual court, and were proceeding there, to leave that court, shewed rather a mistrust of their own case. But it was no objection in that case, that it was taking it away from the jurisdiction of the spiritual court. We do not come to you for any thing the spiritual court can grant us; for that court goes no farther, if the fact be proved, than to make a separation *a mensa et thoro*, but the bonds of marriage is to be continued still: now with submission, this is to punish the innocent instead of the guilty: what would the duchess desire more, than to be separated from the bed and board of her husband, and be left free to accompany sir John Germaine? But we go further, for we come to the parliament to dissolve this marriage for that which is allowed by several learned writers to be a justifiable reason for so doing, for adultery committed by the wife: it is expressly, that a man shall not put away his wife, except in case of fornication; this text plainly allows, that in case of fornication a man might put away his wife; but the Popish canons the doctor has named, have put a construction upon it: say they, you shall put her away; but how? She shall be removed from your bed and table, but you shall not marry another. Then they say, there is no precedent of a bill of this kind, but there hath been a previous prosecution in the spiritual courts. I agree the marquis of Northampton's case, that that act does recite the proceedings in the spiritual court: but that case is stronger than this, for there the marquis of Northampton had married even in the teeth of their canon law, and comes afterwards an act of parliament to make this marriage good, and there the divorce was no ingredient upon the passing of the bill: but the parliament enacted the marriage to be lawful. In my lord Ross's case, there is no mention of any divorce.

I appeal to the Journals of your own Houses for that; but notwithstanding the divorce, the whole matter was examined over again, witnesses were examined both in the House of Lords, and here upon the first bill which was brought, which was to illegitimate and bastardize the children; and the witnesses proved, that my lord Ross and his lady had not lain

together for a long time, and that she had kept company with others; so that the parliament did not found the bill upon what had been done upon the divorce.

I appeal to your own memory, that in the earl of Macclesfield's case, there was no use at all on that side; the bill was brought, that there had been proceedings in the spiritual court, nor is there any such thing recited in the bill, but only an express downright charge of adultery; nor was it proper for them to have mentioned any proceedings in the spiritual court, since they waved that prosecution; but we on the other side insisted on it, as a reason why the parliament should not proceed in it, it being to take upon them an original jurisdiction; but we were then answered by a learned gentleman against this bill, that it was in vain to go there, for they could not give the remedy that might reasonably be expected. I beg the favour to mention a case or two, where divorces have been in parliament, and there have been no proceedings in the spiritual court; one of them was the case of Mrs. Knight, who was married *infra annos nobiles* to Mr. Goodwin. Every one knows, that a marriage *infra annos nobiles* is a good marriage; and if the woman be above nine years old, she shall be endowed; and yet notwithstanding, for some irregular proceedings, without going into the spiritual court, they came into parliament; a bill was passed, by which this marriage was dissolved; and I think it is expressly enacted,

That she shall not marry till such an age. This goes farther; for here I am sure the doctor would have explained, and told you, if there had been reason to dissolve the marriage, they could have done as great a feat in the spiritual court; that they could have examined witnesses upon oath, and could have told you whether there was proper evidence; yet the parliament, without any regard to what they could do, would assert their own jurisdiction.

The case of Mr. Wharton was mentioned on the other side; and therefore I need not say any thing to it: there was nothing of divorce, nor needed any.

They say this bill begins where it is proper for matters of this nature to end; and that after we have taken a turn into the spiritual court, and travelled three or four years there, then it will be fit for the judgment of parliament. I would know if they had been seven years in that court (and perhaps if they come there, we shall not get out sooner) to what use the examination of that court would be. This house, I presume, would not let those depositions be read here, especially if the witnesses to their facts were living.

They say this is a very summary way of proceeding; it may be too quick for the duchess; but you may be pleased to consider, that there was a bill brought into the other House some years ago, and rejected; upon what terms, that will rest upon us to shew you by and bye.

But the matter was, the witnesses that proved the fact, was sent out of the way by the duchess

and sir John Germaine, when things were under an examination; and we hope a matter of this nature never shall be baffled by keeping the evidence out of the way.

We told them long ago, who the witnesses were; they were the duchess's servants, such as they thought fit to entrust.

They say this bill deprives the duchess of her trial; I hope nobody thinks the parliament will pass a bill, without due examination of witnesses, and legal proof of the fact; if so, what matter is it, whether the proof be made before the parliament, or some inferior court? If the duchess be guilty of this crime, we come here for relief, which the spiritual court, the doctors tell you, cannot give us; since the duchess hath broke the bond of matrimony, we come to you to dissolve that marriage, and I hope we shall have it.

The doctor hath insisted on one thing, that I think is very extraordinary: he tells you, by the rules of their law, if the woman can recriminate, and prove her husband guilty, in such a case, they must set the fault of one against the fault of the other.

I wish the doctor could have told you the offence had been equal, that the injury to families had been equal; a man by his folly of this kind brings no spurious issue to inherit the lands of his wife, but a woman deprives her husband of any legitimate issue; for when she converses in this manner with another man, the issue may be equally looked upon to be that man's, if not more, and his lady hath kept this conversation ever since the year 1687, and left the duke.

One thing is farther objected, and they insist upon certain articles of agreement in ninety-four, and they read to you the preamble of them: why, Sir, the articles, if they come to be read through, I am sure it won't amount to what they pretend; it does not amount to this, that the duchess might use her body as she pleased; there is no agreement, that she should live after her own pleasure. Indeed, she was to have the use of her household goods, and servants, and live where she pleased; but that will not justify her in her way of living.

Then to tell you, these are matters of long standing; they are so, and of a long continuance; for, if my instructions prove true, we shall prove this scene of adultery for matter of eight years successively, and that by servants that were privy to the intrigues, who were sent away to Holland; but no sooner was the bill baffled, but the man was sent for again, and the same conversation continued that was between the duchess and sir John Germaine before he left England.

The same was continued after he came back to his service in (1691); only they were something more cautious, and people were not admitted so familiarly to see them in bed together in (1692); and so it continued till 1695.

They mentioned the Statute of Limitations, which was to put an end to frivolous and vexatious actions: how they can apply it to this

case, I cannot see; because a man shall not bring frivolous and vexatious actions after a long distance of time, therefore a man shall not complain when he hath received the greatest injury that can be done to mankind.

Sir, they are kind to us again, in recommending it to the duke to go into the spiritual court till the next sessions: but we think we are in proper method here, for that relief which the spiritual court cannot grant; and since we have so good reason to come here, if we prove the fact, I hope this high court will not send away a complaint of this nature, without such relief as suitable.

Mr. *Northey*. Sir, I am of the same side: I would beg leave to say this: As to what the counsel have said in relation to the evidence, that there were three witnesses examined upon oath, in the House of Peers, before the bill did pass there; and I believe they are aware of that, and that when you hear our witnesses, there will be no answer to be given on their side; and indeed the witnesses they brought, were so far from contradicting our witnesses, that they did really confirm them. But that is not the case now, what our evidence is, or whether it be fit for you to believe them, that will be when you have heard them; and for the matter of the time, that you cannot take notice of neither, till you hear our evidence. But this I may say, we shall bring a man that will speak to within four or five years.

But the matter they apply themselves to, which is material, is, whether it is proper for you to proceed on this bill, that is, to give such a relief as we desire, by dissolving this marriage? And in the next place, whether this be a proper time to ask this favour?

For the first, the learned doctor tells you, it is not proper at any time to do it, for he would have the canon law govern here, as it does in their courts. But the counsel on the other side have cited you several precedents where it hath been done. In the Case of the marquis of Northampton, the second marriage was contrary to the canon law, and yet that marriage was confirmed according to God's law. And this bill is to relieve against the canon law.

Now, whether we are here in a proper time; sir Thomas Powys has said a great many things, which may be proper to many other purposes. One argument was, because the witnesses cannot be upon oath; but that we know will not prevail in this place. In the next place they except, because this proceeding is in a summary way. I would know of them, whether there is not the same objection to all proceedings before a jury, that they have no notice what witnesses will be produced?

Then in the next place they bring a great argument for the recital of some of these bills, that there have been a sentence in the ecclesiastical courts. Now, it is true, they have been so in some of those cases: But I beg leave to observe, that in the case of the marquis of Northampton, the bill was not to confirm the sentence, or to enable them to marry, but to

deliver them out of the hands of the ecclesiastical courts, who said it was not lawful in that case to marry, for they were married before.

I beg leave to say, that in the case of my lord Macclesfield, there was no notice in the bill that came down to you of any proceedings in the ecclesiastical courts: And I take this to be the reason, because there was no sentence, though where there was a sentence, they had good reason to take notice of it. And I think there is as much certainty, and as good ground to proceed on this bill, as in the other case, for the witnesses have been already examined in the House of Lords. In the case of my lord Ross, there was no regard to the determination of the ecclesiastical courts, as a guide to the parliament; and it was looked upon as of no consequence, for the witnesses were examined again.

It is true, when we came before you without such a proceeding, we came under this disadvantage, you will be sure to expect a plainer and fuller proof; but for that we will undertake to make the fact so plain, that they cannot give the least pretence to answer to it.

We are here asking that we cannot have any where else: their great design is delay, and that we have learnt from the civilian, who tells you, their methods are very grave and deliberate, and, that they may have a commission to examine witnesses beyond sea; and that is to enquire how their own servants have lived beyond sea.

As to what sir Thomas Powys would have, that is, that we should go into the spiritual court, and apply ourselves here again next sessions, I do not think the legislature will send us back to ask that in the spiritual court which both have submitted to: For after the duke had miscarried in the relief he sought by another bill, by the duchess's sending the witnesses out of the way; why, truly, after that, to prevent any prosecution in the spiritual court, the duchess submitted to a separation by articles, and that was all the duke could have pretended to by the ecclesiastical law: We follow her upon that, and come to enforce that separation. And, to make it effectual, and for that which we humbly hope will be thought but justice to the duke, that is, to be delivered from this wife, and to have liberty to marry again; we think there is no occasion for delay, and that nobody can be hurt by a precedent that carries relief in this nature, and deliver us from a law, which in the days of popery was put upon us. Upon the whole matter, I hope you will think that we are here very properly for relief, and that we shall have the favour to call our witnesses.

Dr. *Oldish*. Sir, the great objection against the passing of this bill was, because witnesses had not been examined in the proper court. It is very true, generally speaking, in cases it ought to be so; but here is a very great exception to that rule, and which, I think, cannot admit of an answer, and that is, the notoriety of the fact; and in that case they begin with execution. And if that be so, I think there never

was a clearer demonstration in the world; for when formerly the duchess came to give in her answer in the House of Lords, to the charge against her, she did declare, that in the year 83, or thereabouts, she went out of England, and tarried three years, and returned about the time of the revolution. And it does plainly appear there, beyond all question, that she was at Lambeth, and went under the name of the lady Beckman, and was attended by one Keemer, who went then by the name of Goodman. Besides this, there are witnesses that speak to particular facts. Now, I say, here is that which amounts to demonstration; and where there is a notoriety of fact, that is an exception out of the general rule, and it is proper to begin with execution.

There is an exception to the general councils and canons that have been mentioned, that there shall not be a divorce *à vinculo*. Sir, I say, it was an ecclesiastical constitution, which was against the law of God; and it is demonstrably so; for where our Saviour says, that a man shall not put away his wife, except in case of fornication; it is plain, that in case of fornication he may.

There is another thing insisted on, and that is, that there was a reconciliation between the duke and his duchess. It is true, a reconciliation should drown all things before that time; but when the law takes notice in case of a relapse, that does *recrudescere*, it rubs upon the old sore, and then that which was before laid asleep is brought again upon the stage, and will return with greater vengeance. And we have plain proof of her living in the same manner since, as before.

But they would insinuate to you, that in case there was a trial in the ecclesiastical court, there might be a recrimination; but there must be a compensation, which cannot be thought in this case; for, I think, in this case, under favour, there is no comparison. I do not think they are *paria*, for it is impossible for the husband to do that injury as the wife may; for she may bring a bastard into the family, and then the estate does not go according to the law of God and nature, for every body desires his own blood should succeed him.

Sir Tho. Powys. Sir, I shall say but very little. But three or four things have been mentioned on the other side, which they offer as if they conceived them to have great weight, and yet they seem to me as very capable of being answered; and I crave your favour to do it.

They have gone much upon the proofs that they are ready to make, and, I think, not very properly, because we speak against their proceeding upon this bill; but I am sure it turns upon them: For, according to their own shewing, they are very well prepared to proceed in a regular course, for they have their witnesses ready, and nothing does obstruct them.

Mr. Serj. Wright mentioned a thing, which, I must confess, I was surprized in; for when I told him, he could not find any precedent of

such a bill as this, without a previous proceeding in the spiritual court; Mr. Serj. Wright said, it was quite otherwise; and to shew you it was so, he cited two cases where there was no marriage. Now, I always understood, a divorce must be in any case where there was a marriage, for the case of Mr. Knight's, that was very lately: That was the case of an infant, who they pretended to have married *infra annos nubiles*; and therefore, says he, the declaring of that marriage to be null and void by act of parliament, was a divorce. The other was the case of Mrs. Wharton, which was no marriage neither, for marriage must be by consent, and that was a force: and that he fancies to be a case, where there was a divorce too, without proceeding in the spiritual court; and yet, of his own shewing, it was no marriage.

Another thing I am much more surprized at, we insisted, that they would not shew an act for making a divorce without giving the party an opportunity to make a defence; and the doctor says, in common cases it ought to be so: and they cited the earl of Macclesfield we first mentioned, and the doctor told you the progress it had, and that there was a full and regular proceeding, of great length of time; and, that my lady Macclesfield had all her witnesses examined, and my lord prosecuted her to an excommunication, which is in effect a sentence, for it is in our law as in cases of outlawry. This he calls a precedent wherein they proceeded to get an act of parliament, without a previous proceeding in the spiritual court.

He tells you in the next place, That notwithstanding the divorce in the case of my lord Ross, the parliament did examine witnesses; it is true, they did, for I don't think they will so entirely pin their faith upon those proceedings, as to have no other satisfaction. But will he therefore say they took no notice of it, when it is the foundation and ground of the bill?

He tells you in the next place, that the crime does not seem equal between the one and the other; and so, in some sort, they ridicule the doctor's notion of recrimination. But I apprehend the doctor is right in it: for it would be hard if a man should marry a young woman, and give her an ill example in his own family, (I do not say it is this case) and bring her acquainted with loose and ill company, and by his example or provocation lead her into the same offence; would that man deserve to be rewarded with a new wife, and another portion, because his first wife had only followed his example?

They say, the offence is not equal, because the man brings no children into the family.

I doubt it happens oftentimes to them that go abroad, that they bring home that to their wives which sticks longer by them than their children.

Then to come and say, the articles cannot be of any use to us at all; and to imagine that we use the articles so, that the duchess might be at perfect liberty to live in adultery; I wonder how that conceit hath followed him hither,

when we told him we had not such a thought as to live in adultery, but they to direct her to live separate; and so we used them, as an answer to that part. We used them likewise as an act of total oblivion and remission of any thing beyond that time; and, I hope, to such purposes they shall be thought sacred.

Now I beseech you, Sir, on the whole matter, have they on the other side said one thing but what does totally tend to bring all cases of adultery immediately before you? Have they distinguished this case from the case of any other person? And then, if they have not, I do not see from henceforward, that any but fools will go to the ecclesiastical courts for relief: For says, the serjeant, they cannot give them a final relief, and enable any person to marry again, and therefore let nobody think to go there again; but here is a relief to be had worth a man's having. But, I hope, we shall have the benefit of the law, as it is, till you think fit to alter it, and then you will erect some judicature, where people may have their trial. Now therefore the argument goes too far, or it argues nothing at all; because, if there be any thing in it, it goes to take away the proceedings of those courts totally.

But though those courts cannot do all that these gentlemen desire, they can do what is very proper to be done; they can examine witnesses, and pronounce sentence, and give the party a full opportunity of knowing the accusation and accusers; and then the cases we have mentioned have had the aid of an act of parliament.

Sir, we have spent a great deal of your time already; I hope, since you see what use they make of the last precedent of my lord Macclesfield, where he did proceed to an excommunication. Now from thence they argue, that you should proceed originally in this case. When is the time to make a stand, but in the first case? and then no man can complain of any injury. If you grant this to my lord, I think injustice you cannot deny it to any other that stands in need of it. I believe there never was the like before; and therefore, I hope, you will put a stop to it here.

Mr. Dodd. The gentlemen on the other side have told you, that our Saviour hath said, That no man should put away his wife, except for fornication. It is true, the text is so; but he cannot shew you any text wherein our Saviour says, That the man may marry again, though he might put his wife away. Another thing was said, as to the proceeding in the ecclesiastical courts: Dr. Oldish says, there is to be nothing but execution where there is notoriety of fact; and here the fact is notorious, and therefore you may come up to order execution; but that is a strange doctrine to our English constitution. Would they hang one first, and try him afterwards? That would make work. Let the fact be never so notorious, yet it is the right of all the people of England to have a legal trial; and, I hope you will not interpose till there hath been a regular trial in another place.

Then Sir Thomas Powys offered to produce the articles, but they were not admitted.

March 25.

The House resolved themselves into a committee of the whole House, to consider of the duke of Norfolk's bill. Sir Rowland Gwynne took the chair of the committee of the whole House. And the counsel and solicitors were called in, and the bill read to them; and then Mr. Northey, of counsel with the duke, opened the evidence thus:

Mr. Northey. I am of counsel for the duke of Norfolk. I shall not trouble you now (because I think it not fit) to say any thing for the bill, for that you have approved of by commitment of the bill, and declared it to be a reasonable and just relief against the duchess, for the adultery charged in the bill. I shall not spend any of your time in aggravating the crime of adultery.

But that which is incumbent on his grace's counsel now, is to lay before you the proofs of the fact suggested in the bill; and the facts to be proved are the introduction of the bill, That the duchess has lived for divers years in separation from the duke, and had unlawful familiarity and adulterous conversation with sir John Germaine; and for that fact we will call our witnesses.

And our evidence will make this out to you, as plain as it is possible to expect a matter of this nature to be proved.

However, I think they have managed things in that manner, as we shall be able to give as plain a proof of these facts as might be expected of those acts which are in their own nature most public. However, in the nature of the thing, there were but a few persons to be intrusted with it, and those were generally servants, who had attendance on the duchess's person. We shall produce you servants both of the duchess and sir John Germaine; and, I hope, it cannot be an objection that they are servants; for to object to them for that reason, is to say, you shall prove the fact, but you shall have no witnesses; for these are facts that cannot be proved but by such as were concerned with the duchess.

For our evidence, it will fall out to be this: The duke and duchess were married in the year 1677, and they lived together till about the year 1685: And then the duke having some account of her conversation of this nature, they did part, and afterwards she came to live openly with sir John Germaine; for, in May 1689, the witnesses will give you an account, that for two months together she lodged with sir John Germaine at the Cockpit; and they lived there as man and wife, as the witnesses phrase it. During the time they lived there, there was a near relation of sir John Germaine's, Mr. Daniel Germaine his brother, and Mrs. Briane his sister, did frequently come to the house; and two of the witnesses were frequently in the room while they were a bed together.

After two months time, the duchess thought fit to be a little more private, and it was given out she was gone to France: but in truth she removed to Vauxhall, to a house that was taken by sir John Germaine's brother, and went by the name of my lady Beckman; and she lived there two years successively; and sir John Germaine came there frequently, once or twice in a week, and lay there at nights during that time. We have two witnesses that did attend the duchess, as well as at the Cockpit; one of them is Ellena Vaness, who was hired by sir John Germaine's sister, and lived with the duchess at the Cockpit two months. We have a second witness, one Hosier, who was with sir John Germaine at the Cockpit fifteen days before the duchess went to Vauxhall; and afterwards he went to Vauxhall when she removed there, and staid with her all the two years.

These are both foreigners, and Dutch people, and it was reasonable enough to expect foreign witnesses, when an English duchess had a foreign gallant: they are such as he thought fit to entrust about her.

After she had lived two years at Vauxhall (this brings her to the year 1691) she removed home again to her house at Mill-bank, and there sir John and she were frequently together, and have been seen a-bed together.

This brings us to the time when the duke having an account that she had this conversation with sir John Germaine, brought a bill into the House of Peers for a divorce; but it happened that the duchess and sir John Germaine, to avoid the condemnation, kept the witnesses out of the way, and afterwards caused them to be sent into Holland.

The woman staid abroad till about three months ago, but the man returned before into sir John Germaine's service; and he will give you an account of what observations he made there, for the familiarity continued between them then. He was admitted into the room where they used to be, and he will give you an account how he hath seen them frequently together; and he brings it down to within the year 1695.

We have another witness, one William Bayly, who likewise was a servant to sir John Germaine, and came into his place when Hosier went beyond sea. He is an unwilling witness, because he hath been preferred by sir John Germaine; but when he was upon his oath in the other House, he did give an account, That while he continued in sir John Germaine's service, notwithstanding this public reproach in 1695 and 1696, she frequently came to sir John Germaine's house with one Keemer, whom she had great confidence in, and one Susannah Barrington, I think, yet in the duchess's service. And this Mr. Bayly will give you an account, that his master was often from home; and when he was so, he used to carry his linen to this Keemer, who was the duchess's servant, or this Keemer would come to him for it: and this will bring it down to 1696. There are several witnesses to confirm this; but we think,

with submission, after the duchess had been so accused in the House of Lords of such a familiarity, any evidence of a conversation between them afterwards, is as much as a thousand witnesses; for no woman that valued her reputation, having been accused as she was, would have had any conversation with sir John Germaine afterwards. But we do not want circumstances to support the evidence of fact; we have as plain evidence in this case, as can be expected in a case of this nature. We will spend no more of your time, but beg leave to call our witnesses.

Mr. Atwood. Sir Rowland Gwynne, please to favour me with a few words on the same side; I shall not mis-spend the time of the committee in repeating any thing said by Mr. Northey; I shall only observe, that the witnesses, Hosier and Vaness, say, That Susannah Barrington was privy to this adulterous conversation: and this Susannah Barrington has withdrawn herself since the Bill was depending in the House of Lords.

It is further proved, that Mr. Daniel Germaine and Mr. Briane's wife were in England lately, and that these were privy to the same conversation.

Then the witnesses were called in one by one, and interpreters allowed.

The witnesses that were examined before the Committee of the Commons were Ellena Vaness, Nicholas Hosier, William Bayly, and Ann Read.

But all, except Ann Read, were examined in the House of Lords, and their evidence there being at large set forth, the reader is referred to the same. The evidence of Ann Read is as follows:

Ann Read being asked, whether she had ever seen the duchess go to sir John Germaine's house, and when? says, That about April 1692, (which was soon after the duke's bill had been rejected in the House of Lords) she saw the duchess of Norfolk go in a chair to sir John's house; that the door was immediately opened upon her chair's being set down, and she went into the house with her mask off.

She being asked, whether she had seen sir John come to the duchess's house, and when? says, She, within a twelve-month last past, or thereabouts, followed him to the duchess's house, about three of the clock in the afternoon, and that she did not see him come out.

After the witnesses were examined on the part of the duke of Norfolk for the bill, sir Thomas Powys, of counsel with the duchess of Norfolk, being called upon to make defence, spake to this effect:

Sir Thomas Powys. I am at a loss, Sir, and under some kind of a surprize, because, as far as I apprehend, you call upon us to make our defence. I hope in a case of such moment as this is (and it may be there cannot be greater), and since you are pleased to take this case out of the usual way of trials, and to try it in the first instance, you will be pleased, that we should be fairly and regularly heard. And since it was

not allowed us, upon our being heard against the bill, that we should have a time to make our defence; now we have heard what the witnesses swear, we shall desire but a short time, no more than what is absolutely necessary, to make our defence. This hath spent us six hours already; and I am sure the witnesses that have been examined have given such variety of answers, that it doth afford a great deal to be said to it. We have likewise a good many witnesses to be examined, but I am far from proposing any thing to delay it. We had a week's time allowed us in the House of Lords, but that is no rule for you, and we do not expect it here: But, even while we are at this bar, a person from a very worthy member gives us intelligence, upon sight of this cook-maid, of a matter that will defame her; and he will be ready to make it out, that she was turned away for being a common thief in Holland; and therefore, Sir, you see how time is necessary in point of accidents that do happen; and I cannot make our defence now.

Thereupon the counsel withdrew; and the committee having considered of the desire of the counsel for the duchess to have time allowed them to make their defence, were of opinion, that the counsel should proceed then to make their defence; and candles were ordered to be brought in.

And the counsel being called in again, sir Rowland Gwynne being in the chair of the committee, acquainted them with the determination of the committee.

Then sir Thomas Powys observed upon the evidence that had been given, and insisted, that the evidence given before the Committee of Commons did differ from the evidence given by them upon oath in the House of Lords; and offered to produce the examination of the said witnesses upon oath in the House of Lords. And an objection being made, that such examination ought not to be read in that case, as evidence before this committee; the counsel withdrew, and the committee considered of the said objection, and were of opinion, that the said depositions should not be read.

And the counsel being called in again, were acquainted with it, and that if they had any witnesses, *viva voce*, to encounter their evidence, they might produce them.

Sir Thomas Powys. Sir, by this resolution my client is deprived of that defence I thought I could have made for her; but I submit to the pleasure of the Committee.

Mr. Atwood. The examinations in the House of Lords were so lately, that it is an easy thing for the solicitors, who were by, to give an account of a contrariety in the evidence, if there were any.

A Member. Whether you have any other evidence to offer, but as to this point?

Sir Tho. Powys. All our evidence would tend to contradict these witnesses; and if the reading of those depositions will not be allowed, we must abide your pleasure, and submit it to you.

Mr. Dodd. We must submit it to you; our witnesses were in concurrence with that sort of evidence.

Sir Rowland Gwynne. There are several persons named, who are persons of credit and good reputation, Mr. Briane and his lady, Mr. Daniel Germaine and his sister; these would be witnesses of credit, against those that are, you say, not of credit.

Counsel. We have summoned them and Mrs. Pitts, and done all that we could on our side to get them here; and I hope you will not prejudge our case, to say they are in our interest; that is to determine the question. We have likewise summoned Mrs. Pitts and her two maids; and whether they will appear, or not, that we cannot tell; but this we are ready to make out to you.

Mr. Atwood. Susannah Barrington, the duchess's woman, privy to the whole conversation, is proved to have been with her since the bill was brought into the House of Lords.

A Member. Whether he has one living witness to produce, that he can make good his defence by?

Sir Tho. Powys. Sir, if you expect an answer by me, I am assured that we have witnesses; but if I cannot bring those people against themselves, if I cannot bring Nichola against Nichola, I despair of doing any good, if I bring a thousand other witnesses against him: and therefore I pray this favour of you, that since it is your pleasure that this evidence be not allowed, you will not make a bad construction of it, that I do not proceed to make a defence to this bill; for I cannot truly do it, unless I had some other instructions from my client, but shall defeat her expectation to proceed upon the other part of the case, since what we built upon with good authority, as we thought, is not thought fit to be admitted.

Sir R. Gwynne. Sir, you are at liberty to go on, if you have any thing more to say, than that you cannot proceed without further directions from your client.

A Member. Whether they have any thing to offer in the defence of the duchess, upon the crime she is charged with; for, I believe, it is a new thing for the counsel, when their client is charged with a crime, to say, they cannot defend her unless they go and ask, whether they shall defend her, or no? If they have any thing to say in her defence, we shall be ready to hear it.

Sir R. Gwynne. Sir Thomas Powys, have you any thing more to say?

Sir Tho. Powys. I cannot but repeat what I have already said, that I would be glad to make the best defence this case may bear; and I may say, I have defended it twice with very good success, and this is a third time; and I would make the best defence this case would bear now. And I must own to you, that the course of our evidence, we did propose to ourselves, is so far broke, by the first determination you were pleased to make, that I cannot venture upon the rest of the defence, if so be your pleasure be not to admit of this matter.

Sir R. Gwynne. You may by any solicitors or agents, that were present when these witnesses were examined in the House of Lords, prove what they swore there.

Mr. Dodd. We apprehend you have already determined the matter, and we cannot now meddle with it; but if I apprehend it aright from the chair, it is your opinion, that we may produce the solicitors and agents, to give an account of what was sworn in the House of Lords. Now we are under this disability by your determination, that we, relying upon what you have determined against us, are not prepared with our solicitors, or others, to give

evidence of that matter, but in a little time they will be able to give an account of what was then sworn.

Mr. Atwood. It seems they want to be taught their lesson.

And then the Counsel withdrew, and the Committee proceeded upon the Bill clause by clause, and went through it, and ordered the same to be reported; which was done accordingly; upon which the Bill passed.*

* "The duchess afterwards married sir John Germaine, bart." Former Edition.

410. Proceedings against Sir WILLIAM WILLIAMS, bart. for the Publication of Dangerfield's Narrative: 36 CHARLES II.*—7 WILLIAM III. A. D. 1684—1695.

An INFORMATION against Sir WILLIAM WILLIAMS, for Printing and Publishing a seditious Libel, reflecting upon the Duke of York, the King's Brother.

REX v. WILLIAMS. Trin. 36 Car. 2.

Midd. ss. QUOD Willielmus Williams nuper de Westm' in Com' Midd'Ar' existens homo perniciosus et seditiosus ac machinans et false malitiose et seditiose intendens pacem et comm'

* Mr. Wynn, in his learned "Argument upon the Jurisdiction of the House of Commons," p. 31, notices, that the "Bill of Rights, after enumerating among the invasions of the constitution, 'the prosecutions in the court of King's-bench, for matters and causes cognizable only in parliament,' declares, 'that the freedom of speech and debates, or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.'" And he says, "That this declaration applies specifically to the cases of the prosecutions of the Speaker and Sergeant [Topham] will be evident, when it is observed, that no other cases had occurred in the reigns of Charles 2, or James 2, where it had been attempted to question, in any other court or place, the freedom of proceedings in parliament."

It is observable (though I recollect not to have met with the observation) that the House of Commons appears to have been desirous that the Bill of Rights should abolish all informations in the court of King's-bench.

On January 29, 1688-9, that House appointed a committee (of which Mr. Pollexfen, sir George Treby, sir Edward Seymour, Mr. Finch, sir William Williams, sir Robert Sawyer, Mr. Sommers, Mr. Eyres, and other eminent persons were members) "to bring in general Heads of such things as are absolutely necessary to be considered for the better securing our Religion, Laws, and Liberties."

tranquillitat' hujus Regn' Angl' inquietare molestare et perturbare ac seditionem discord' et malevolentiam int' dict' Dom' Regem nunc et subdit' suos hujus Regn' Angl' facere movere excitare et procurare necnon serenissim' et excellentissim' principem Jacobum ducem Ebor' et Alban' unicum fratrem dict' Dom' Regis in maximum odium contempt' et vilipendin' cum dicto Dom' Rege et ligeis et fidel' subdit' ipsius Dom' Regis inducere ac inferre

On the second of February, sir George Treby reported, That the committee had agreed upon several Heads, which he read in his place and delivered in: after some amendments made to some of them they were agreed to by the House. The twenty-second head is "Informations in the court of King's-bench to be taken away."

On the fourth of February, it was, among other things, referred to the same committee "to distinguish such of the general heads as are introductory of new laws from those which are declaratory of ancient rights." In the afternoon of the 7th of February, sir George Treby accordingly made a report, in which, among the practices which are declared to be "utterly and directly contrary to the known laws and statutes and freedom of this realm," is enumerated the "causing Informations to be brought and prosecuted in the court of King's-bench, for matters and causes cognizable only in parliament:" and among the new laws by which it was proposed and advised to provide for making a more firm and perfect settlement of their religion, laws, and liberties, and for remedy of several defects and inconveniences, one was "for taking away Informations in the court of King's-bench;" and to this report the House agreed.

Ultimately the suppression of Informations in the King's-bench was not specifically introduced into the Bill of Rights, but it seems probable that it was one of the articles concern-

et ad nequissimas nefandissimas et diabolicas intencon' machinacon' et practicacon' suas pred' perimplend' perficiend' et ad effect' redi-

ing which the two Houses disagreed, and which were discussed in the conferences between them, respecting that most important statute during its progress. The House of Lords, it seems, indeed objected altogether to the clause reciting the prosecution of Informations in the King's-bench, for matters cognizable only in parliament, &c.: they alledged that they did not fully apprehend what was meant by it, nor what instances there had been of it, which therefore they desired might be explained if the Commons should think fit to insist farther on it. The Commons answered, that they thought it a very high grievance and a matter of the greatest consequence to the Lords, and to themselves, that matters and causes cognizable only in parliament, should be drawn into examination in inferior courts. See Commons Journals, February 8, 11, 12. On the last of which days sir William Williams was added to the managers of the conference, and he reported the proceedings upon the free conference which was had on that day, although Mr. Sommers had reported the proceedings of the ordinary conference which had taken place on the same day. It appears as if the two Houses had adjusted by a compromise their disagreements upon the subject.

According to Mr. Barrington "the attorney general's power of filing Informations *ex officio*, seems to be borrowed from the civil law, where there is always a *parti publique*, or public prosecutor." Obs. on West. primer.

In a recent Case (*Rex v. Mary Jones and another*, Mich. Term, 52 G. 3,) that most upright and learned-magistrate, Mr. Justice Bayley, seemed to be of opinion that Mr. Attorney's power of filing Informations *ex officio* was sometimes exercised vexatiously.

The question, Whether commitments by a house of parliament may be examined by a court of law? has been frequently agitated. See the Cases of captain Streater, vol. 5, p. 365, of Richard Thompson, vol. 8, p. 1, of Benjamin Flower, A. D. 1799, the recent Case of sir Francis Burdett, and the other cases and authorities, particularly the learned investigations of Mr. Hargrave, therein referred to. In vol. 5 of this Collection, p. 948, upon a motion for a Habeas Corpus, it was held by Newdigate, a Commonwealth judge of B. R. that a prisoner committed by the parliament could not be discharged by an inferior court. The following Report of Pritchard's Case, 17 Car. 2. B. R. I have extracted from 1 Keble 871, 884, 887. The same case is shortly and ill reported in sir Thomas Raymond 120, 1 Lev. 125, Siderf. 265.

"The House of Lords ordered him to be committed, and delivered the order to the Serjeant at Arms to take him, and after the House prorogued he was taken, and detained till fees

gend' idem W. W. nono die Novemb. Anno Regn' Dom' Caroli Secundi nunc Regis Angl' &c. 34, apud Paroch' Sancti Martini in Campis

paid, and security given to appear the next sessions; which *per curiam* is illegal, and such order cannot be executed afterwards. But by Hyde chief justice, the chancellor of course may cause their orders to be executed. But by Twisden, he must have a special order from the House to execute their orders. But by Keeling and Windham, the House of Lords is not like other courts, but is wholly determined by prorogation, and ceaseth till the next session. And so was Streater's Case, [See it as above referred to] on Habeas Corpus 1654: he was delivered, the parliament being determined, against which he spake those words, for which he was committed. Adjournatur.

"The return of the Habeas Corpus was, that he was committed March 27 to the Fleet, till fees paid, being taken into custody by Lee, Serjeant at Arms of the House of Lords, (not saying when but only) by their order dated 11 Feb. Coleman excepted for the incertainty; it doth not appear what the fees are, nor who should be judge of them. Also the commitment is not only for fees, but till security given to appear the next sessions. Adjournatur.

"The parliament by prorogation is *quasi* ended: and were the prisoner committed for a contempt, the court might in convenient time have bailed him. But here the want of the day of the taking is material, being in the knowledge of the Serjeant at Arms; therefore it shall be presumed the taking was after the rising of the parliament, which court consists of King, Lords, and Commons; at which time all the privileges of each particular House cease, and each prorogation is a new parliament; and the bill twice read before must now be begun anew; and therefore we cannot bail him till the next parliament, but the party ought to be discharged. Parliament, Br. 86, and 4 Inst. 1 H. 7. 20, in Flowerdieu's Case. By Windham, recognizance taken by parliament is fruitless by their session, but judgment given there is delegated to the chancellor, being as a thing finished; but this is but process. And by Twisden, its all one whether he were taken sitting the parliament, or after, for that is but a contempt to them, which this court may discharge: and in Chenye's Case, in this very parliament, I heard it declared, that whatever is done, must at the next prorogation be begun anew, except in error, where *scire facias* may be retornable at the next sessions, being grounded on judicial record. But this is but matter of contempt, which is discharged by the session of parliament. Hyde chief justice, 22 Ed. 3. 23, determines this Case: and omnes in omnibus concurred clearly that he ought to be discharged."

See the Trial of Robert Frances, gent. for the murder of Thomas Dangerfield, and the Note thereto, vol. 11, p. 503, of this Collection.

in Com' Midd' Vi et Armis, &c. falso illicite injuste nequit' malitiose scandalose seditiose et diabolice pro Lucro suo proprio inprimi et publicari causavit et appunctuavit quoddam falsum scandalosum seditiosum et defamator' Libell' intitulat' 'The Information of Thomas Dangerfeild gent.' in quo quidem libello int' at' continet' prout sequitur. The Information of Thomas Dangerfeild gent. About the months September or October 1679, when Mrs. Cellier and myself (pred' Thomas Dangerfeild in informatione pred' mentionat' innuendo) waited on my lord Peterborough (Henricum Comit' Peterborough innuendo) to be introduced to his highness the duke of York, his lordship inquired of me (prefat' T. D. innuendo) if the lady Powis had given me (pred' T. D. iterum innuendo) any directions how to discourse the duke (pred' Jacob' Ducem Ebor' innuendo) I (seipsum pred' T. D. innuendo) replied she (pred' ducissam Powis innuendo) had: then he (pred' Com' Peterborough innuendo) desired to know what they were, upon which, I (pred' T. D. innuendo) shewed his lordship a little book, in which was contained a scheme, and the pretended discovery, which I (pred' T. D. innuendo) had made in the Presbyterian Plot, which book his lordship carefully perused, and finding some omission therein, he (pred' Comit' Peterborough innuendo) ordered me (pred' T. D. innuendo) to write, while his lordship did dictate to me (seipsum T. D. innuendo) those words, videlt', that the Presbyterian party intended to make an insurrection in the north, and so to join with an army of the Scots: Immediately after this his lordship took us (pred' T. D. et Margaretam Cellier in Informatione pred' silit' mentionat' innuendo) into the duke's closet (pred' Ducem Ebor' innuendo) at Whitehall, where we (pred' T. et Magistrum Cellier innuendo) both kissed his hand (manus pred' Jacobi Ducis Ebor' innuendo) and me (pred' T. innuendo) he (pred' Ducem Ebor' innuendo) took from the ground, for I (pred' T. innuendo) was kneeling; then I (pred' T. innuendo) gave his highness (pred' Ducem innuendo) the aforementioned little book, which he (pred' Ducem innuendo) after some short perusal thereof thanked me (pred' T. innuendo) for, and also for my diligence for the Catholic cause, and did advise me (pred' T. innuendo) to go on, and wished good success to all my undertakings, adding in these very words (viz.) That the Presbyterian Plot was a thing of most mighty consequence, and if well managed, would be very conducive to the safety of the Catholic cause, and I (dictum Ducem innuendo) do not question but the effects of it will answer your expectation, especially in the northern parts, where I (pred' Ducem innuendo) am well assured the major part of the gentry are my (pred' Ducem innuendo) friends, and have given sufficient demonstration of their affections to me (pred' Ducem innuendo) as also of their intentions to prosecute this Presbyterian Plot to the utmost, for they are no strangers to the design: Immediately after this his highness

(pred' Ducem Ebor' innuendo) ordered Mrs. Cellier and myself, in the hearing of my lord Peterborough, who was privy to the whole discourse, to be very careful of what we (pred' Thomam Dangerfeild et Magistrum Cellier innuendo) communicated to the persons who were to be the witnesses in that new Plot, lest we (pred' Thomam et Magistrum Cellier innuendo) should be caught in the subornation, and so bring a terrible odium upon the Catholics, and make ourselves (pred' Thomam et Magistrum Cellier innuendo) incapable of any further service: After this the duke (pred' Ducem innuendo) informed us (pred' Thomam et Magistrum Cellier innuendo) that in a month or two's time, the commissions would be ready, but ordered us (pred' Thomam et Magistrum Cellier innuendo) in the mean time to bring our part to bear with the commissioners, and particularly ordered me (p'd' Thomam innuendo) to find out some persons (as there were enough sure amongst the Catholics, as well as elsewhere) which were fit to be trusted, and that should accept of such commissions, which should be delivered to them by a person appointed for that purpose, but not to be known to them to be any other but a Presbyterian, so that when occasion should require, they might, together with those which we (pred' Thomam et Magistrum Cellier innuendo) then had, be ready to swear in the Plot, and that the Presbyterians were raising forces against the king and government, and had given out commissions to that purpose; and in order to this, I (pred' Thomam innuendo) did in some short time after procure one Bedford, Curtis, Grey, Hill, Hopkins, and others, to accept of such commissions when they should be ready, whose business in the mean time was to spread reports in the coffee houses, that the Popish Plot was a contrivance of the Presbyterians, &c. Now for our (pred' Thomam et Magistrum Cellier innuendo) encouragement in the prosecution of that sham plot, the duke (pred' Ducem Ebor' innuendo) promised, that he would take care that money should not be wanting, but ordered us (p'd' Thom' et Magistrum Cellier innuendo) to use all the expedition the thing would allow, to make a discovery thereof to the king's attorney: after which, the duke (p'd' Ducem Ebor' innuendo) said, the Catholic party would be eased of the charge, in regard he (pred' Ducem innuendo) was sure it would be defrayed some other way: then the duke (pred' Ducem innuendo) made divers vows, and bitter execrations, to stand by us (pred' Thomam et Magistrum Cellier innuendo) in the thing, and engaged on his honour to be our rewarder, adding, that such considerable services were not to be slighted, and further promised, that to whose lot soever it should happen to be imprisoned, according to their fidelity and stedfastness in the cause, so much the more should their reward be augmented, and that all care possible should be used to support and preserve them, but particularly desiring me (pred' Thomam innuendo)

to keep up to the courageous and active character which his highness (p'd' Ducem Ebor' innuendo) had heard of me, all which I, (pred' Thomam innuendo) promised to do, whereupon we (pred' Thomam et Magistrum Cellier innuendo) withdrew to the lord Peterborough's, where we (pred' Thomam et Magistrum Cellier innuendo) continued till his lordship (pred' Comit' Peterborough innuendo) had introduced sir Robert Payton to the duke, which being done, his lordship left them together, as he (pred' Comit' Peterborough innuendo) said, and came to us (pred' Thomam et Magistrum Cellier innuendo) where, amongst other discourse, his lordship (pred' Comit' Peterborough innuendo) told me (pred' Thomam innuendo) I had a great opportunity to make my fortune what I would myself, if I (pred' Thomam iterum innuendo) would but follow the advice of his master the duke of York, who, as his lordship said, would certainly be my king in a very short time, adding, that I (pred' Thomam innuendo) must be resolute in my undertakings, for said he (pred' Comit' Peterborough innuendo) the duke (pred' Ducem Ebor' innuendo) much affects resolution, but hates mortally the timorous man; then I (pred' Thomam innuendo) answered his lordship (pred' Comit' Peterborough innuendo) that I (pred' Thomam innuendo) valued not my life, provided to lose it would be serviceable to the duke's interest, at which expression he (pred' Comit' Peterborough innuendo) seemed fully satisfied, and from that time called me (pred' Thomam innuendo) captain Willoughby, and at our (p'd' Thomam et Magistrum Cellier innuendo) coming away, his lordship (pred' Comit' Peterborough innuendo) gave particular order to his servants, that at what time soever, day or night, either Mrs. Cellier or myself (pred' Thomam innuendo) should come to speak with his lordship, we should be forthwith admitted, and then we (pred' Thomam et Magistrum Cellier innuendo) parted. Some short time after, I (pred' Thomam innuendo) went to wait on his lordship (pred' Comit' Peterborough innuendo) from the lady Powis at midnight, to desire him (pred' Comit' Peterborough innuendo) to move the duke (pred' Ducem Ebor' innuendo) to get me (pred' Thomam innuendo) with all expedition to the king, for then I was ready. About four days after this his lordship sent for me, and took me (pred' Thomam innuendo) to the duke (pred' Ducem Ebor' innuendo) again, who was in his closet at Whitehall, and the duke (pred' Ducem Ebor' innuendo) told me (pred' Thomam innuendo) I must prepare myself to wait on the king, to give his majesty a more particular account of the Presbyterian Plot, than what the little book made mention of, which book the duke (pred' Ducem Ebor' innuendo) said he had given to the king, and that he (pred' Ducem Ebor' innuendo) had so ordered the matter, that I (pred' Thomam innuendo) should be furnished with money to enable me in the prosecution thereof; but his highness (pred' Ducem Ebor' innuendo) charged me to consider well

my story, before I (pred' Thomam innuendo) waited on the king; then the duke (pred' Ducem Ebor' innuendo) told me (pred' Thomam innuendo) I had gained by my diligence a good reputation among the Catholics, and that I (p'd' Thom' innuendo) should highly merit by my services to that cause, adding, that I (p'd' Thom' innuendo) should in a short time see the Catholic religion flourish in these kingdoms, and heresy torn up by the roots, and that he (pred' Ducem Ebor' innuendo) had heard of the proposal which had been made me (pred' Thomam innuendo) by the lords Powis and Arundel, about taking off the king (Serenissim' Dom' nostr' Regem innuendo) and of my refusal, as also of what I (pred' Thomam innuendo) had accepted touching my lord Shaftesbury, and of all my transactions in the Presbyterian Plot, saying, in these words, (viz.) If you (pred' Thomam Dangerfield innuendo) value the religion you profess, my interest (Interesse pred' Ducis Ebor' innuendo) as you say you do, and your own future happiness, take my advice (Advisament' pred' Ducis Ebor' innuendo) and depend upon my honour and interest for your advancement. You look like a man of courage and wit, therefore less discourse may serve with you (pred' Thomam innuendo) than another, so that if you will but move by the measures which I (pred' Ducem Ebor' innuendo) will give you (pred' Thomam innuendo) you shall not only escape with safety, but be rewarded according to the greatness of your actions; to all this, I (pred' Thomam innuendo) replied, I (pred' Thomam innuendo) would stand and fall in the defence of the Roman Catholic religion and his highness's service (servitium pred' Ducis Ebor' innuendo) and was not a little concerned for my refusing to kill the king (Serenissimum Dominum nostrum Regem innuendo) whom I (pred' Thomam innuendo) was then well satisfied by my ghostly father, stood condemned as an heretic; but this I (pred' Thomam innuendo) did offer, that if his highness (pred' Ducem Ebor' innuendo) would command me (pred' Thomam innuendo) to the attempt, I would not fail, either to accomplish it, or lose my life, upon which the duke (pred' Ducem Ebor' innuendo) gave me twenty guineas, and said, if I (pred' Thomam innuendo) would be but vigorous in what I (pred' Thomam innuendo) had undertaken already, he (pred' Ducem Ebor' innuendo) would so order it, that my life should not be in the least danger, adding, in these words, (viz.) We are not to have men taken in such daring actions, but to have them make an effectual dispatch and be gone, upon which I (pred' Thomam innuendo) took my leave. Some short time after this, when I (pred' Thomam innuendo) was ready to convey the letters into colonel Mansel's chamber, I (pred' Thomam innuendo) went to the lord Peterborough, who brought me to the duke (pred' Ducem Ebor' innuendo) to whom I told how I (pred' Thomam innuendo) was ready to fix the letters in the colonel's chamber, to which his

highness (pred' Ducem Ebor' innuendo) answered, I (pred' Thomam innuendo) must make haste, that I (ipsum Thomam iterum innuendo) might be impowered to make a general search of the like nature, for said the duke (pred' Ducem Ebor' iterum innuendo) in these words, (viz.) Since I (pred' Ducem Ebor' iterum innuendo) saw you (pred' Thomam iterum innuendo) last, the lady Powis has informed me (pred' Ducem Ebor' iterum innuendo) that there are abundance of letters and witnesses ready, so that it is now high time to begin; by this time there was some great man come to wait on the duke, so I withdrew. About four days after this, when I (ipsum Thomam Dangerfield iterum innuendo) had been pressing earnestly with Mr. Secretary Coventry for a warrant, and could not prevail, I (ipsum Thomam iterum innuendo) went to the lord Peterborough, and did desire his lordship to make application to the duke (pred' Ducem Ebor' iterum innuendo) to use some means for a warrant, to which his lordship (pred' Comit' Peterborough innuendo) answered, it was my fault there was not a warrant granted, and that the duke (prefat' Ducem Ebor' iterum innuendo) was sensible of my neglecting to make an affidavit, so that now he (pred' Ducem Ebor' innuendo) did begin to doubt my courage. Thomas Dangerfield in Contempt' Legum hujus Reg' Angl' manifest' in malum exemplum omn' alior' in tali Casu Delinquen' ac contra pacem dict' Dom' Regis nunc Coron' et Dignitat' suas, &c. Unde idem Attorn' dict' Dom' Regis nunc General' pro eodem Dom' Rege petit advisamentu', &c. Et modo scilicet' die Veneris prox' post Crast' Sancte Trin' isto eodem term' coram Dom' Rege apud Westm' ven' pred' Willielmus Williams per Simonem Harcourt Attorn' suu' et habito auditu information' pred' dicit quod ipse non intendit quod Dom' Rex nunc ad information' pred' in Cur' Dom' Regis nunc hic responderi velit aut debeat quia dicit quod materia in eadem informatione mentionat' eidem Willielmo Williams in forma pred' imposit in parlamento et non in Cur' Dom' Regis nunc hic audiri et terminati debet et idem Willielmus Williams ulterius dic' quod per Legem et Consuetud' Parliament' hujus Regn' Angl' Prolocutor domus Commun' in Parliament' Assemblat' pro tempore existen' (seden' hujusmodi Parliament') secundum officii sui debitum ut minister ejusdem domus debet et semper consuevit loqui signare et publicare tal' process' Anglice *proceedings* dict' domus comm' et in tali modo et forma qual' ipse per eosdem Communes sic assemblat' loqui signare et publicare ordinat' foret Quodq; quelibet locutio signatio seu publicatio alicujus process' ejusdem domus Comm' per pred' Prolocutor' juxta ordin' dictor' Comm' in forma pred' fact' secundum Legem et Consuetud' Parliament' sunt acta et facta eorundin' Comm' sic in Parliament' Assemblat et ut eor' locutio signatio et publicatio et non ut Act' seu fact' hujusmodi Prolocutor' propr' semp' accept' et Capt' fuerunt Quodq; hujusmodi Prolocutor de hu-

jusmodi locutione signatione seu publicatione p' ipsum juxta ordin' eorundin' Comm' in Parliament' assemblat' seden' Parliament' ill' fact' in aliqua al' Cur' sive loco quocunq; preterquam in parlamento respondere non debet Et idem W. W. ulterius dicit quod quoddam Parliament' Dom' Caroli Secundi nup' Regis Angl', &c. p' ipsum nup' Regem debito modo summonit' ad inchoand' apud Westm' pred' 17. die Octobr' Anno Regn' dict' nup' Regis 31. p' diversas Prorogation' continuat' fuit videlt' apud Westm' pred' usq; 21. diem Octobr' Anno Reg' dict' nuper Regis 32. quo quidem 21. die Octobr' Parliament' ill' apud Westm' pred' tent' fuit et ibidem ab eodem die usq; 10 diem Januar' Anno Regn' dict' nuper Regis 32. supradict' continuavit seden' Quodq; idem W. W. ante pred' 17 die Octobris Anno 31. supradict' scilicet decimo die Octobris Anno 31. supradict' apud Civit' Cestrie in Com' ejusdem Civit' debito modo electus fuit un' Civiu' pro dict' Civitate Cestrie in eodem Parliament' deservitur' et postea scilicet p'd' decimo septimo die Octobris Anno Regn' dict' nuper Regis 31. suprad' apud Westm' pred' idem W. W. sic elect' debito modo retorn' fuit un' Civium pro pred' Civitate Cestrie in parlamento ill' deservitur' prout per retorn' inde in Cur' Cancellar' apud Westm' pred' de Recordo remanen' plenius liquet et apparet et duran' toto tempore Parliament' ill' idem W. W. fuit et remansit un' Comm' in eodem Parlamento Quodq; idem W. W. ad pred' Session' Parliament' tent' per p'rogation' ut prefertur apud Westm' pred' dicto vicesimo primo die Octobris Anno 32. supradict' apud Westm' pred' debito modo elect' et constitut' fuit Prolocutor' pro Communibus in eodem Parlamento assemblat et sic prolocutor pro Communibus in Parliament' ill' assemblat' idem W. W. continuavit usq; dissolution' ejusdem Parliamenti quodq; in eadem Session' Parliamenti pred' ad inchoation' ejusdem Session' videlt' vicesimo primo die Octobris supradict' apud Westm' pred' idem Dom' nup' Rex allocut' fuit tunc Dominis et Communibus in Parlamento ill' assemblat' ad p'sequend' ulteriorem examinationem Conspiration' Anglice *the plot*, cum stricta et impartiali Inquisitione et eis adtunc et ibidem dixit quod ipse non putavit seipsum neq; ipsos secur' quousq; materia ill' perageretur. Et idem W. W. ulterius dicit quod in eadem Session' Parliament' suprad' que apud Westm' pred' continuavit usq; decimu' diem Januar' Ar' Regn' dict' nup' Regis 32. supradicto ntraq; domus Parliament' illius in p'rosecution' dict' directionis ejusdem nup' Regis strictam et impartial' inquisition' de prementionat' Conspiration' de et concernen' dicto nup' Rege fecerunt, Et super Inquisition' ill' in eadem Session' Parliament' supradict' pred' Thomas Dangerfield in information' pred' superius specificat' pred' Libellum intitulat' 'The Information of Thomas Dangerfield gentleman,' ut veram Information' suam de Conspiratione pred' tam Dominis Parliament' (eodem Parliament' in domo sua apud Westm' pred' Assem-

blat') super Sacrum suum exhibuit et deliberavit quod ibidem recordat' fuit et exist' prout per Record inde int' Record' Parliamenti remanen' plenius apparet quam Communib' Regn' Angl' in eodem Parlamento in domo sua apud Westm' pred' Assemblat' ad barram ejusdem domus Mainb' suis propriis exhibuit et deliberavit, Et post pred' exhibition' et deliberation' inde dictis Comm' ut prefertur scilicet ad eandem Session' Parliament' supradict' dict' Communes hujus Regn' Angl' in Parliament' illo in pred' domo sua apud Westm' pred' Assemblat' Ordinaver' quod dicta Informatio dicti Thome Dangerfield inter al' Informationes ante tunc exhibit' Anglice 'given in,' ad barram ejusdem domus tangen' pred' Conspiracy' foret impress' Anglice 'should be printed' (existen' prius prelect' Anglice 'Perused,' et signat' p' p'rolocutor eorundem Comm') et quod idem Prolocutor nominaret et appunctuaret personas ad information' pred' imprimend' per quod idem W. W. (eodem W. W. duran' tot' Session' Parliament' supradict' uno Comm' in eodem Parlamento Assemblat' et Prolocutor Domus Comm' ill' ut prefertur existen') in prosecution' ordin' pred' ut Prolocutor Domus Comm' pred' postea et duran' eadem Session' Parliamenti pred' scilicet 10 die Novembris, Anno Regn' dict' Domini nuper Regis 32. suprad' apud pred' Paroch' Sancti Martini in Campis in dicto Com' Midd' pred' Information' dicti Thome Dangerfield eisdem Communib' hujus Regn' Angl' ut p'fertur exhibitam perlegit et signavit apponendo nomen Willielmi Williams Prolocutoris Domus Comm' pred'. et adtunc et ibidem appunctuavit Thomam Newcombe et Henricum Hills (adtunc Typographos dicti Dom' nuper Regis) ad imprimend' dictam Information' p'd' Thome Dangerfield juxta pred' Ordin' eorundem Comm' et Officii sui debitum Et superinde dicta Informatio predicti Thome Dangerfield postea et duran' eadem Session' Parliamenti scilicet 10 die Novembris Anno Regn' Dom' nuper Regis 32. supradicto impressa fuit per eosdem Thomam Newcombe et Henricum Hills juxta ordinem pred' videlt' apud p'd' Paroch' Sancti Martini in Campis que quidem appositio nominis Willielmi Williams Prolocutor' Domus Comm' p'd' et appunctuatio pred' Thome Newcombe et Henrici Hills ad imprimend' dictam Information' p'd' Thome Dangerfield juxta ordin' eorundin' Comm' in eadem Session' Parliamenti suprad' ut p'fertur assemblat' per ipsum W. W. in forma p'd' facta sunt eadem Causatio et appunctuatio impressionis et publicationis Libelli pred' in p'd' Information' p'd' Attorn' Dom' Regis general' mentionat' unde idem W. W. per eandem Information' supius impetit' existit Absq; hoc quid idem W. W. est Cul' de p'miss' in dicta Informatione p'd' Attorn' Dom' Regis general' spec' super p'd' 9 diem Novembr' in eadem Informatione spet' vel ad aliquod tempus post eandem Session' Parliament' p'd' vel ante eandem Session' aut alit' vel alio modo quam p'ut idem W. W. superius placitando allegavit Et hoc

parat' est verificare unde ex quo materia p'd' fact' fuit per ipsum W. W. ut Prolocutor Domus Comm' in Parliament' Assemblat' p' ordin' eorundin' Comm' in domo suo assemblat' et seden' Parliament' ill' et non alit' vel alio modo vel ad aliquod aliud tempus idem W. W. pet' Judic' si Dominus Rex nunc ad Information' pred' in Cur' dict' Dom' Regis nunc hic responderi velit aut debeat."

This Case was argued on behalf of sir William Williams, by sir Robert Atkyns, who appears to have volunteered his assistance in the conduct of the cause, as one which concerned every Commoner in England, although he was at that time resident in the country, and had so entirely retired from the profession, that he was obliged to borrow a gown to appear in court. For this information, I am indebted to the kindness of Mr. Williams Wynn, who possessed some letters from sir Robert (by an unfortunate accident they have been burned lately), upon the subject.

SIR ROBERT ATKYNS'S ARGUMENT.*

The Information taken singly by itself, (without the Defendant's Plea) contains a very severe and heavy charge in it, against the defendant, set out with the highest aggrava-

* From a Tract printed in 1689, intituled, "The Power, Jurisdiction, and Privilege of Parliament; and the Antiquity of the House of Commons asserted: occasioned by an Information in the King's-bench, by the Attorney General, against the Speaker of the House of Commons. By sir Robert Atkyns."

In the case of the King against Wright, 8 Term Rep. 293, it was argued in support of a motion for a criminal information against a bookseller for printing and publishing a Report of the House of Commons [which Report had in fact been previously printed by order of the House,] reflecting on the character of Mr. Horne Tooke, that the House of Commons themselves were not justified in directing or giving a sanction to the publication of the libel; or at all events they had no legal authority to direct or sanction the publication of matter that amounts to a libel on any individual, beyond an entry on its own Journals, or for the use of the members of the House; but even if they possessed such an extraordinary power, the House having in that instance only directed an entry on its own Journals, and ordered the printing (by their own printer) of as many copies of this Report as were sufficient for the use of the members of the House, that did not give the defendant, a stranger, the right of printing and circulating copies of it, so as to furnish him with a legal defence either to an action for damages, or to an information or in-

tions: and this against a gentleman of the profession of the law, and one who hath had the honour to be Speaker of several parliaments.

We may observe in this Information the worst of adjectives or epithets fastened upon the defendant: it stiles him, a pernicious and seditious man. It charges him with the worst of actions; sc. stirring up of sedition, disturbing the peace of the kingdom, endeavouring to procure ill-will between the king and his subjects; and to bring the duke of York into contempt with the king and his subjects; and with the printing and publishing a false, scandalous, seditious and infamous libel. These crimes and actions are set out in Mr. Attorney's Information with the worst of adverbs; and with a great heap of them together; viz. That these things were done by the defendant, falsely, unlawfully, unjustly, wickedly, maliciously, scandalously, seditiously and devilishly. And to add (if possible) to all this, it is charged to be done out of one of the basest principles: out of malice; and for one of the most sordid and odious ends, viz. For his own lucre.

It may further be observed, That the Information does not alledge or affirm, that there is any such person in the world as Thomas Dangerfield (though it mention the name;) nor that any such person did ever frame or draw up any such scandalous and libellous book or information, as is mentioned in Mr. Attorney's information. But (for all that Mr. Attorney shews) the name of Thomas Dangerfield may be but a feigned or borrowed name,

dictment for a libel. The House of Commons were not justified in making the Report in question, inasmuch as it reflected on innocent individuals. It is the undoubted right of every subject, who is accused of a crime, to be tried by a jury of the country; and as it appeared on the former part of the publication in question, that Mr. H. Tooke had been acquitted by a jury, it was a foul libel on him to say that he was guilty of the crime of which he had been acquitted. And it was mentioned, that in this case of *R. v. sir W. Williams*, where an information was filed against the defendant, who had been speaker of the House of Commons, for publishing a libel, "*Dangerfield's Narrative*," it was determined by this court that the defendant was not justified in publishing, though he had published as speaker, and by order of the House of Commons. This determination still remains in force, notwithstanding several attempts in parliament to get rid of it; and sir Robert Atkyns in his "*Treatise on the Power, Jurisdiction and Privilege of Parliament*," vindicates the legality of this determination. This decision therefore proves, that the House of Commons themselves cannot justify the publishing of any matter reflecting on an innocent individual.

But by lord Kenyon in giving judgment, "The case of *R. v. sir W. Williams*, which was principally relied upon, happened in the worst of times: but that has no relation to the

and that the defendant may be the author and composer of this libel, as well as the publisher. And one would not imagine, upon reading Mr. Attorney's information, that any thing of these matters thus charged, was ever transacted in parliament: but Mr. Attorney gives them another date, both of time and place. He does not lay the scene at Westminster, but at St. Martin's in the fields, and he times it to the year 1682, whereas there was no parliament in that year. This was warily done.

Thus the case stands upon Mr. Attorneys' information, and should it be left here, it would be a woeful case with the defendant; but as Solomon says in his Proverbs; the first in his own cause is just, then comes the other party and enquires into him. The plain English of which is, as we used to say, 'One tale is good till another is told.'

The Defendant, in his Plea, states the matter truly and fully, and tells us, that there is nothing true in this Information exhibited against him, save only that there was such an Information of Dangerfield's, but that the defendant was none of the author. It was drawn up and delivered into both houses of parliament, first to the Lords, upon oath; and there ordered to be entered in their Journal: and afterwards delivered at the bar of the House of Commons. And that the Defendant, being Speaker of the Commons, he examined that Information of Dangerfield's, and directed the printing of it: but it was all done in time of parliament, and ordered to be done by the House of Commons.

present case. There the publication was the paper of a private individual; and under pretence of the sanction of the House of Commons, an individual published: but this is a proceeding by one branch of the legislature, and therefore we cannot enquire into it. I do not say that cases may not be put in which we would not enquire, whether or not the House of Commons were justified in any particular measure, if, for instance, they were to send their serjeant at arms to arrest a counsel here who was arguing a case between two individuals, or to grant an injunction to stay the proceedings here in a common action, undoubtedly we should pay no attention to it. But the Report in question, being adopted by the House at large, is a proceeding of those who by the constitution are the guardians of the liberties of the subject; and we cannot say that any part of that proceeding is a libel." And Grose, J. added, "It must be remembered that that [the case of *sir W. W.*] was declared by a great authority, to be a disgrace to the country."

It is remarkable that in this case of *Rex v. Wright* (8 Term Rep. p. 294) the Reporter represents the learned persons who argued in support of the application for an Information to have stated that sir Robert Atkyns, in this *Treatise on the Power, Jurisdiction, and Privilege of Parliament*, vindicates the legality of the determination of B. R. in *sir William Williams's* case.

By this narrative of the Plea, all the unlucky adjectives and untoward adverbs are thrown off, and the defendant cleared from the malice. Nor is it true that is said in Mr. Attorney's Information, to be done for the defendant's lucre. He did it out of obedience to the parliament; and he denies that he made any profit by it, but according to the order of the House; the profit of the printing was to Dangerfield. And all this is confessed by the demurrer.

The plea consists of these parts: matter of fact, matter of record, and matter of law. It begins with matter of law; and sets down the law and custom of parliament. Then he does assume the matter of fact, and of record, and brings them home to that law. He tells us, That, for certain, there was such a thing as a Popish Plot, and that it was a desperate, horrid, devilish plot. And here all the bitter adjectives and adverbs would have been well bestowed, rather than upon the Speaker of that parliament; which parliament with such admirable zeal and courage did prosecute some of those plotters.

He sets forth, that the lord Stafford was in parliament convict before the Lords of high treason, committed in that plot; and he was convicted at the prosecution of the Commons, according to the law, and custom of parliament. He says, that the king in his Speech to the Lords and Commons, charged them to make a further strict and impartial enquiry after this plot. Then the plea tells us, They did accordingly make an impartial enquiry, and divers others were thereupon convicted of that plot.

It now appears plainly, that all that is contained in this Plea was not only done during the parliament, but by the parliament itself; and that the defendant only acted as Speaker. And it is worth the remembering too, that there has been another parliament since, namely that at Oxford. And though all that was done by him in the parliament at Westminster, was then very well known and remembered; and though he were so pernicious and seditious a man, in the opinion of Mr. Attorney's information, yet the world had a better opinion of him, for he was chosen Speaker again, in that latter parliament, and his majesty approved of him.

At last, the defendant concludes his plea to the jurisdiction of this court: viz. That what he had so acted, being acted in parliament time, and by order of parliament, he demands the judgment of this court, whether they will take conusance of it.

The Attorney General demurred to it.

The subject matter of this record is a very large field, viz. The Power and Jurisdiction of Parliament, and yet I shall have but a narrow path to walk in. It is a very nice and tender point: it is my case, as it was heretofore with those that were to undergo the old Saxon trial by fire ordail (*per ferrum candens*) if I tread aside and make a wrong step, I may do myself a mischief. But by the grace of God, I shall

take care neither on the one hand to give any just occasion of offence to those above me; nor yet on the other hand, shall I be wanting in that duty I owe to the kingdom's cause. I shall speak my mind freely in it, and leave the success to God. And while I must argue for the freedom of acting in parliament, and speak for the Speaker, and endeavour to maintain their rights and privileges, I may justly claim that ordinary and reasonable privilege for myself, that if I happen unawares to misplace a word, or to be misapprehended in what I say, I may have the liberty instantly to explain myself. And I take myself to be under the protection of the law, while I argue the law.

In arguing this case, I shall make three points, or lay down these three positions:

1. That what is done in this case, is done in a course of justice, and that in the highest court of the nation (the parliament) and according to the law and custom of parliament.

2. That however, that which is done in this case, is not to be imputed to the defendant, who acted in it but as the servant or minister of the parliament, though in a very honourable station.

3. That these being matters transacted in parliament, and by the parliament, this court of the King's-bench ought not to take conusance of them; nor hath it any jurisdiction to judge or determine of them.

As to the first, I shall frame this syllogism: No indictment or action lies for what is done in a course of justice, or in a way of legal proceeding. But what has been done by the defendant, and by the House of Commons in this case, hath been done in a course of justice, and in a way of legal proceedings, and that in the highest court of the nation. Therefore what hath been here done, is neither subject to an action or indictment.

I shall first prove the major proposition: That no indictment or action lies for what is done in a course of justice.

The reason of the law is, That the law and courts of law, and justice, and remedies against wrong, ought to be free and open; and no man must be frightened nor discouraged from a legal prosecution of his right.

To prove this, I shall make bold to cite the opinion and authority of a town-clerk. The report of it is in the Holy Scripture, the truest and highest report. It was the opinion and advice of the town-clerk of Athens. We read it in the Acts of the Apostles, and it instantly stilled and quieted a mighty uproar, it had so much weight in it. 'If any man,' says he, 'have any matter against another, the law is open, and there are deputies; let them,' says he, 'implead one another.'

The parties to a suit in law, the counsel, the attorney, the witness, the officers, the jury, are all under a protection of the law for what they do or say in the prosecution of a suit in law, or any legal proceeding.

I will put some few cases suited to every one of these who are the several actors in a suit.

By the stat. of 3 E. 1, called the stat. of W. 1, he that reports slanderous news, whereby discord may grow between the king and his people, or the great men of the realm, is to be imprisoned, till the first author of the tale be brought into the court. This comes near our case; and this is all the punishment that the statute inflicts upon this crime of reporting such a slander.

Sir E. Coke in his exposition upon this stat. in his 2d Instit. 228, says, That this stat. extends only to extrajudicial slanders. And therefore, says he, if any man bring an appeal of murder or robbery against any of the peers of the realm, although the charge be false, yet shall not the peer have an action *De Scandalis Magnatum*, neither at the common law, nor by this stat. of W. 1, nor any other stat. for any such appeal, nor for affirming the matter of it to be true, either to counsel or attorney, or for speaking the same in evidence to a jury.

It was the lord Beauchamp's case, 13 H. 7, Keilway, 26, 27, 28. Sir Richard Crofts sued a writ of forgery of false deeds against the lord Beauchamp: The lord Beauchamp sues sir Richard Crofts in an action *De Scandalis Magnatum*, upon the statute of 2 R. 2, c. 5, for this slander, in charging him with forgery. Keble, of counsel for the lord B. admits, that at the common law no action did lie for this slander, it being in a course of legal proceeding. But Keble was of opinion, that this statute of 2 R. 2, did give the action in such a case, though it were a slander occasioned by a suit. But by Brian and the rest of the court, the action *De Scand. Magnatum*, did not lie for such a slander, though the matter of it were false, because it is in prosecution of a lawful suit. With this agrees Boulton and Clapham's case in justice Jones's Rep. 431, and Weston's case, Crok. Jac. 432.

Sir E. Coke puts the difference in his 2d Inst. before cited. If a man prefer a bill in the Star Chamber against a great peer, and charge him with forgery or perjury, no action *De Scand. Magnat.* lies, it being in a legal proceeding, and in a matter wherein that court had a jurisdiction. But if in such a bill in the Star Chamber a peer be accused for felony (which that court hath nothing to do with, nor no jurisdiction in) this (says sir E. Coke) has not the face of a legal proceeding, and shall not excuse a man in an action *De Scand. Magn.* sir Rich. Buckley's case, 4 Rep. 14, Cro. Eliz. 230, the same case. Yet where there is but a mistake of the jurisdiction, if the suit be once well commenced, some little irregularities in the proceedings shall not expose them to the action *De Scand. Magn.* as, if a man bring an appeal of murder, and through the ignorance of the party, or his clerk, or attorney, it is made returnable in the Common Pleas, where they have no jurisdiction in it: yet no action *De Scand. Magn.* lies for this, the suit being well begun, and it being in the nature of a lawful suit. So says sir E. Coke.

In the case of a counsellor pleading for his client.

He likewise in what he affirms or pleads for his client, if it be pertinent to the matter of the suit, and he has it by instruction from his client, he shall be protected against an action of slander for it. This is a point that may concern many of us.

It was the case of sir Hen. Mountagu recorder of London, M. 3 Jac. Cro. fo. 90, in B. R. Ral. Brook brought an action upon the case for slander against sir H. M. for saying of the pl. Brook, that he had committed felony. Sir H. M. pleaded specially to the action, That he was a counsellor at law, and was retained against the pl. Brook, and at the trial in giving of evidence to the jury, he did indeed speak those words; but averred that they were pertinent to the matter, and were part of his instruction. It was resolved upon a demurrer, That the plea was good, the words being pertinent, though they were false. And there is a further reason given by the court in that case, viz. the words appear not to be spoken out of malice: and no actions of this sort, nor will any indictment of this nature lie, unless there be malice in the defendant; and where there is any justifiable occasion of speaking words that a man in discharge of his function or calling is led by the subject-matter of discourse, as a preacher, or pleader, or the like, to speak words in such case; it shall be presumed they were not spoken out of malice.

In the case of an Attorney.

Sir E. Coke in his 2d Instit. in his exposition of the stat. of *Articuli super Chartas*, 28 E. 1, c. 10, tells us, That in the very next year after the making of that stat. viz. 29 E. 1, Will. de Weston brought an Action of Conspiracy in the King's-bench, against William of Hempswell, parson of Newton, and John of Malden, parson of Askerby, for causing the plaintiff to be cited before the archdeacon of Lincoln for a trespass, whereof he had been acquitted in the king's court. John of Malden pleaded, That he was '*Communis Advocatus pro suo dando*,' and so justified as an attorney; and it was found the parson was *Communis Advocatus*, and so not guilty of the conspiracy.

In the case of a Witness: For what he says as a witness, or for what is said against him, to disable him from being a witness, or to take off his credit, no action of slander will lie.

35 H. 6, 14. In an action of conspiracy, one of the defendants justified as being a witness, to the jury.

Crok. Jac. 432. In the King's-bench, Weston against Dobneet, in an action for slander. There was a suit in the spiritual court, and the plaintiff that brought the action of slander, was produced as a witness in that cause, and the defendant in that suit in the spiritual court, put in exceptions against him, That he had been perjured, and therefore ought not to be used as a witness. Thereupon, Weston the witness, brought this action for that slander. And after arguments, the whole court held, that the action of slander did not lie for this manner of slander, because it was in a course of justice, and not *ex malicia*.

In a Writ of Conspiracy. One of the defendants pleaded, that he was one of the indictors. Judgment, *si actio*. And the plea is allowed, 20 H. 6, 5. and 33.

Nay though it be not in a course of justice, in a suit of law, yet if a man be in the doing of his duty, and in discharge of his function, and his lawful calling, and in discoursing of a subject proper for his function, and enforcing of every man's duty of avoiding of any sin, and in pursuit of it, tells a story which he takes up upon trust, and does not know it to be false, and it prove at last to be utterly untrue, and an innocent person is highly slandered by it, yet he shall not be subject to an action of slander for it. The occasion of speaking shall clear him from the malice, without which the action will not lie.

In the Book of Martyrs, written by Fox, there is a story of one Greenwood, who lived in Suffolk, that he had perjured himself before the bishop of Norwich, in testifying against a martyr that was burnt in queen Mary's time: and, says Fox, this Greenwood afterwards, by the just judgment of God, had his bowels rotted in him, and so he died.

This story by Fox in his Book of Martyrs, was utterly false of Mr. Greenwood, and after the printing of that Book of Martyrs, Mr. Greenwood was living in that very same parish.

One Prist a parson happened to be presented to the living of that parish where this Mr. Greenwood then dwelt; and 27 Eliz. in one of his first sermons, happened to inveigh against the sin of perjury; to which his text did lead him; and the better to deter the people from the sin of perjury, he told this story out of Fox's Book of Martyrs, and named the very man Mr. Greenwood; and Mr. Greenwood himself was then in the church, and heard this story told of himself, but the preacher knew it not, but thought the story to be true. Greenwood brings an action of slander against Prist the preacher; and upon the trial of the cause before the L. C. J. Wray, the case appearing to be thus, he directed the jury to find for the defendant, for that it appeared it was not done out of malice: And C. J. Popham affirmed it to be good law, it being a matter delivered after his occasion, as matter of story. This case is cited by sir E. C. in sir Henry Mountagu's case, before mentioned. Crook. Jac. f. 90. With this agrees the case of the lord Cromwel, against Denny a vicar, 4 Rep. 13, b. in an action de Scand. Magn.

There is a case in many circumstances of it much resembling our case.—It was the case between Smith and Crashaw, and others, M. 20 Jac. in the King's bench, in sir Jeffr. Palmer's Rep. 315. An action upon the case is there brought against the defendants, for maliciously causing the plaintiff to be indicted of treason; upon which indictment the grand jury found an ignoramus. To this action the defendants pleaded not guilty, and were found guilty. It was moved in arrest of judgment; That to accuse one for treason was not action-

able, for the safety of the king and state: For if a man be subject to an action for it, it will be a means that treason shall be smothered, and men will not expose themselves to actions, by making such discoveries.

J. Houghton held the action would not lie upon an ignoramus found; for by that the party is not acquitted, but may be indicted again and convicted. But he holds, that if he be indicted, and upon trial 'Legitimo modo acquietatus,' then he shall have an action upon the case, in nature of a conspiracy; for now he is absolutely acquitted and cleared of the accusation, and never can be indicted again for that particular fact.

Dodderidge agrees with Houghton, and puts this case; If an action of conspiracy be brought against a man, for indicting the plaintiff of treason, the defendant may plead specially (and that is the safest-way of pleading) that he heard the plaintiff speak such and such treasonable words, and that he thereupon complained to a justice of peace, who committed the plaintiff upon it, and this (says he) shall excuse him.

Ley, Chief Justice, inclines too against the action, and gives a strong reason, because, says he, it is misprision to conceal it; and yet if we allow of this action, it shall be dangerous too to discover it, so that the defendant does 'Lupum auribus tenere.' And so the judgment was arrested.

But we find, that soon after, when the judges of that court were changed, the same plaintiff brought a new action for the same cause: And it was adjudged for the plaintiff, that the action would lie; but the judges acknowledged it was the first precedent. I suppose it was upon pleading not guilty. Perhaps the court might have been of another opinion, had the defendant pleaded specially, and justified, according to the opinion of judge Dodderidge. The case is Cro. Car. 15; & Latch. 79.

The allowing of such actions of conspiracy, or upon the case, or of indictments or informations for what is said or done in a course of justice, and especially by way of discovery of treasons, would prove of a mischievous consequence; and would be an occasion of multiplying actions against the parties to the suits, against counsel, the attorneys, the witnesses, and so suits would be infinite. As in this present case, should an action be adjudged to lie against the defendant for what he has acted by authority of parliament, what a multitude of actions would be stirred up by it? If the Speaker be liable to this information for what he has done: by the same reason he would be liable to the actions of the several great persons that are said to be defamed by the printing of Dangerfield's Narrative. And if the Speaker be liable, who acted but by command of others, and as their minister, how much more would all those persons be liable, by whose command he so acted? And how many narratives have there been printed, wherein several great persons were severely reflected on, and how many votes of

the like nature have there been printed? So that there would arise a multitude of suits.

In sir Drue Drurie's case, 6 Rep. 74. The justices in judging of that case, give a very good rule and caution: they say, That judges ought to have good consideration in all cases depending before them, not only of the present cases, but also of the consequences, what general prejudice may ensue upon them either to the king or subject. The case before you exceedingly requires that consideration. The prejudice to the king will be, that he will not be safe, for by this means men will be discouraged from discovering treasons. The subjects will receive prejudice, by the multitude of suits that will arise by it. This may suffice to be said in maintaining the first proposition, That no information or action lies for what is said or done in a course of justice.

The minor proposition is, That what is here done by the defendant, in this case, was done in a course of justice, and in a legal proceeding, and that in the highest court of the nation, (in the court of parliament) and done according to the law and custom of parliament. This I must make out in the next place.

In the making this out, I am under a necessity of speaking of the transcendant power of the high court of parliament, and I must assert these positions following.

1. That the House of Commons was originally, and from the first constitution of the nation, the representative of one of the three estates of the realm, and a part of the parliament.

2. That what is done by either house, according to the law and usage of parliament, is properly, and in the judgment of law, the act of the whole parliament: And that what concerns the one, must of necessity concern the whole; not merely by consequence, but by an immediate concernment, as being one and entire.

3. That what hath been acted in our present case, by the defendant, as Speaker, and by the House of Commons, whose minister he was, and by whose command and order he did what he did, was done according to the law, and usage of parliament.

As to the first, That the House of Commons was from the first constitution of this kingdom, a part of the parliament. There has been an opinion, that hath been stiffly maintained by some divines, and others of late, that the House of Commons originally were no part of the parliament, at least not as now elected, and consisting of knights, citizens and burgesses; but that their beginning was in the 49th year of king Henry 3, when that king had given a total overthrow at the battle of Evesham, to Symon Montford earl of Leicester and the barons. And that to balance the power of the barons, that king caused the knights, citizens and burgesses to be chosen, and to make a part of the parliament. And from hence some unquiet innovating writers, 'quorum res, et spes ex adulatione pendent;' and who would destroy foundations, and remove our ancient land-

marks, and the ancient and just limits and boundaries of power and authority; persons of necessitous estates, or of greedy and ambitious appetites, which drive them upon devising how to do some acceptable service to those that maintain them: or at the best out of unsettled judgments, and too much zeal, which carries them to a contrary extreme. These men conclude, that therefore all the power and privilege the House of Commons claims, is not by prescription, but that they depend upon the king's royal will and pleasure, and had their original by his mere concession, and not by ancient inherent right, nor original constitution, and therefore may be resumed at pleasure.

It was one of the Articles against Dr. Manwaring,* in the parliament 3 Car. 1. for which he was impeached by the Commons, and sentenced by the Lords in parliament; that to subvert, scandalize and impeach the good laws and government of this realm, and the authority of the high court of parliament, and to avert his majesties mind from calling of parliaments, and to alienate his royal heart from his people, he did in his sermons, and in his books printed, endeavour to persuade the king: that his majesty was not bound to observe the laws of the realm concerning the rights and liberties of the subjects: that authority of parliament was not necessary for raising of aids and subsidies. His sentence was imprisonment during pleasure, and but 1,000*l.* fine for this high offence, not 20,000*l.* as hath been of late times. He was to acknowledge his offences, as it should be set down by a committee in writing at the bars of both Houses. He was suspended from his ministry; disabled to preach at court; his books were to be called in, and burnt in London and both the universities.

Power limited by law is safest. It may be thought 'Potestas minor, sed tutior et diuturnior. Ea demum tuta est Potentia, quæ viribus suis modum imponit.'

To encounter these new and upstart opinions, I shall mention an author or two, whom all sober men reverence, that are of a contrary judgment to these new authors. And they are either eminent lawyers, or divines. And I am the more encouraged to do it, because his majesty that now is, hath upon several occasions been pleased graciously to declare, that he holds parliaments to be the best method for healing the distempers of the kingdom, and the only means to preserve the monarchy in credit at home and abroad; and he promises to rule the people by the law.

Hales, that solid learned divine, in his Golden Remains, cites Baldus for it: 'Digna vox est Majestate Regnantis, legibus alligatum principem se profiteri.'

And learned Hooker, that great champion for the discipline, and for the rites and ceremonies of the church, in his Eccles. Polity, delivers his opinion quite contrary to these time-servers. Pag. 27. 'All public govern-

* See vol. 3, p. 335, of this Collection.

ment,' (says he) 'of what kind soever, seemeth evidently to have arisen from deliberate advice, consultation and composition between men. That composition signifies the laws.' And, pag. 28. he says further, 'That the power of making laws to command the whole politic societies of men, belongs properly to the same entire societies.'

What can be said more in confutation of the book that goes by the name of sir Rob. Filmer?

The duke of Wittemberg, at the council held at Wormes, when other princes discoursed of many privileges and conveniences of their lordships and territories, openly protested it to be his greatest felicity, that he could 'in aperto campo, et in sinu subditorum suorum dormire. Non eget mauri jaculis, nec arcu,' &c.

I shall further add only the judgment of one or two of our most famous and learned judges concerning this matter.

Fortescu, that was first lord chief justice, and afterwards lord chancellor in the reign of H. 6, in his excellent book in commendation of the Laws of England, affirms this doctrine. 'Ad tutelam legis, subditorum, ac eorum Corporum et bonorum erectus, rex est. Et ad hanc potestatem à populo effluxam ipse habet.'

Sir E. Coke, in his 12 Rep. 64. delivered his opinion freely in the Case of Prohibitions, before the king and the lords of the counsel; where there was a warm debate between the judges and Dr. Bancroft, archbishop of Canterbury. And what sir E. C. delivered for law, was with the clear consent of all the justices of England and barons of the exchequer. And there sir E. C. says, it was greatly marvelled at, that the archbishop durst inform the king, That the king had an absolute power and authority by the word of God to determine what causes he pleased in his own person.

And it is admirable to observe with what a true and honest courage that grave chief justice sir E. C. answered the king himself in that debate. When the king was pleased to say, It was treason to affirm, that the king was under the law: The chief justice answered him with the words of an ancient judge, and author of our law (that is, out of Bracton) That the king was sub Deo et Lege. And Fleta, another of our ancient authors in our science, useth words to the same effect. This doctrine differs from some of our late mottos in the Serjeant's rings.

Tacitus in his Annals, gives this excellent commendation of two of the best of the Roman emperors, Nerva and Trajan: 'Res olim insociabiles miscuerunt, imperium et libertatem.' And that author well observes it as the true case and condition of a people, and a necessary consequence: 'amissa virtute pariter ac Libertate.'

This discourse of mine may seem to some to be a digression; but a man can never have a juster occasion for it than now, and upon this argument and suit: I make that my apology, which I learn from king James, (his majesty's

royal grandfather) in his discourse of the Powder-Treason, which proves it the more seasonable. 'There is a time,' saith king James, 'when no man ought to keep silence. It hath' says he 'been ever held as a general rule in all well governed common-wealths, whether Christian, or Ethnicks, That when either their religion, or their king, or their country was in any extreme hazard, no good country-man ought then to withhold either his tongue or his hand according to his calling or faculty, from aiding to repel the injury, repress the violence, and avenge the guilt upon the authors.'

To support the power and privilege of the House of Commons, as being an essential part of the parliament; it is absolutely necessary to make it out against these innovators, that the House of Commons have ever been a part of the parliament, and that they were long before 49 H. 3. Or otherwise they are but precarious in their power and privileges, and enjoy them but of grace.

Every privilege is by prescription, says the lord Dier, fol. 60, à med. in Trewinnard's Case, which I shall have occasion to mention more at large before I have done. And in the same, Dier, fol. 70, in the case of Withers and Iseham, it is held, that a man cannot prescribe to an incident or appendant, nor indeed to any power or authority where the principal thing hath not had a perpetual continuance. Therefore where the beginning of a thing is known, there can be nothing belonging to it by prescription.

In one of our late king's reigns, the House of Commons in an Address of theirs, made mention of their privileges as their ancient and undoubted right and inheritance: but offence was taken at it, and they were told, it had been better if they had said their privileges were derived from the grace and permission of the king and his ancestors.

Now I shall clearly prove that these Powers and Privileges were indeed their ancient right and inheritance. Which they cannot be unless that House, or the Commons by their representative, have been ever from the beginning of the government a part and member of the parliament. I shall prove it out of several authentic authors of the law, historians and antiquaries, and by a multitude of records, and by divers acts of parliament, which are all the sorts of proof that can be in a question of this nature.

The Mirrour of the Justices, of which book sir E. Coke says, That most of it was written before the Conquest (as appears by the book itself) Tho. Horne, a learned man, added much to it in the reign of E. 1, in this Mirrour of the Justices, c. 1, s. 3, it is said, that king Alfred ordained for a perpetual usage, That twice in the year or oftener, if need be, the parliament should assemble. And to let you see of whom that parliament did consist, he tells us in the same chapter by whom the laws were then made. It is (says he) among other things, or-

dained, That no king should change his money, nor impair it, nor inance it, nor make any money but of silver, without the assent of the Lords and 'all the Commons.'

Sir E. C. in his Preface to the 9th Rep. tells us, That tenants in ancient demesne, because by their tenure they were bound to plow and husband the king's demesnes, before the Conquest: And in the Conqueror's time, had divers privileges, which they claimed by prescription; and among others, Not to contribute to the wages of the knights of the shire.

Now the privilege must be as ancient as their tenure and service, for their privilege comes by reason of their service, and their service is known by all to be before the Conquest, in the time of Edward the Confessor, and in the time of the Conqueror. And it is expressly said by this learned and reverend judge, That these tenants, in ancient demesne, claimed this by prescription; and it could not be so, if the wages of the knights of the shire had begun within memory of man, or of any record. Therefore it clearly follows, that knights of the shire to serve in parliament, and the paying wages to them for their service, has been time out of mind; and did not begin 49 H. 3, for that is within time of memory in a legal sense.

The same argument is used by a learned lawyer and antiquary Mr. Lambard, in his *Archion, or Commentary upon the Courts of Justice*, fol. 57, and 239, and 245, where he maintains that the parliament was used in the Saxons time, and then consisted of the king, Lords and Commons, as in the time of king Ina. anno 712. He does affirm, That burgesses were chosen to the parliament before the Conquest, fol. 257, 258, 265.

Littleton's *Tenures*, sect. 164, says, That the ancient towns called burroughs, be the most ancient towns that are in England, for the towns that now are cities or counties, in old time were burroughs, and called burroughs, for that of such old towns came the burgesses to the parliament.

Sir E. C. in his Comment upon this text of Littl. 1 Inst. 110, says it is called *Parliamentum*, because every member of that court should *Parler la ment*. Many pretenders to learning, take upon them to censure sir E. C. for this and some other like etymologies, as being ridiculous.

Let me do right to that learned in the law, and (which is more) honest and worthy chief justice, who lives in his useful works, and in (that great blessing from God) a numerous and flourishing posterity. It is true, *mentum* is an ordinary termination of divers words of the neuter gender, and so it is (if we will be strict) in the word *parliamentum*. But give me leave to say, if it be ridiculous, he is not the first nor the greatest that hath been guilty in this kind; nor is it any proof of illiterateness, nor to be charged only upon the profession of the common law, as if it were an absurdity peculiar to us. For the antiquity of the like etymology, it is of above a thousand years standing;

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and for the authority of it, it is to be met with in the imperial laws of Justinian the Roman emperor, and the last of the Roman emperors.

Even in the very text of the civil law, it makes the etymology of *Testamentum*, 'Ex eo appellatur' says the text, 'quod testatio mentis est.' 'Allusione quadam etymologica ostendit rei et vocis convenientiam,' says Vinius in his comment. fol. 270. 'Nomen ab officio convenienter habet.' And Vinius says further, 'Estque hujusmodi allusiva derivandi ratio, omnibus auctoribus admodum familiaris. In jocis Venustas delectat; qualis est illa Ciceronis, Fides, quia fiat quod dictum est.'

And sir E. C., it may be, was prompted to this etymon from that ancient author, the *Mirroure of Just.* who, in the place I before cited, c. 1, sect. 3, though he did not expressly mention the word parliament, yet speaking of it under another name, he tells us what their property is, viz. 'A parler la ment.'

Thus much by way of digression, for the vindication of that honour of our profession, sir E. C. to whom not only his own, but all posterity are highly obliged, especially our profession.

The Register of Writs, fol. 261. 'Quod homines de antiquo Dominico non contribuant expensis Militum ad Parliamentum venientium.' This is the title of the writ.

The writ itself runs thus, viz.: 'Monstraverunt Nobis' says the king 'Homines et Tenentes de Manerio de S. quod enim de antiquo Dominico Coronæ Angliæ, ut dicitur, quod licet ipsi et eorum Antecessores Tenentes de eodem Manerio à tempore quo non extat memoria, semper hactenus quieti esse consueverunt de expensis Militum ad Parliamentum Nostra, vel Progenitorum Nostrorum Regum Angliæ, pro Communitate dicti Comitatus, venientium, &c.'

M. 11 H. 4, Fitzh. avowry, Placito, 52, (which is said to be the first case in our Year Books, concerning wages to knights of the shire) in a replevin the defendant avows as undersheriff, by virtue of a *fieri facias*, to levy the wages of the knights of the shire; and he took his distress in a town called Wotton. Tremain, for the plaintiff, pleads in bar to the avowry, that W. temps d'ont, &c. never paid to the wages of the knights of the shire; and so issue is joined upon that prescription.

M. 14 H. 8, fol. 3, in the Year Book, by Fineux Ch. J. The parliament, says he, consists of the king, the lords and the Commons, and they are by the common law one body corporate. Now, that they cannot be at the common law, but by prescription.

I shall now proceed to prove it by several records of parliament, that the Commons have ever been a part of the parliament, as constituted at this day, of knights, citizens and burgesses.

Ex Rotulo Parliamenti, anno 51 E. 3, Membr. 5, num. 45. Mr. Pryn's 4th part of a Register of Parliamentary Writs, fol. 315, in sir Rob. Cott. Abr. it is too short; but at large in Mr. Pryn, as before cited.

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There is a Petition of the Commons to the king in French.

Item, For that of Common Right (which is the same with the Common Law, in the language of the acts of parliament) of the realm. Of every county of England there were and are chosen two persons to be at the parliament, for the commons of the counties, besides the prelates, dukes, earls and barons, and such as hold by barony; and besides cities and burroughs, who ought to chuse of themselves such as are to answer for them. And such as are chosen for the counties ought to have their accustomed wages, and to have writs to the sheriffs to levy them.

They pray that it be ordained this present parliament, that the wages be levied of all the commons of the counties, as well within franchises as without, excepting within cities and boroughs, and excepting of those that are summoned by writ (meaning the barons) and their tenants.

Resp. Soit fait come devant ad este use en cest Case.

This was in the time of E. 3, who was but the fourth king in succession from that H. 3, in whose reign our new authors would have our knights, citizens and burgesses to have their original.

And the king's Answer to the Petition of the Commons admits the matter of the Petition to be true, and refers to usage in former times.

In the same fourth part of Mr. Pryn's register, fol. 643, 5 H. 4, rot. parl. num. 71, and 78. On the behalf of Rich. Chedder, esq. menial servant to Tho. Brook, knight for Somersetshire. The Commons petitioned, That whereas, 'After the custom of the realm, all the lords, knights, citizens and burgesses, with their servants coming to parliament, by the king's writ, in coming, going and returning, are under your royal protection,' &c. And this Petition was answered by the act in print.

We may note from hence, that their privilege, and therefore much more their being a part of the high court of parliament, it was by custom of the realm.

I would note further (since I shall have occasion to use it for another very material point) that this custom (though the then present occasion for the mention of it, was from the servant of a member of the Commons House;) yet it is alledged as one entire custom for the whole parliament, viz. all the lords, knights, citizens and burgesses. They are all but one body, one court; and their rights and privileges are entire, and not some for the Lords, and other for the Commons; but it is a joint privilege.

From hence it follows, you cannot invade the privilege of the one House, but you invade both.

Elsing, in his Treatise of Parliaments, fol. 145. It is also in sir Rob. Cott. Abr. fol. 433, but not so full.

In the time of the same king, 5 H. 4, num. 74.

The Commons pray, That whereas according to the custom of the realm, the lords, knights, citizens and burgesses, coming to parliament, ought not for any debate, &c. to be arrested.

It is said to be the custom of the whole realm (that is, the same with the common law) and it is made to be one entire custom, both for the Lords and Commons; and this is for freedom of debates, and not the same with the last that I cited, though in the same year.

39 H. 6, rot. parl. num. 9, on the behalf of Wr. Clerk, burg. of Chippenham in Wiltshire.

And 17 E. 4, rot. parl. num. 36, on the behalf of J. at Will. cit. for Exeter.

In both these cases (though upon occasion of two particular members) yet the whole House of Commons petitioned.

And the petition on the behalf of Wr. Clerk, runs thus; 'That, whereof time that man's mind is not to the contrary, it hath been used,' &c. and then sets forth their privilege.

The petition of the Commons on the behalf of J. at Will. is in these words, viz. 'The freedom of which Commons hath ever afore this time been, and oweth to be, that the knights of the shire, citizens of the cities, and barons of the cinque ports, called to any of the parliaments of your noble progenitors (among other liberties and franchises) have had and used privilege, that any of them should not be attached by their persons or goods in their coming to any such parliament, their abiding, nor returning to their proper homes,' &c.

Their freedom had 'ever' been; then it did not begin first, nor had they themselves their beginning in 49 H. 3.

And 'oweth to be:' then it was not of mere grace, and by permission, but of right it ought so to be.

And two acts of parliament passed upon those two petitions, which confirm the truth of those suggestions.

And another thing I would observe, which does naturally and easily flow from these records, and is very useful to us, viz. That the Commons petitioning to have these freedoms allowed them, does nothing derogate from their right to those liberties and franchises, nor is no argument to prove them to be mere emanations of royal favour; for the humble way of address, by the Commons to the king to have their rights maintained, is made use of by our novelists, to prove they were granted from time to time, merely by the king's grace.

I am far from condemning this humble way of subjects addressing to their sovereign: it becomes the duty of subjects, and is due to the majesty of a king, to have all decent reverence shewn: but I would not have ill use made of their humility, to deprive them of their rights. It was (as I take it) the observation of Caesar, in his commentary, of the temper of the old Britains, 'Jam domiti ut pareant, non ut serviant.'

In that famous case of Thomas Thorp, the Speaker of the Commons, 31 Hen. 6, num. 25,

there are the very words of the Petition, at large set forth, in the fourth reg. of Mr. Pryn, fol. 644. Thorp was taken in execution, at the suit of the duke of York. The whole House of Commons petitioned to have their Speaker restored to them: and their petition is in these words: 'By common custom, time out of memory of man, and ever afore these times used, in every of the parliaments of the king's noble progenitors,' &c. And so it proceeds to declare the privilege of the Commons.

I would observe also, out of these three last records of parliament; that when any breach of privilege befel but a single member of that House, as that of Walter Clerk, and J. at Will. the whole House thought itself concerned, and the whole House petitioned; especially in this last case of Thomas Thorp, their Speaker, to whom the d. of York was no friend. This will be useful to my second point.

Hitherto I have presented you with records of parliament, as being the most proper proof of the rights of parliament, much beyond the reports of our historians, from whom our innovators fetch most of their arguments. I shall now offer you some records out of an inferior court, one of the four courts of Westminster-hall, that is, out of the Exchequer: but they are judicial records, adjudged by the whole court, by advice, with all the judges of both benches, to confirm the same point.

M. 12 E. 4, and H. 13 E. 4, in the office of the pleas in the Exchequer, mentioned by Mr. Pryn, in his fourth part of his Register of Parliament Writs, fol. 752.

In a plea of debt by Donne against Walsh. Walsh was menial servant to Henry earl of Essex, and he sued out his writ of privilege, and the writ under the great seal, was of this tenure: viz. 'Cum secundum consuetudinem in regno hactenus obtentam et approbatam, Domini Magnates Milites Comitatum ac Cives et Burgenses Civitatum et Burgorum, ad Parliamenta nostra venientes, ac eorum Familiares ratione alicujus Transgressionis' (and so proceeds to enumerate other sorts of actions) 'dum sic in parliamentis nostris morentur, arrestari aut implacitari minime debeant,' &c.

And then the writ mentions that action of debt, brought against Walsh, menial servant to the earl of Essex, in that present parliament, 'Vobis mandamus' (says the king by that writ of privilege to the barons of the Exchequer,) 'quod si ita est.' Those words do not refer to the custom set forth, nor to the law upon it, but to the allegation in the writ of matter of fact; viz. That Walsh the defendant was menial servant to the earl of Essex.

And then the defendant does by way of plea, grounded upon that writ, apply the writ to himself; and avers, that he is the same person mentioned in the writ; and avers, that he was the menial servant to the earl of Essex, and then demands allowance of his privilege,

The plaintiff in that suit traverses the custom and privilege alledged in the writ (as to the being impleaded) but admits it as to the free-

dom from arrest. This traverse is in the nature of a demurrer; for it is 'Quæstio Juris, ad quam respondent Judices non Juratores.'

'Et super hoc viso et prælecto brevi prædicto, per Barones, &c. Habitoque avisamento Justiciariorum Domini Regis, de utroque Banco in hac parte. Quia videtur præfatis Baronibus de avisamento Justiciariorum prædictorum, quod talis habetur et habebatur consuetudo, quod Magnates et Milites Comitatum, ac Cives et Burgenses Civitatum et Burgorum ad Parliamentum de Sumonitione Regis venientes, ac eorum Familiares Ratione alicujus Transgressionis, &c. dum sic in Parlamento morentur, capi aut arrestari non debent.' (But then they adjudge that the privilege does hold only against arresting their persons, but not against the suing them.)

This strongly proves the point I have in hand, That the House of Commons have their privileges by custom, and therefore the House itself could not have its original within time of memory, as 49 H. 3 is, in a legal understanding.

It is very useful further to observe, That the single and sole occasion of this record was from the privilege of the peers, from the suing a menial servant of a peer. No man denies but the peers have ever been a part of the parliament: nay, our new modellers of the government would have the parliament to consist only of the king and lords.

And yet it is said to be a Joint Custom for the Commons, as well as for the Lords, by express and particular words. Why did they not lay the custom for the privilege of the Lords only, that might have served for that present occasion, which was about the privilege for a menial servant of the then earl of Essex?

But the custom was an entire custom for both Houses: this proves them to be coetaneous, and twins by birth and original.

All this is by the judgment of all the twelve judges, in a judicial proceeding: and it takes in the opinion of the chancellor, who issued out that writ.

The other record of the same court is entered H. 12 E. 4, rot. 7, inter Ryner et Cousin, keeper of the wardrobe to the king, in an action of debt too; and there the defendant claims his privilege, not as servant to the king, but as servant to Thomas St. Leger, knight of the shire for Surrey.

And the writ of privilege sets forth the same entire custom, both for Lords and Commons (though the occasion was here from the Commons only) and the court of Exchequer gives the like judgment, as in the former case, by advice too, of all the judges of both benches.

The next record I shall make use of, shall be that of E. 2, which is a most invincible proof that the knights, citizens and burgesses have originally, and before 49 H. 3, constituted the House of Commons, and have ever been a part of the parliament.

The burgesses of St. Albans, in their petition to the king, say, That they 'sicut cæteri Bur-

genses Regni ad Parliamentum Regis, per duos Comburgenses suos venire debeant, prout retro-actis temporibus venire consueverant, tam tempore Domini Edwardi, nuper Regis Angliæ, Patris Regis' (which must be E. 1.) 'et progenitorum suorum' (which must be understood of the progenitors in the plural number of E. 1, for he mentions the then king E. 2, afterwards) so that of necessity it must take in king Hen. 3, and his father king John, at the least.

And this computation much exceeds the date given to the House of Commons by these new authors, viz. 49 H. 3.

And then the Petition descends to the mention of the then king's time, viz. E. 2. 'tempore Domini Regis qui nunc est, semper ante instans parliamentum.' And the Petition complains of the sheriff of Hertfordshire, who by the abbot's procuring, refused to summon that borough.

The answer by the counsel is, 'Scrutentur Rotuli, &c. de Cancellaria, si temporibus progenitorum regis burgenses prædicti solebant venire, vel non.'

This answer admits the general usage of burgesses to be chosen for divers boroughs, in the times of the king's progenitors; for it is absurd to think, that that needed any search of the Rolls in Chancery, but the search was to be only, whether that particular borough of St. Albans was one of those ancient boroughs that had used that privilege, and had a right to it, which would appear by the Rolls, and returns of writs of summons.

The record lays the usage for the borough to have been 'semper, ante instans parliamentum;' so that the usage had been from ever.

In the Rolls of Parliament 11 H. 4, num. 59, cited by Mr. Pryn, in his *Brevia Parliamentaria Rediviva*, fol. 185, there is a Petition of the Commons in French, reciting the stat. of 7 H. 4, c. 15, which statute (as the Petition says) was made for the preserving the franchises and liberties of the election of knights of the shire, used throughout the whole realm, and by the king's progenitors from parliament to parliament, time out of mind observed.

I will now put the court in mind of some acts of parliament, that fully prove this point.

The statute of 5 R. 2, parl. 2, c. 4. (in a time when parliaments were not so much valued) 'It is thereby enacted, by assent of the Prelates, Lords, and Commons, that all persons and commonalties, which should have a summons to parliament, should come from thenceforth to parliaments in the manner as they were bounden to do, and had been accustomed of old times; otherwise they should be amerced as of old times had been accustomed.'

Rot. Parl. 2 H. 5. pars 2. num. 10. This is left out of sir Rob. Cott. Abr. That act declares, that the Commons had ever been a member of the parliament, and that no statute or law could be made without their assent. I will not spend time in citing those learned antiquaries, or his-

torians; as sir Henry Spelman, Bede's Eccl. Hist. nor famous Selden, nor learned Camden, who by general words, used in the Saxon times, for the assembling of parliaments, though not by that name, prove the Commons to be a part of them; but they do not prove the Commons to be so elected, and to consist of knights, citizens, and burgesses, as is clearly proved by the records I have already offered.

The parliament in the Saxon times was styled, 'Commune concilium, tam cleri quam populi.' And the laws were made 'per commune concilium, et assensum omnium episcoporum et principum procerum comitum, et omnium sapientum senior et populorum totius regni et populi conventus.' King Edward the Confessor confirmed the Saxon laws, and made new, says Lambert in his book *De Priscis Anglor. Legibus*, c. 8, fol. 139, and there it is said, all to be done 'à rege, baronibus et populo.' These general words cannot be understood otherwise, than to include the Commons.

And so 'totius regni assensu et omnium astipulatione et judicio,' says Mr. Selden, a judgment was given concerning Lanfrank, archbishop of Canterbury. The statute of Magna Charta was made and confirmed 9 H. 3, which was forty years before this new date of the original of the House of Commons, viz. 49 H. 3. And it appears by several statutes, that Magna Charta was made 'De communi concilio regni' says one statute: 'Per commune assent de tut le realm,' says another. 'Per le Roy, Peers, et Communes de le terre,' says another.

It is worth the while to examine the grounds of their opinion, and it will appear how weak they are.

These new authors affirm, that the House of Commons began to be admitted as a part of the parliament, not till 49 H. 3. Their reason is, because (as Mr. Pryn says, in his *Plea for the Lords* fol. 182, and in his preface to sir Robert Cott. Abr.) the first writ of summons of any knights, citizens, and burgesses now extant is no ancienter than 49 H. 3, dorso 10 and 11. And from thence he concludes, that it is most apparent, that the Commons had no place, nor votes by election in parliament, before the end of the reign of H. 3, and sir Robert Filmer is in like manner positive in it in his book, called *The Freeholders Grand Inquest*, fol. 18, and they both cite Mr. Selden and Camden and other learned authors, and Mr. Dugdale in his *Origines Juridiciales*, fol. 18, follows them in it. It is true Mr. Selden in his *Titles of Honour*, fol. 717, towards the end of that fol. does take notice that the first roll that they find extant is that of 49 H. 3, for the summoning of the Commons by way of election; but he does not thence conclude, (as those new authors do) that this was the first time that the Commons came to the parliament by election.

But in other places of his learned book, he does strongly intimate his opinion to be that the Commons did very anciently and long before 49 H. 3, make an essential part of the parliament, and were summoned to it; but in what

form they were summoned, and when they first began to be distinguished from the Barones Majores, Selden himself seems much unresolved.

Learned Camden does indeed date the original of the Commons as a part of the parliament, and as now elected, from 49 H. 3, fol. 13 of his Britannia, in the edit. at Lond. An. 1600. But let us take notice upon what authority he does it. He says he has it 'ex satis antiquo scriptore,' but he names not his author.

Mr. Selden fol. 713, says, he could never meet with that author, and professes he gives little credit to that relation, but acknowledges there had been a great change in the constitution of the parliament, but supposes it long before 49 H. 3, viz. in the time of that king's father (king John) and that it was done by a law, though the law be lost, as many rolls of parliament were, wherein those laws were entered.

And the distinction of 'Barones Majores et Minores' he supposes was made by act of parliament, about the time when the great charter of king John was made at Runnymede, viz. 17 Johannis. By which Charter, some of the Barones Majores were severally to be summoned to parliament by special writs. And all other tenants *in capite*, or tenants by knights service were to be summoned by a general summons directed to the sheriff of every county.

By this conjecture, it should seem that the court of parliament before consisted but of one house or assembly. And it is generally held, that at the first, from the beginning of the reign of William the first, till that charter of king John, all tenants *in capite* had a right to sit in parliament. For says Mr. Selden fol. 704, medio folii. Tenere de rege in capite, and to be a baron, and to have a right to sit in counsels or courts of judgment, are synonimies. That great charter of king John, says Selden, was made by the king and his barons, 'et liberos homines totius regni,' and that it seems first made the distinction.

But Mr. Selden does by no means leave it to H. 3, or his son E. 1, or to any other king at any time, to send his special writ of summons to such of the barons only, 'quibus ipse rex dignatus est brevia summonitionis dirigere;' as Mr. Camden's nameless author taught him, and from Mr. Camden, Mr. Pryn, sir Robert Filmer, and Mr. Dugdale take it up, and so propagate that error. So that this new fancy is wholly grounded upon the credit of that uncertain writer, whom Mr. Selden could never meet with, and to whom he gave no credit. The argument upon this subject, begins fol. 701, in Mr. Selden's Tit. of Honour, and is continued to fol. 718. Now the argument taken from the rolls of summons, which are not extant before the time of 49 H. 3, is of no weight. For by the same argument it might be proved, that there was no parliament from the time of 49 H. 3, till 23 E. 1, for there is no roll nor no other testimony left of a sum-

mons for any knights, citizens and burgesses, from 49 H. 3, till 23 E. 1. And yet we know there were no less than fourteen parliaments between those times.

They may as well argue, that there were no acts of parliament, nor no parliament till 9 H. 3, when Magna Charta was made, because there are no rolls of them till that time. Whereas it is beyond all dispute, that there were parliaments and acts of parliament long before, as 4 Will. 1, when the bishops were brought in to hold by barony, (as Mr. Selden conceives) and some in H. 1, and others yet extant in history, yet the rolls of them are lost. This is observed by the lord chief justice Vaughan, in his Rep. fol. 358, in the case of Thomas and Sorrel.

In the next place, these late authors proceed further in their error, and maintain that the Commons had no further power in parliament, than what the king and the Lords admitted them unto.

And sir Robert Filmer, fol. 40, allows neither Lords nor Commons any power but by the king's bare permission, and thus they are growing in their invasions against the court of parliament, and impeach one first, and the other will follow more easily.

And sir Robert Filmer further holds, the legislative power rests solely in the king, and fol. 39, he hath these words, 'But the truth is,' saith he, 'the liberties and privileges of both Houses, have but one and the self-same foundation, which is nothing else but the mere and sole grace of kings.'

And doctor Heylin, in his Life of archbishop Laud, fol. 91, denies the privileges of parliament to be the peoples' birth-right, but holds them not otherwise exercised, than by the grace and goodness of the king.

Mr. Pryn, sir Robert Filmer, and Mr. Dugdale, lay great stress upon the diversity that is in the writs of summons, between the summons for the Lords, and the summons for the Commons.

That to the Lords, say they, is, 'super negotiis predictis tractaturi vestrumque consilium impensuri.' But that to the Commons, is, say they, only 'ad faciendum et consentiendum his quæ tunc ibidem de communi consilio dicti regni contigerint ordinari.'

It is true, that for many years of late, that distinction hath been so used in the summons, but not constantly so.

As to this point, I will cite Mr. Dugdale's, and Mr. Pryn's own books against their own opinion.

The very first writ of summons, which as they say is now extant, for the summoning of the Commons by election, viz. 49 H. 3, runs in these words, 'Nobiscum ac cum predictis praelatis et magnatibus nostris super præmissis tractaturi atque consilium impensuri.' Dugd. Orig. Jur. p. 18.

The writ, 'De expensis Militum qui venerunt ad Parlamentum venientibus,' says that writ, 'usque ad Westmonasterium ibidem de

'diversis negociis nobiscum tractaturis.' See Mr. Pryn's 4th part of a Register of Parliament Writs, fol. 8.

In Mr. Ryley's *Placita Parliamentaria*, it appears, that as the summons to the temporal Lords, fol. 318, was 'ad tractandum,' and so likewise the summons to the prelates, fol. 319, so also, fol. 320, it is entered in these words, 'Mandatum fuit singulis Vice-comitibus per Angliam quod de quolibet comitatu duos milites, et de qualibet civitate duos cives, et de quolibet burgo duos Burgenses eligi et ad dictum Parliamentum venire facerent ad tractandum,' &c.

In the same book, fol. 570, an. 15 E. 2, there is mention of a writ of summons, for knights out of Wales, to a parliament at York, 'ad tractandum et consilium impendendum.'

In Mr. Pryn's *Brevia Parliamentaria Rediviva*, fol. 274, there is the very indenture returned by the sheriff of Norfolk for Great Yarmouth, 'ad tractandum, consulendum et consentiendum.' 31 E. 3.

And fol. 68, of that book, another writ, 'de expensis militum,' 18 E. 2, reciting the cause for which they had been summoned to the parliament, viz. 'ad tractandum,' &c.

And in the same book, fol. 145, it appears, that 18 E. 3, the writs to the sheriffs for chusing knights, mentioned what their work was to be, in these words, viz. 'Nobiscum, cum prælati et proceribus prædictis super diversis et arduis negotiis nos et statum regni nostri specialiter tangentibus tractaturi et suum consilium impensuri.'

And fol. 147 and 149, the like words in the writs.

And fol. 177, the indenture returned by the sheriff of Wiltshire, recites their trust in the same words, and pursues the words of the writ.

And 276, and 283, and 381, indentures returned from Reading, Bristol, London, with the same words. And ib. fol. 178 and 179, and 291 for Windsor, and 365. So that in the reigns of seven several kings, and those of the most ancient kings, there was no such distinction in the writs of summons.

Another argument used by these late authors, to prove that the whole power and all the privileges of the House of Commons, are not from the original constitution of the government, (as I affirm, and I hope have proved they are) but of a later original, and by the mere grace and indulgence of princes (as indeed they must be, if the House of Commons began within memory) is taken from the words and phrases of our historians, who have written since the coming in of the Normans, and ascribe the making of laws, and all the determinations and decrees in matters of judicature, and all the actings of the ancient parliaments before the time of the Normans, to the king and Lords only, exclusive to the Commons, and that the Commons had no part in them, till this time of 49 H. 3.

And they ground this opinion upon the form of penning of our ancient acts of parliament,

which seem by the words of them to be mere concessions of our former kings, and to have proceeded only from their royal bounty, and at their sole will and pleasure.

And they confirm themselves in that opinion, from observing the course used in the beginning of parliaments, when the speaker makes his humble petitions to the king for the granting of them freedom from arrests, and freedom of speech.

Now to discover the falsity of these grounds, and the weakness of these arguments, taken from the words and phrases used by our historians, I shall shew that our historians, who have written since the time of the coming in of the Normans, and have translated the Saxon annals, have in those translations, instead of the Saxon titles, used the titles that were never in use before their own times, which titles used in the Saxons' times had quite different significations from the titles used in the times of the translators.

The title 'earl,' for example, is used in the penning of the Saxon laws (as among those of Athelstan) as we may see by Mr. Lambert in his book *De Priscis Anglor. Legibus*, and the title 'comes,' came in amongst us since from the empire; and signified a different thing from earl. Now our translators mistaking those two titles, 'earl' and 'comes,' to signify the same thing, wherever they met with earl in the annals of the Saxons, they have rendered it comes in their translations: and whatever in those times was done by earls, and whatever power the earls then used, is by our translators ascribed to our comites, who are therefore also called earls, when in truth they had different significations, and were different in their powers. Mr. Selden takes notice of this error in our Norman or English translators proceeding from their ignorance. But from this error false conclusions have been raised, and false measures taken in our discourses, concerning the power of the peers.

Sir H. Spelman observes the same error in our translators, in rendering words and titles, 'Non è more Sæculi antiquioris,' but according to the titles used in their own times, when many times they signified different things. *Nobilis*, says Mr. Selden, in the Saxons' times, denoted every gentleman.

Now because *nobilis*, in our times, is generally restrained to peers, whom we call the nobility, our new writers, as Mr. Pryn, and sir Robert Filmer, and several others, ascribe all to the earls and barons and other peers of our times, which they read in the translations of the Saxon annals, to be acted by those that are called *nobiles* in those annals. Although in truth in those Saxon times, they were acted by the middle sort of persons, as well as by those of the highest sort of dignity under the king.

Those translators misled our new authors, for the Norman writers translate the word *thanes* into barones, and these new authors of ours, whatever they find in these translations to be related of the barones, they limit it as a pecu-

liar to our present barons, and so ascribe all judicial power antiently used in parliament to the barons only. And they bring those historians and translators for a proof.

For example, the Saxon title thanes, was in the Saxon times applied to all lords of manors. But the translators of the Saxon annals, translating the title thanes, into barones, our innovators apply all that in Saxon writers is said to be done by the thanes, that is, all lords of manors, as peculiarly belonging to the power of the barons in our times.

Hence it is that sir E. Coke cautions us against taking reports of law from historians: in his preface to the 3d Rep. he calls it Chronicle law.

The word *baro* was not in use in England till the Normans' times, and the root of it (as Mr. Selden and Camden and sir H. Spelman teach us) is from the Northern language *barn*, which signifies the male sex, as when we put cases of baron and feme; or it signifies, 'a freeholder' hence come the words, courts baron.

'*Nomine Baronagii*,' says Camden, *Eliz. Edit. Lond. An. 1600, fol. 137, 'omnes quod-ammodo Regni Ordines continebantur.'* It comprehended the gentry as well as the greatest persons. After this manner, Godwin in his *Roman Antiquities*, speaking of the Roman magistrates, translates the words *triumviri Capiales* into three High Sheriffs, but this affords no argument, that what was done by the *Triumviri* among the Romans, may therefore lawfully belong to the power of high sheriffs among us.

And so the words 'Proceres, Magnates, Optimates, Nobiles,' and such like, were not in the writers of the Saxons' times restrained to men of the highest rank then, such as our earls and barons are now, but to all persons of the better sort, though not of the highest rank, not only to Patricians, and those of the Senatorian order, but to those also that were 'Equestris ordinis.' Excluding none but the 'Ignota capita,' or 'sine Nomine turba,' such as the Romans styled 'Plebeians.' Magnates et 'Proceres,' are said to make the statute of Mortmain, but we all know that the parliament that made it, consisted then of king, lords, and commons.

The great charter made 17 of king John, appears by the body of the charter itself to have been made 'per Regem, barones, et liberos homines totius Regni; so that it is most plain it was not made by the king and the barons only, as Mr. Selden observes in his *Title of Honour*, fol. 709, and there he refers to the 'Close Rolle 17 Johannis dorso, membr. 22.' Yet k. H. 3, speaking of this meeting, calls it 'Baronagium Angliæ,' and rot. clause. 28 H. 3 'Pars unica membr. 12, dorso,' it is called 'Parliamentum de Runni-meade quod fuit inter Dominum Regem Johannem et barones suos Angliæ.'

As for the other gross mistake, That the power of making laws rests only in the king, (as sir Robert Filmer would have it,) which he

proves from the titles of acts of parliament, and the forms of those acts being by way of charter and grant from our kings in ancient times, as that of *Magna Charta*, 'Dominus Rex Concessit;' and the stat. 'de donis conditionalibus, dominus Rex statuit,' sure he was no lawyer that used this argument, and he never read the Prince's case.

Nor sir E. Coke, 2 Inst. nor shall I need to labour in the confutation of this error, the fallacy of it being so well known to every man that wears a gown. As for that stat. of *Mag. Char.* whereby the king only seems to speak, and all that is ordained by that stat. runs in the language of the king's concessions only; yet we know the stat. of 15 E. 3, c. 1, which confirms it, says of it, that it was ordained by the king, lords and commons. The stat. of 28 E. 1. c. 8, and c. 13, hath these words, viz. 'The king hath granted unto his people that they shall have election of their sheriffs every year, if they list.' One would take this to be a most gracious liberty, and an high condescension if it should be granted now a days.

And our innovators would be apt to conclude from the words of this act and from the penning of it, that the people once had this mighty privilege merely as a boon from the king, and by virtue of his grant. Whereas there is nothing more certain and clear than that the freeholders (who are often called the people, and are the true proprietors of the nation and land) had originally and from the very first constitution of the nation, the election not only of all sheriffs, but of all other magistrates civil or military that had any authority over them under the king; so that they had a mighty freedom in the very constitution of the nation, and this overthrows all the wild fancies of sir Robert Filmer, and Dr. Heylin, and some later doctors, as if all were derived from mere grace and bounty, and many other deductions might be made from the knowledge of this.

The freeholders had originally the election of the conservators of the peace, who are become out of date by introducing our present justices of peace, who have their power not by the election of the freeholders, or are they of their nomination (as antiently) but nominated by the king, and have their power by special commission under the great seal; and how, and by what means, and in what tempered times this came about, and that this freedom was gained from the freeholders of England, you may read in Mr. Lambard, in his *Eirenarcha*, fol. 16, 19, 20, 147. It was done by act of parliament, in the beginning of E. 3, and in his infancy, when his mother Isabel ruled all.

The freeholders originally and from all antiquity did likewise by writ at the county-court styled in pleno Folkmote chuse the Here-tochii; What were those? That sounds like a strange word. I will imitate our Norman or English translators in the translation of the

Saxon annals, and render it into the English style; you may by that rule call them lords lieutenants, or deputy lieutenants; for the Saxon laws tell you their duty or office, they were the 'Ductores exercitus.'

See Lamb. de priscis Anglor. Legibus, in his ch. de Heterochiis, fol. 147.

All these great officers were chosen by the freeholders as our knights of the shire are, and as coroners and verderers (formerly men of great power) are chosen by writ at the county court to this day.

These were mighty powers and freedoms, and enjoyed by the people as anciently as any of our records reach, and are more authentic proofs than the writings of historians, and best shew the native freedom that the people had by the ancient constitution of our government, contrary to all the new doctrines of our late writers, and prove that the privileges and freedoms we yet enjoy are not mere emanations of royal favour, as our novelists would impose upon us.

See sir E. Coke to this purpose. 2. Inst. 174, and 558.

I could name some great men, that have lately used the same language in books published 'sub magni nominis umbra.' Bracton, who lived in the time of H. 3, l. 1, c. 1. fol. 1, affirms 'Legis vigorem habet quicquid de consilio et consensu magnatum et Reipub. communi sponsione (authoritate regis præcedente) juste fuerit definitum et approbatum.'

In the last place, that humble and modest way of the people's addressing to their sovereign either for the making of laws (which has been very ancient) or for granting of privileges (as the Speaker of the Commons hath of late years done) it shews indeed great reverence, and I do not in the least dislike it; and it becomes the majesty of the prince to be so addressed to; but let it not be made an argument that either the laws thereupon made, or the privileges so allowed, are precarious, and merely of favour, and may be refused them.

I would be loth to pay wages and to maintain at my charges every one that styles himself my humble servant.

In that act of parliament intituled, The Petition of Right, the title corrects and qualifies itself, 3 Car. 1, the Lords and Commons petitioned the king, but it was for their rights and privileges; not for any new, but for their ancient rights and privileges, and yet they style it a petition.

In the title of this act (the Petition of Right) those 'res olim insociabiles, sc. Imperium et Libertas' are 'bene mixtæ': and from hence is a mixt monarchy.

In the Stat. of Provisors, 25 E. 3, the Commons prayed; they are fond of the word, and I commend it in them; but the word was used by the figure Catachresis, as the scholars call it; not properly, as appears by the subject matter of that act that follows; what was it, I pray, that they so prayed? They prayed (says that act) that upon the mischiefs that happen

to the realm, the king ought, and is bound by his oath, with the accord of his people in his parliament, thereof to make remedy and law. The peers are here included in the people; so that the word prayed, had it been used to any other than the king, had signified remonstrated, declared, or represented.

This proves too where the transcendent power of the legislature is, and that the exercise of it, though it be free and not subject to coercion, yet it is not at will and pleasure in the exercise of it, but guided by rules.

And though the Speaker does (upon his being approved of by the king) make it his humble petition to have liberty of speech allowed the Commons; from whence Dr. Heylin, and sir Rob. Filmer, and others, infer that the Commons enjoy that liberty merely by the king's grace and favour; yet they are clearly answered by the words that accompany that humble petition, he prays they may be allowed that freedom, as of right and custom they have used, and all their ancient and just privileges and liberties. So that this from the Speaker is also a petition of right.

Nor is this request of the Speaker's, ancient in the use of it, if we may believe Mr. Hakewel, in his Treatise of the manner of Enacting Statutes in Parliament, fol. 136.

Thomas Moyle, speaker, 34 H. 8, the first that is recorded to have made petition for freedom of speech.

I hope I have sufficiently made it out, that the House of Commons as a member of the high court of parliament, are not of so late an original, as 49 H. 3, but have been as ancient as the nation itself, and may in the sense of Julius Cæsar in his Comment, be accounted among the ab-origines, and that they have had a perpetual being, to speak in the language of the law, 'temps dont, &c. à tempore cujus contrarii memoria hominum non existit,' and that they are therefore capable by law (together with the rest of the three estates in parliament) to prescribe and claim a share in all parliamentary powers and privileges; I do not mean separately, but in conjunction with those other estates, which they could not otherwise legally have done, if their original and commencement could have been shown.

I shall in the next place endeavour to make it evident, that the three estates of parliament are one entire body and corporation; and that all their powers and privileges in the right of them, and in the title to them, are intire, 'per my et per tout,' and belonging to the whole body of the parliament, though in the exercise of those powers, and sometimes in the claim of them they are distinguished, and in the practice of their powers, they are in many things distributed into parts.

For their powers are one thing, and their privileges are another; the latter are but an incident or attendant upon the former.

It is very material in our present case to have this matter considered, I mean the intireness of this high court; for 'Divide et Impera.' The

faggot is easily broken when first the band is broken. If this be well considered, the consequence of this case will be better understood.

It concerns the defendant only by name and more immediately, but in the right and near consequence, it is now most evident, that it nearly concerns the House of Lords: this information of Mr. Attorney's, like a *Terræ motus*, or as that great blast would have done (had not Almighty God, in his infinite goodness to this nation, prevented it) shakes the foundation of both houses, and reaches to all future parliaments; it frights me to speak what may be the effects of it, if it should prevail and be stretched to the utmost. I am far from saying or thinking it is so intended. But who knows how far a single precedent will be made use of in times to come?

All the estates in parliament, are all called by one common name, as *Commune Concilium Regni*, *Magna Curia*, they are one body politic, M. 14 H. 8, fol. 3, in the Year Book, (which I cited before to another purpose); it is said by Fineux Ch. J. that the parliament at the common law consists of the king, lords, and Commons, and they are (says he) but one body corporate.

This proves likewise (what I before argued) that the Commons at the common law (which is *ab initio*) were a part of the parliament.

In the case of Ferrers out of Crompt. Jurisd. of Courts, fol. 8, 9, 10, (for I keep within my proper element, and move in my sphere, and cite authors of our own science of the common law) H. the 8th, called before him the lord chancellor, the judges, the Speaker of the House of Commons, and others, and thus expressed himself before them, viz. That he was informed by his judges, that he the king as head, and the two houses as members, were knit together in one body politic, so as whatsoever offence or injury (during time of parliament) is offered to the meanest member of the house, is to be judged as done to the king's person and the whole court of parliament. And sir Edward Mountague the Ld. Ch. J. then present, confirmed all that the king had said, and it was assented to by all the rest of the judges. Now if you bruise or pierce the hands, (and the House of Commons may well be compared to the hands, for they have been the liberal hands, and the hands feed the head) the head and all the rest of the body must quickly be sensible.

In Trewinnard's Case, Dier. 60, and 61, the privilege of the Commons upon this very account, is termed the privilege of the parliament, and the judgment given in that case by the House of Commons, is there said to be the judgment of the most high court of parliament.

The statute of 1 Jac. c. 1, says, the parliament is 'the whole body of the realm.'

By the two records that I cited before out of the office of pleas in the Exchequer, 12 E. 4, it appears in two several cases of privilege, the one concerning the Lords, and the other concerning the Commons, in both cases the privilege was laid and claimed as one entire privi-

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lege, and so allowed by the judgment of that court, by advice of all the judges of both benches.

The Speaker of the House of Commons, by the rolls of parliament, (which are the most proper proofs in a thing of this nature) is termed the Speaker of the Parliament, so it is in the roll of 1 R. 2, in sir Robert Cotton's Abr. fol. 155, it was in the reign of a king that was no favourer of parliaments.

Sir John Bussey, Speaker to the Parliament, sir Robert Cotton's Abr. 20 R. 2, num. 14 and 15.

51 E. 3, num. 87, sir Robert Cotton's Abr. fol. 151, sir Thomas Hungerford, Speaker of the Parliament.

And so is the Speaker of the Commons styled in the case of Ferrers, in Crompton's Jurisd. of Courts, fol. 8, 9, 10, (before cited.)

In the statute of 6 H. 8, c. 16, the clerk of the House of Commons is called clerk of the parliament.

In the case of Godsol and sir Christ. Heydon, 12 Jac. in B. R. in serjeant Roll's Rep. fol. It was affirmed by sir E. C. that in ancient time all the parliament sat together, and the separation was at the desire of the Commons, notwithstanding, says he, they are but one House: and he further affirms, that he had seen a record, 30 H. 1, of their degrees and seats.

Having made it appear that the parliament is one entire body, and therefore mutually concerned in powers and privileges as to the right and title of them, though divided sometimes in the exercise; I shall proceed briefly to show what those powers are, in order to the proving that what in our case is charged to be done by the Speaker, by order and command of the parliament, (for so I may now affirm) is pursuant to their power and jurisdiction.

The parliament hath three powers: 1. A legislative, in respect of which they are called the three estates of the realm. 2. A judicial, in respect of this it is called *Magna Curia*, or the high court of parliament. 3. A counselling power, hence it is called, *Commune Concilium Regni*. For the proof of these, I shall cite some few antiquaries, but chiefly some authors of our profession of the law, and those of the best authority with us. I shall mention them without observing any exact method, because divers of them extend to more than one of these distinct powers, and some of them refer at once to all of them.

Sir Henry Spelman in his Glossary Tit. *Gemotum*, which was the old Saxon word for a parliament, fol. 261, 'Convenere,' says he, 'Regni Principes tam Episcopi quam Magistri tratus,' there are those that now make up the House of Lords, 'Liberiq; homines,' there are the Commons, what is their proper work and power? 'Consulitur de communi salute, de pace et bello.' This proves them the *Commune Concilium Regni*.

Learned Camden: 'Quod Saxones olim Wittena Gemot nos Parliamentum recte dici-

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'mus,' as to their power, 'Summam et Sacro-sanctam auctoritatem habet in legibus ferendis, interpretandis, et in omnibus quæ ad reipubl. salutem spectant.' This shews their legislature.

The Mirror of Justices, (this is an authority in law) c. 1, fol. 9, says, Parliaments were instituted 'Pur oyer et terminer;' this is the supreme court of Oyer and Terminer. The court of King's-bench is said to be above all courts of Eire or Itinerant; and if the King's-bench be adjourned into any county, where the Eire is sitting, the Eire ceases, 'In præsentia Majoris,' &c.

But this court is above the King's-bench and all courts of Oyer and Terminer. The King's-bench is the highest Eire, but this is (according to Solomon's hyperbole) higher than the highest.

But what is the proper subject of their Oyer and Terminer? Our ancient author, who wrote some part of his book before the conquest, tells us, their work is to hear and determine 'les plaintes de tort le roy, de la reign, et de leur enfans,' (the king's children) so that they make an impartial enquiry, but says our author further, 'De eux specialment de queux torts lun ne poit aver autrement common droit,' this flies very high to prove their judicial power. I forbear to English it.

It is the proper work of this supreme court, to deal with such delinquents, as are too high for this court of the King's-bench or other ordinary courts. Against whom, through their potency or mighty interest, common right cannot be had, it must be understood in ordinary courts. And the writing and printing of this, was never taken to be a scandal to the government or to the justice of the nation. For the author speaks in the person of the king himself, and tells us, that the high court of parliament is armed with a power, able to cope with and quell the most insolent offenders.

When the Great Judge of all the earth comes to make inquisition for blood, and to execute judgment by the hands of this high court, 'The lofty looks of man shall be humbled, and the haughtiness of men shall be bowed down and made low.' To discourse of this judgment, will make a *Fœlix tremble*.

We have often heard it confidently said from the pulpit, That our laws are like the spiders' webs, which catch the little flies, but the great ones break through them. Now it is quite contrary with this great court, this great court encounters only with great offenders. It is like the imperial eagle, 'Aquila non capit Muscas,' it leaves them to this and other inferior courts, but that takes to task the 'Animalia Majora.'

In that great case, Rot. Parl. 40 E. 3, num. 7, king John had resigned up the crown of England to the pope, by the hand of Pandolphus his legate, and sordidly submitted to take the crown at his hand again, at a yearly tribute!

In the reign of our noble king Edward the

3rd, the pope demanded his rent and all the arrears. The prelates, dukes, counts, barons, and commons, resolved that neither the king nor any other, could put the realm nor the people thereof into subjection, 'sans l'assent de eux.' This intimates, that with their joint consent the crown may be disposed of.

This was the highest resolution in law, in one of the highest points in law, concerning the king's claim of an absolute power, and in a time when the pope was in his height. And the Commons join in the resolution, both against the pope's and king John's pretence to a despotic power.

Sir Tho. Smith, who was a secretary of state, in his Commonw. l. 2, c. 2, fol. 50, 51, 'In Comitibus Parliamentariis posita est omnis absolute potestatis vis,' (taking in the king as the head of them, as it ought to be understood) this shows where the rightful absolute power under Almighty God is. And among other Magnalia he tells us, 'Incerti Juris Contrarias dirimunt.' This shews their transcendent judicial power; they determine the greatest disputes and doubts in law. They would quickly decide this dispute and controversy, were it once before them, without argument.

This appears to be the proper business of a parliament, even from the writ of summons both to Lords and Commons, (for they did not anciently differ in any thing material, as I have abundantly shown already) they are 'De Arduis Regni tractitare, et Concilium impendere,' here is their counselling power. According to that equitable rule, 'Quod omnes tangit, ab omnibus tractari debet.'

Their legislative power is most clearly set out by Bracton, (a judge in the time of Hen. 3, in whose latter times our innovators would have the House of Commons to begin) I cited him before; 'Legis vigorem habet,' says he, 'quicquid de Consilio et de Consensu Magnatum et Reipubl. communi Sponsione (auctoritate Regis præcedente) juste fuerit definitum et approbatum,' 5 H. 4, num. 11. The record there uses too gross a word. The Commons, says the roll, require the king, it should have been, made it their request to the king, and the lords accorded, that four special persons should be removed out of the king's house.

This in some ages, as in the reign of R. 2, would have been thought a very high presumption, and a saucy thing (to speak in the language of the pulpit, and press too from a late Cambr. Dr. and a chaplain in ordinary, if the title of the print may be credited, but said to be printed by the ——— of that university. A saucy thing with their profane and unhallowed hands to presume to meddle in a thing so sacred. Thus says the late printed sermon.) But it was a sacred or consecrated thing indeed in this roll of parliament mentioned. One of the four required to be removed out of the king's house, where he was a domestic, was no less than the king's confessor. And it was

not in the reign of a R. 2, or H. 6, but of H. 4, one of our wisest and most active valiant kings.

But it may be thought that these four persons were in some desperate Popish plot of killing the king, as the four we have heard of, were.

No, the king himself will resolve that doubt. That noble king said in answer to it, 'He knew no cause wherefore they should be removed, but only for that they were hated of the people.' And yet that great king charged those four to depart from his house. This proves their counselling power.

I might enumerate a vast multitude of *Animalia Majora*, no small flies, that have in several ages been caught in the net or web of an enquiry made by the House of Commons, who fish only for such greater fish, such as we call the pike, who by oppression live upon the smaller fish, and devour them. The Commons to that end fish with a net, that has a wide and large mesh, such as lets go the small fry, and compasses none but those of the largest size. Such as the lord Latimer in the time of E. 3, an. 50, such as Michael de la Pool, earl of Suffolk, and lord chancellor, in 10 R. 2, Thomas Arundel, archbishop of Canterbury, 21 R. 2, and such like; William de la Pool, duke of Suffolk, 28 H. 6, who were all impeached by the House of Commons in several parliaments.

And I myself have seen a lord chief justice of this court, while he was lord chief justice, and a learned man, by leave from the House of Commons, pleading before that House for himself, and excusing what he had done in a trial that came before them in the west, whereof complaint was made to the House. And he did it with that great humility and reverence, and those of his own profession and others, were so far his advocates, as that the House desisted from any further prosecution.

In the late act of 13 of his now majesty, for safety of his royal person, there is a proviso for the saving of the just antient freedom, and the privilege of either of the Houses of Parliament, or any of their members, of debating any matters or business, which shall be debated or propounded in either of the said Houses; or at any conferences or committees of both, or either of the said Houses; or touching the repeal or alteration of any old, or the preparing any new laws; or the redressing of any public grievances. I observed but now out of Trewinn. Case in the Ld. Dier. that the judgment of the House of Commons in a case of the privilege of that House, in that report, is called a judgment of the most high court of parliament; which proves they are not without a judicial power.

3 H. 6, sir Rob. Cott. Abr. fol. 574. The great case between the earl of Warwick and the earl Marshal for precedency, fol. 576, was determined by the king, 'By advice and consent of the Lords and Commons;' and yet one would have thought that a case of precedency between two peers should have been a peculiar of the Lords.

In the case of 1 H. 7. in the year books, fol. 4, about reversing of Attainders, it is advised by all the judges, that those knights and others of the House of Commons, should not sit in the House, till the act for reversal of their Attainders were passed. And the reason is, that it is not convenient, that such as were attaint should be judges; (and it might have been added in their own case) so that attainting by bill, or reversing attainders, though by bill, is most properly a judicial act, and the members of the House of Commons are acknowledged to be judges in that case by all the judges, and by that statute of 6 H. 8. c. 16. which I mentioned before to another purpose, the Journal of the House of Commons is called a record.

I have formerly observed, but to another purpose too, that the writs of summons anciently for electing knights, citizens and burgesses to parliament, did direct them in their duty, that they were to meet 'ad Consulendum et consilium impendere,' though of late years this has been omitted, and now advantage is taken of it.

Let us in the next place examine, whether the matters acted in this case by the House of Commons be warranted by these powers of the parliament, and have been done in pursuance of those powers.

And upon examination, we shall find they have done nothing but what they had a full power to do, and what is agreeable to the law and usage of parliament.

It is set forth in the plea, (and admitted by the demurrer, but we all know it to be true) that there was an horrid, devilish, and Popish plot. The enquiry after which, and the searching of it to the bottom, and discovering all the accomplices, was 'Negotium Arduum,' and it did 'Regem, et Statum Regni specialiter tangere,' according to the writ of summons to parliament.

For the plea tells us the design of it, viz. to kill the king. 2dly. To subvert the government and the laws, to suppress the true religion, and to destroy the professors of it.

The plea shows, that one great lord was convicted of it by impeachment of the Commons, and attainted before the Lords. The king's speech shows there was need of further enquiry, and that it was not as yet thoroughly done, nor himself, nor the two Houses safe; and the king charges both Houses to make an impartial enquiry. The word impartial imports, there might be some great persons concerned, that might be apt to be favoured.

And the plea shows that both Houses accordingly made a strict and impartial enquiry after the conspiracy.

All this appears plainly to be the proper work of a parliament, and his majesty himself was of that judgment, and charged them to do their duty in it.

And the enquiry is the most proper business of the House of Commons.

For this reason they are commonly styled

The Grand Inquest of the nation, though sir Robert Filmer's bold writing terms them so by way of diminution and contempt, (as if enquiry were their highest work).

This enquiry of theirs is necessary in a subserviency to all the several high powers of that high court. Namely, in order to their legislature, or to the exercise of their power of judicature.

Courts that have power of Oyer and Terminer, and to punish great and enormous crimes, are still by their commissioners armed with a power of empannelling grand inquests, to make enquiries in order to their exercise of their power of determining.

Or it may be in order to their counselling power, for removal of great officers or favorites, whereof I have given an instance, and the parliament Rolls and Journals are full of them.

But still they first make enquiry. They enquire among themselves, and every grand juryman by his oath is to impart his knowledge in any thing material to his fellows. But the most effectual enquiry is most probably from without doors; and without such enquiry, things of great importance may lie concealed.

And the defendants plea shows some good effect of that enquiry. Divers were convicted: and one Thomas Dangerfield delivered in an Information, and that upon oath, and first to the Lords' House, so that it did not begin with the Commons; but if it were so infamous and malicious, why did not the Lords reject it, and commit the informer and punish him? No, they received it, and entered it of record in their Journal. The reason was, it was done in a course of legal proceeding, they could not reject it, being the proper court of justice for a thing of this nature. And the king had given it them in charge to enquire. Nor do they by receiving of it give it any countenance or credit. Then why should it be so heinous a thing in the House of Commons, more than in the Lords? Let us remember still they are but one body; and though they sever themselves for their better dispatch of their great affairs, and distribute the work amongst them, yet the power by which they act, is entire.

But why should any man divide and sever those that are entire? It concerns the Lords equally with the Commons.

But how comes it to concern the Speaker of the Commons so highly above the House itself, who acts merely as a minister, and by command of the House; but that I reserve for a point distinct.

But perhaps it may be allowed, that what is done by either House, in receiving Dangerfield's Information and entering of it in their Journals is parliamentary enough. But the offence and scandal arises first upon the publishing of it in print. Now a word or two to that.

Let us consider how public this information of Dangerfield's was before the printing of it. It was made very public by being delivered at the bar of the Lords, the high court of parlia-

ment; and indeed all courts of justice ought to be open and of easy resort.

The Information of Dangerfield is first made a record of that court, and to a court of record any person may resort, as sir E. C. tells us in his Preface to the 3d Rep. and that it was the ancient law of England, and is so declared by a general act of parliament, 46 E. 3, c. which though a general law is not in the printed book of Statutes, as I observed of another general and useful act of parliament before (however it comes to pass) in that act of 46 E. 3, the Commons prayed that a record of whatsoever is done in the king's court, ought in reason to remain there for perpetual evidence for all persons. And they complain that of late the court had refused to suffer the people to search and to have exemplifications for evidence against the king or to his disadvantage. Therefore they pray that search and exemplification be made to any persons of any record whatsoever, though it concern the king or any other, and make against the king or any other. And the answer is, 'Le Roy le voet.'

But then it was made more public, by being delivered in at the bar of the House of Commons, which ought to consist of about 500 members, who are supposed to come from all parts of the kingdom: so that this was made very public, before this publishing of it in print.

Let me observe by the way, that this author of the information (Thomas Dangerfield) was not sent for by the House of Commons, but for any thing that appears, applies himself to the House of Commons, as he had before done to the Lords, of his own accord, so that this is far from malice or ill design.

The Commons order it to be entered in their Journal, among other informations that had been given them. And besides, they order this and several others to be printed.

The offence and scandal is supposed by Mr. Attorney's information to begin here: what need was there of printing it? I wish we could hear the House of Commons answering for themselves to this point: they could (it may be) give a better account of it, and a sufficient reason for the printing of it. But let it be observed, they barely cause it to be printed. They do not give any attestation or credit to it, but leave all that hear or read it, to judge or believe as they think fit. They do not make it their own, by printing it without mention of the true author, they stile it the Information of Thomas Dangerfield, as indeed it was; they do not adopt it their own, as they had done, had they left out the name of the author.

Nay the author himself had delivered it in a course of justice and in the highest court of justice, i. e. before the Lords in parliament. If it were a libel and slander, why did the Lords receive it, and cause it to be entered of record as they did? Why did they not rather reject the information and punish the author?

If it were no crime in the author to deliver it to the Lords, were it true or false, why should

it be a crime to print it as being his, and with his name?

Whether the matter of that information were true or false, yet what is done by the House of Commons and by the defendant as their Speaker, is all true, that is that Thomas Dangerfield had drawn up, and was the author of such information, and this was true. By the statutes that punish the reporters of false news, the penalty is but imprisonment, till the first author be brought forth, and that is done in this case. [See the 1st St. in such cases of reporting false news, viz. W. 1, c. 34, the reporter is only to be imprisoned till he have found out him of whom the word was moved. So is 2 R. 2, c. 5, the Stat. De Scandalis Magnatum. So is 12 R. 2, c. 11. Dier, 155. The lady Morrison's case, Crok. Jac. 162, but more fully in Marshe's actions of slander, fol. 19, 20. If an action of slander be brought for reporting what another had said slanderously, the plea in his declaration must aver that *A.* did never so report: the defendant may plead that in truth *A.* did so report, and it is a good plea, by Tanfield. Leonard's Rep. 1, p. 287, in an indictment upon the stat. of W. 1, c. 33, and 2 R. 2, c. 5, for reporting false news, it was found *billa vera* as to the defendant's reporting the false news, but as to the 'maliciose et seditiose,' 'Ignoramus,' and the defendant therefore discharged.]

The author is avouched, and his name is printed with the information, and it is upon record in the Lords' House, and he in person did present it to the Lords.

Besides, if there can be any just reason or occasion assigned for the printing of it, it shall never be ascribed to malice or ill design, and without malice alledged, this information lies not. Nor can a thing so dishonourable as malice and ill design, be decently or justly conceived or objected against so great and grave an assembly: Why? It is the body of the whole nation. And can a whole nation be in reason suspected to harbour malice, and to have a design against the common-weal, that is, against themselves?

There may most probably and justly be this in the case, to induce the printing this narrative or information of Dangerfield. The plot was very desperate and dangerous, it was not yet fully discovered and searched to the bottom. They were commanded by the king to search further into it. Besides it was the proper work of the House of Commons so to enquire, as they were the grand inquest of the nation. Here was one positive witness already that had sworn to these particulars, before the highest court of justice, where the great persons concerned in it, sate themselves as members of the Lords' House. But one witness alone, though it were sufficient to make an accusation, yet it was not enough to make a conviction; in high treason the law requires two at least. The House of Commons could not in duty and conscience to the king and kingdom, pass it by or let it sleep.

This Information, though but from one man, might possibly have given courage to another person or more than one to testify to the same particulars, if there were any more that knew them to be true, who were unwilling to be the first in the discovery, not knowing but they might stand singly in it: but finding the discovery already made and sworn to, might then think it their duty, and be encouraged to appear also in it, when it might probably be of effect and amount to a legal testimony. The difficulty, and the danger, and discouragement, lay upon the first informer.

This consideration might induce the House of Commons out of a sense of their duty, to make a further and impartial enquiry as his majesty had commanded them, to make it yet (if possible) a little more public in order to a fuller proof: and printing is but one way among many other of publishing or enquiring into any matter. And of late years enquiry by printing has been a most frequent practice, and we meet with it every week, and it is become the most ordinary way of making enquiries, which run into all parts of the nation. And the printing of public proceedings at trials, has been generally of late practised by the courts of law, or by the judges of those courts, or by the chief of them.

But what has made this Information of Dangerfield's more public, than Mr. Attorney General's preferring this Information against the defendant Mr. Williams, for causing it to be published in print? Had it not been thus awakened again, it might have slept in silence, and have been buried in oblivion. Tacitus the Roman historian, tells us in his Annals, in the life of Nero, of one Fabricius Veiento, who was accused for uttering slanderous speeches against the lords of the senate and against the priests, in certain books, which he termed *Codicellos*, which in our dialect, is the same with libels or little books. Nero would have the hearing of the cause himself, and he was convicted before him, and was condemned to exile, and his books were sentenced to be burnt. Tacitus observes, that before this sentence for the burning of the books, there was little notice taken of these books, and few there were that read them: but when once it grew dangerous to read them, then they were much sought after. But the very opening of that Information of Dangerfield here in this great court, and in so great an audience, which was of necessity, and occasioned by Mr. Attorney's Information that recites it, though Mr. Attorney never intended this ill consequence, hath made the matter of it as public as possibly can be. And it must be observed, that it never yet came so far as to a trial, nor to have an *ignoramus* found, much less to an acquittal *modo legitimo*, in which case, according to the opinion of some judges, an action of conspiracy, or upon the case for a slander will not lye, as not being ripe for it till an acquittal: by the same reason it is not ready for an Information,

which is but the king's suit, the reason being the same in both.

But it may perhaps be thought, that in respect of the persons concerned in it, this was too high a flight, and too bold an attempt, and that the height and eminence of some persons may exempt them from common justice, and from the power even of a parliament.

In answer to which, I would observe, that some laws are more especially levelled against the highest subjects. By the statute of W. 1, c. 5, the king forbids that 'nul haute homme,' no high or great man, upon pain of grievous forfeiture, disturb elections, but elections ought to be free. The like may be observed in the statute of W. 1, c. 35, 'Des hautes hommes,' &c. And the greater the persons are, if they are in the rank of subjects, they must be subject to the king's laws, and they are the more proper for the undertaking and encounter of this high court. It will not be 'Impar congressus.'

I cited before, the Mirror of Justices, c. 1, p. 9, where it is said, that parliaments were ordained for to hear and determine in such wrongs, and against such persons, especially against whom otherwise common right cannot be had. I will cite no historians to prove what hath been done in antient times within this very kingdom, of this nature against the highest subjects. I will keep still within my own sphere, and cite none but authorities in law. And so keep myself in the way that belongs to me, and so doing, I am under the protection of this court and of the law, and may rely upon the performance of that blessed promise, 'He will keep thee in all thy ways.' There must be no respect of persons in doing justice. The great Judge of all the world gives it as a rule, and himself gives the example, 'God is no respecter of persons.'

The king was pleased to charge both Houses, to make a strict and impartial enquiry. I shall cite two authorities in law, that come to this point. The first is in case of a brother and heir apparent too, and of a person that did after succeed in the crown. King Richard the 1st in his Magna Curia, 'petiit sibi Judicium fieri de Comite Johanne fratre suo qui contra fidelitatem quam ei juraverat, Fœdus contra eum cum inimico suo Rege Franciæ inierat.' That was the offence charged.

It may possibly be objected that the king himself complained: True, but he complains to the proper judicature: This proves their power. Hunt's Arguments for Bishops, fol. 80.

But what did the high court do upon that complaint? They pronounced a very severe sentence, though it were but in the nature of a mean process to make him appear, and answer.

Seld. Tit. of Hon. fol. 707. The Lords order or adjudge, that if John earl of Moreton did not appear within 40 days after summons, 'Judicaverunt Comitem Johannem demeruisse Regnum.'

Let me remember you of a stronger and higher case, and I have it out of an author of

the law too. Crompt. Jurisd. of Courts, in his Chapter of the Court of the King's-bench. In a case of 'Corpus cum Causa.' Whidden, one of the judges of the court, cited a case that did happen in the time of Gascoign, Ch. J. in the reign of king H. 4, Gascoign committed the prince of Wales (who was afterwards our king H. the 5th,) to prison for endeavouring to take away a prisoner from the bar of the King's-bench, and the prince humbly submitted and went to prison, and the king hearing of it, commended it.

If the King's-bench, being an inferior court to that high court, might soar so high, how much more the highest court of the realm, where the king sits in the exaltation of his orb, and is in his greatest splendor? The king indeed is presumed in law to be in this court, which makes the stile of its proceedings to be 'Coram Rege,' and some of our kings have been said to have sate here. But the king is in his high court of parliament, 'per eminentiam,' as H. 8, one of the highest and most resolute of our kings said in the case of Ferrers, (which I cited before to another point,) That he was informed by his judges, (who were all then present) that he in no time stood so high in his state royal, as in the time of parliament. Then if we consider the person whom the Ch. J. Gascoign committed. He was a continuing, settled fixed heir, and then prince of Wales, whose chair now stands vacant in the Lords' House in time of parliament, and afterwards this prince of Wales proved a renowned king.

'Nescit Imperare qui nescit obtemperare.' The Sacred Scriptures tell us, that the 'heir differeth nothing from a servant.' I may say also from a subject, 'until the time appointed of the Father,' Gal. 4, 1, 3.

What would the author of the Sermon preached before the University have said in these cases that I have cited? He would have called them unwarrantable proceedings, and would have affirmed that the persons thus proceeded against, were too sacred to be touched with such unhallowed hands. This hath been the bold language from the pulpit and the press, if the title of the book be true from a Cambr. Dr. 'Oblitus professionis suæ, quæ nil nisi lene 'suadet et justum.'

And the author while he was guilty of gross flattery on the one hand, was not afraid to run into the other extreme, of speaking evil of dignities on the other hand, of one of the three estates of the realm, of the representative of the great body (whereof he himself makes but a small inconsiderable atom). [So called 1 Eliz. c. 3, 4 H. 8, c. 8, the House of Commons called the Honourable House in the Petition of Rich. Strode, which is part of the act.]

We know from certain and undoubted histories of our own, that in the time of king H. 8, greater persons in the account of the law than the prince of Wales, and yet but subjects of the king, have been brought to trial, and that before lords commissioners; and however, in other respects their cases might be very hard, yet it

was never doubted but they were subject to the law and justice.

Now to proceed to my second point, wherein I shall be brief, viz. That however, the matters charged in the Attorney General's Information are not to be imputed to the defendant in this case: he being but the minister or mouth of the House, and acting only by their order. He is frequently in the parliament records styled the mouth of the House whose Speaker he is.

Mr. Hakewell in his Treatise of Parliaments, fol. 200, among the catalogue of Speakers, begins with Petrus de Mountf. whom he makes Speaker, 44 H. 3, of the House of Commons, and he cites the register of St. Albans for it, fol. 207, where it is said that Petrus de Mountford Vice totius communitatis consented to the judgment of banishment of Adomar de Valence bishop of Winchester, and sir Robert Cotton agrees with Mr. Hakewell in this point. Mr. Pryn in his preface to sir Robert Cotton's Abr. is of an opinion by himself, that 'tota communitas' signifies the whole baronage. But it appears by the body of the letter there written, that 'communitas' is distinguished from the 'majores.' Sir Robert Cotton's Abridgement, 6 E. 3, fol. 12, in the upper part, it is said, the Lords and great men by the mouth of sir Henry Beaumont. Mr. Hakewell in his aforesaid Treatise, speaking of William Trussel, says, the Commons answered by his mouth: 13 E. 3. 2 R. 2, numb. 16, sir Robert Cotton's Abr. fol. 174. The Commons return their Answer to the king by sir James Pickering their Speaker. 17 R. 2, numb. 17, sir R. Cott. Abr. 353, The king advising with the Commons, concerning a peace with France, return their Answer by sir John Bussey their Speaker. Mr. Hakewell in his book before cited, fol. 205, 7 H. 4, says, that sir John Tiptoft, while he was Speaker, signed and sealed the deed of entailing the crown with these words, 'Nomine totius communitatis.'

Mr. Elsing in his Treatise of Parliaments, fol. 125, tells us, that what was spoken by the Speaker is entered in the rolls, as spoken by the Commons.

But take what is done by the defendant to be his proper acting, yet he acting only as a minister and servant to the high court of parliament, by the ordinary rules of law, in cases of officers, he is not suable, nor any way punishable for it.

This is resolved in the countess of Rutland's case, 6 Rep. 54, and the same case likewise reported in Moor's Rep. 765. That an officer or minister executing process which is erroneously awarded (as where a *capias* is awarded against a peer) the officer is to be excused; for he must not dispute the authority of the court, but obey. And in that case the secondaries of the Compter, and the serjeants in London were excused and held not guilty of any offence.

So in the case of the Marshalsea, 10 Rep. 76, where the distinction is, If the court have a jurisdiction, the officer is excused though the

process be erroneous. 'Qui jussu judicis aliquod fecerit, non videtur dolo malo fecisse quia parere necesse est.'

Keilwey 99, à med. by Brudnel, and the lord Dier in Trewinnard's Case, fol. 60, b. Where a writ of privilege in case of a parliament-man arrested, is granted, where it ought not to be; and the sheriff by virtue of that writ discharged the person arrested. Yet the sheriff (saith that case) is not chargeable in an action for this: 'Parere necesse est.' What that necessity is we may see in that case of Trewinnard, Dier fo. 61, à med. if the sheriff refuse to execute the writ. And as a fair warning to sheriffs and other officers, not to resist or disobey the commands and orders of the House of Commons, the lord Dier mentions what punishment was inflicted upon the sheriffs of London, in the case of Geo. Ferrers. They were committed to the Tower for their contempt in not letting a parliament-man taken in execution, to go at large, when the Serjeant at Arms of the House of Commons came for him without a writ. Nay, the lord Dier says, in the latter end of that case of Trewinnard, that if the parliament erred, (he speaks it of the House of Commons) yet there is no default in the sheriff. When the late king being in person in the House of Commons, and sitting in the Speaker's chair, asked the then Speaker, Whether certain members, whom the king named, were then in the House? The Speaker answered readily and wisely, and with a good presentness of mind (which arose from the genius of that House) 'That he had neither eyes to see, nor tongue to speak,' but as the House was pleased to direct him.

3. As to the last point; That for matters done in or by the parliament (as the matters in our case are) neither the King's-bench, nor any other court, but the court of parliament itself, can by law take cognizance of it. This is the great point of the case.

I shall first offer to prove it by Reasons, and then I shall back and enforce those reasons by many authorities, and those of the highest sort.

1 Reason. The parliament gives law to this court of the King's-bench, and to all other courts of the kingdom; and therefore it is absurd and preposterous that it should receive law from it, and be subject to it. The greater is not judged of the less.

2. The parliament is the immediate court for examining the judgments of the court of King's-bench, and if they be erroneous, they reverse them; and if this court should against law take upon them to proceed in this cause and give judgment, the parliament when it meets, no doubt, will set it aside as erroneous; and no man does in the least doubt but they have power to do it, and there is as little doubt but they will do it; therefore it is wholly in vain for this court to take cognizance of it; and it cannot be reversed elsewhere, it being in a matter of jurisdiction. See the statute of 27 Eliz. c. 8. The preamble reciting, that erro-

neous judgments given in the King's-bench are only to be reformed by the high court of parliament; which court of parliament was not in those days so often holden, as in ancient time it had been: neither yet in respect of the greater affairs of the realm could they well be considered of and determined in parliament, &c. [1 Jac. c. 1. The like words.]

There is an exception of errors that concerned the jurisdiction of the King's-bench; those remain as before; and in the errors that are referred to the judges of the Common Pleas and barons of the Exchequer, by 27 Eliz. c. 8, the jurisdiction of the parliament is to examine them, &c.

3. This court, as all the courts of common-law, judge only by the ordinary rules of the common-law. But the proceedings of parliament are by quite another rule. The matters in parliament are to be discussed and determined by the custom and usage of parliament, and the course of parliament; and neither by the civil, nor the common-law, used in other courts.

4. The judges of this, and of the other courts of common law in Westminster, are but assistants and attendants to the high court of parliament: and shall the assistants judge of their superiors?

5. The high court of parliament is the dernier resort, and this is generally affirmed and held; but it is not the last, if what they do may yet again be examined and controlled.

6. The parliament is of an absolute and unlimited power in things temporal within this nation.

I shall now proceed to Authorities that are full to this point, and do second and back those reasons that I have offered; wherein I shall not observe any method by reducing or ranking of them under these reasons that I have offered, because some of the authorities justify several of these reasons, all at once.

That the parliament hath the highest and most sacred authority of any court; that it hath an absolute power; that it is the highest court in the realm, is acknowledged by our most learned and gravest writers and historians; for I would not wholly omit them, though I do not need them; but I rely only, and put all the stress of my proofs and arguments upon my authorities in law.

Camden in his *Britannia*, 'Summam et sacrosanctam Autoritatem habet Parliamentum.' Knighton, de eventibus Angliæ, l. 1, fo. 2681, col. 1, 2. He calls it the highest court of the realm. So it is called in Trewinnard's case, in Dier 60, 61. Sir Thomas Smith in his *Common-wealth of England*, l. 2, c. 2, fo. 50, 51. 'In Comitibus Parliamentariis posita est omnis absolutæ potestatis vis.'

Sir R. Cotton in his *Posthuma*, edit. at Lond. pag. 345, cited by Mr. Pryn in his preface to sir Robert Cotton's *Abr.* The parliament controls all inferior courts, and all causes of difficulty; 'cum aliqua dubitatio emergit,' refer it to the parliament.

To shew their power and jurisdiction upon

erroneous proceedings in other courts, by authorities in law, which confirms one of my reasons.

In Trewinnard's case, it is said, that though the parliament err, it is not reversible in any other court: this is spoken in a case where the then occasion was upon a judgment given only by the House of Commons, in a case of privilege.

Agreeable to this is 21 E. 2, fo. 46, Br. Abr. Tit. Error. plac. 65, in the latter end of that case, and 7 H. 6, Br. Abr. Tit. Error. plac. 68, by Cottessmore, and 1 H. 7, fo. 19, Br. Error plac. 137. Error in parliament shall be reversed in parliament, 'et non aliter;' for there is not an higher court. 1 H. 7, fo. 19, 20. By all the judges in the Exchequer-chamber for a judgment in the King's-bench, error must be sued in parliament; and as the parliament shall correct the judgments, so they are to correct the judges that give corrupt and dishonest judgments. These are the words and the opinions of the lord chief justice Vaughan in his Reports, fo. 139, in Bushel's case. Such, says he, in all ages have been complained of to the king in the Star-chamber, (which is a court now dissolved by parliament) or to the parliament. He there mentions many judges; those 44 that were hanged in king Alfred's time before the conquest, for corrupt judgments; and those in the time of E. 1, E. 3, and R. 2, for their pernicious resolutions: he vouches the journals of parliament, and instances in the judgment of Ship-money in the last king's time, and the particular judges impeached*.

Sir E. Coke, in his 12 Rep. fol. 64, the words are spoken by sir E. C. but (as that Rep. says) with the clear consent of all the Judges. 'The king hath his court, that is to say, in the upper House of Parliament, in which he with his Lords is the supreme judge over all other judges. For if error be in the Common-pleas, that may be reversed in the King's-bench; and if the court of King's-bench err, that may be reversed in the upper House of Parliament, by the king with the assent of the Lords.'

Now though this is spoken of the Lords' House only, yet it must be again remembered that the parliament (as I proved before) is one entire body, and that their power in the right of it is entire, though as to the exercise of it, it is distributed into parts, and is divided: nor can the House of Lords exercise any power as an House of Parliament, or as a court for errors, without the House of Commons be in being at the same time. Both Houses must be prorogued together, and dissolved together; like the twins of Hippocrates, they live and die together, and the one cannot be in being, without the other also, at the same time be in being too.

2 Inst. 408. Matters of difficulty were heretofore usually adjourned to parliament; but (says he) it is now disused.

* See vol. 6, p. 999, of this Collection.

And 2 Inst. 599. Courts at variance, properly complain to the parliament.

4 Inst. In the Chapter of the court of the King's-bench, errors in the King's-bench in matters that concern their jurisdiction, and other cases there excepted in the act of 27 Eliz. cap. 8. cannot be reversed but in the high court of parliament.

4 Inst. fol 67. There is a court erected by the statute of 14 E. 3. cap. 5. stat. 2. For redress of delays of judgments in the king's great courts, consisting of a prelate, two earls, and two barons, to be chosen in parliament by that statute. If the case before them be so difficult, that it may not well be determined without assent of the parliament, (it does not say by the House of Lords only) then shall the tenor of the record be brought by the said prelate, earls and barons, into the next parliament, and there a final judgment shall be given.

'Si obscurum et difficile sit Judicium, ponantur judicia in respectu usq; magnam curiam.' Rot. Parl. 14 E. 3. Num. ult. Sir Jeffery Stanton's case.

25 E. 3. cap. 2. The chapter of Treason in the 2 Inst. fol. 21. The judge or court in some cases, is to forbear going to judgment till the cause be shewed before the king and his parliament, whether it ought to be judged treason or not.

That this court proceeds by the ordinary rules of the common law; but that high court of parliament proceeds not by that law, but by a law peculiar to that high court, which is called 'Lex et Consuetudo Parliamenti,' and consists in the customs, usages, and course of parliament; and therefore, this court, nor no other inferior court, can, for this very reason, judge or determine of what is done in parliament, or by the parliament.

If this court should take upon it to proceed in such cases, it would justly be said of it as a thing very irregular. 'Metiri se quemq; suo modulo, ac pede, verum est.'

Sir Rob. Cott. Abr. 20, R. 2, nu. 14, 15.

Sir Tho. Haxey delivered a bill to the Commons in Parliament, for the honour and profit of the king, and of all the realm, complaining of the outrageous expences at the king's house, and namely of bishops and ladies.

Here the Camb. Dr. I have before mentioned, would take occasion again to complain of the sauciness of this bill.

K. R. 2 was offended with the Commons for preferring this bill to the king; for it seems they had entertained this information from a particular hand, (as was done in our case from Dangerfield) and they proceeded upon it.

K. R. 2, said it was an offence against his dignity and liberty, and said he would be free therein.

And sir John Bussey, the Speaker to the parliament (as that roll of parliament calls him) is charged to declare the name of him who exhibited that bill.

By this, it appears the king could not take notice of what was done in the Commons' House,

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or delivered to them, but by the House itself, and that is one of the laws and customs of parliament; and yet, no doubt but it was well known to every member of that House, and yet it came not to the king's knowledge.

Nu. 16. The Commons delivered to the king the name of the exhibiter, which was sir Tho. Haxey.

Nu. 17. The Commons afterwards came and submitted themselves to the king, and craved pardon, and the king excused them.

Nu. 23. Sir Tho. Haxey was adjudged by parliament to die as a traitor. The king was offended, the Commons forsook the exhibiter, and submitted, and the Lords adjudge him guilty of treason. This seems to be a strong case against the liberty and the privilege of the House of Commons, (but it seems strange how it should be made treason;) but it is stranger; especially, if it be supposed this sir Tho. Haxey was a member of the House, one would have thought he should have been under a protection and special privilege. But I take him to be no member, for he is afterwards called sir Tho. Haxey, clerk; and graduates in the university and those in orders, were usually dignified with the addition of sir; and it is not yet quite out of use in the university.

I find by Mr. Pryn, in his plea for the Lords, fol. 345, that in the next king's reign, H. 4, the Commons exhibited a petition on the behalf of sir Tho. Haxey, (for he was not executed, the archbishop of Canterbury took him into his protection, being a clergyman;) and the Commons in their petition affirm, that the judgment against sir Thomas Haxey, for delivering in this bill to the Commons in parliament, was against right, and the course that had been used before in parliament, in destruction of the customs of the Commons.

Here note, That the right and course of parliament, and the customs of the Commons, are mentioned as synonymies.

Upon this petition of the Commons, the judgment is adjudged to be null and void.

But this could be adjudged no where but in parliament, for it concerned the right and privilege, and the customs and course of the parliament.

1 H. 4. nu. 91, In sir Rob. Cott. Abr. the record says, sir Tho. Haxey, clerk, pardoned, and the judgment reversed, and he restored to all.

This case, in very many circumstances, suits with the case of Dangerfield, and in many, with our present case. Ours is in the case of an heir apparent or presumptive. But a greater than the heir is here, in this case of sir Tho. Haxey, namely, the then king himself.

But I cite it, principally to prove one of my reasons and arguments to the third point, namely, that there are rights and customs that are peculiar to the high court of parliament; and that there is a law called the course of parliaments, and it may be observed, that the customs of the Commons are the law and course of parliament.

4 Y

Concurring with one observation that I made out of this case, that one of the laws or customs of parliament, is, that no member is to publish at the court, or elsewhere abroad, what is done in the House of Commons, but it ought to proceed from the House itself, and no other, (which is another argument, to prove that no other inferior court can enquire into, or hear or determine of their doings) for no notice can be taken of what they do, unless it come by their own relation and discovery.

That, I say, which concurs with this, is another roll of parliament of that noble king, H. 4; viz. 2 H. 4, nu. 11. The Commons require, that is, request the king, that he would not give an ear to any untrue reports of the Commons' House, until the time might try the same; and that time is when the Commons apply to the king in it, and not before. Whereunto the king granted; which allows it to be the law and course of the parliament.

4 Inst. fol. 15. Every court of justice, says sir E. C. hath rules and customs for its direction. So the high court of parliament, 'de suis propriis legibus et consuetudinibus consistit.'

Again, sir E. C. in his Select Cases, printed 1677, fol. 63,

Note, says he, the privilege, order, or custom of parliament, either of the Upper House, or of the House of Commons, belongs to the determination only of the court of parliament.

And there he cites two precedents for it.

The first that of 27 H. 6, in the controversy between the earls of Arundel and Devonshire, for precedency: the king, by advice of the Lords, referred it to the judges to examine and to report; not finally to determine as judges of the case, but as assistants to the Lords.

The judges answered, That it was a matter of parliament, and belonged to the king and the Lords to determine.

One would think this were a strange answer of the judges, to deny their advice; were they not assistants to the Lords in matters of law?

The true reason of their declining to give their advice, is, it was a case above them, and not to be determined by the ordinary rules of law, and therefore out of their element. 'Quæ supra nos, nihil ad nos.' Therefore their answer was, That it was a matter of parliament, and belonged to the king and Lords, but not to the judges.

This is a resolution of all the judges in the very point; though this particular case concerned only the Lords, being a matter of precedency between two lords; yet, as I have proved, the parliament is one entire body, and are mutually concerned in their powers and privileges.

The other case mentioned by sir E. C. is that of Tho. Thorp, the speaker of the Commons, 31 H. 6, taken in execution at the suit of the duke of York, during the recess of the parliament. We have it at large in the parliament roll of 31 H. 6, num. 25, 26, 27, 28.

The Commons, at the opening of the next

session of parliament, request the king and Lords, to restore their Speaker to them. The judges being demanded of their counsel therein; (note, it was nothing but their advice asked,) It was after mature deliberation, they answered, 'It was not their part to judge of the parliament, which may judge of the law.' Note, the reason to judge of the law, signifies they are the supreme court to judge what is law, and what is not. And to judge of the law, likewise signifies, that they can judge whether a law be good or not; in order to approve of it, and to enact it, or to repeal a law. [Mr. Pryn, in his Plea for the Lords, calls this a famous memorable case, and says he was then chief baron.]

This is in a case that concerned the privilege of the Commons and their Speaker; and yet they say, that judging in this case were to judge of the parliament: this intimates too, that the parliament judges by other rules than those of the common law. And it is the common law is the proper element of the judges of the courts of Westminster-hall.

This is a second resolution of all the judges in the very point.

Mr. Hakewel, in his Treatise of the Manner of Enacting Laws in Parliament, fol. 125, reports this case of Thorp at large.

It is time now to come to higher authorities, that is, to resolutions of parliament in this point.

And first, the resolution of the House of Commons in maintenance of their own right, or at least a claim of their right; I have it out of an author that is very far from being a friend to the House of Commons; and it is a clergyman too. I mean Dr. Heylin, in the Life of archbishop Laud, fol. 89. He reports, that the House of Commons made a protestation in 1621, against all impeachments, other than in the House, for any thing there said or done.

Let me present you with the like claim made by the Lords, which seems to run something in the form of an old act of parliament.

In sir Rob. Cott. Abr. 11 R. 2, num. 7. In that parliament, all the Lords, as well spiritual as temporal, being present, claimed their liberties and franchises; viz. That all weighty matters in the same parliament, which should be afterwards moved, touching the peers of the land, ought to be determined, judged and discussed by the course of the parliament, and not by the civil law; nor yet by the common laws of the land, used in other more courts of the realm.

The which claim and liberties the king most willingly allowed and granted thereto in full parliament, says that roll.

Now, as I have before proved, the liberties and franchises of the parliament, in the right of them, are entire, and due to both Houses, for both make up the parliament.

Mr. Selden, in his Title of Honour, says, That a thing granted in full parliament, signifies an act of parliament.

Now for an act of parliament full in the point, and then I can go no higher.

It was in the case of Richard Strode, one of the burgesses for Plympton in Devonshire, in the parliament of 4 H. 8, for agreeing with the Commons' House, in putting out bills, as it is reported there, which seems to resemble the printing or publishing, mentioned in our case. Those bills so put out were against the abuses of the tanners, who were a great and numerous body of men; who by these bills took themselves to be scandalized and slandered. [Pryn's Plea for the Lords, fol. 401, at large.]

After the parliament was risen, this Richard Strode for what he had so done in parliament, was presented and found guilty in the Stannary courts, and condemned to forfeit 40*l*. (a moderate fine.) He was for this imprisoned in a dungeon, within a castle, and fed with bread and water.

When the parliament met again, he petitioned the parliament for remedy, and that the judgments had against him and the executions might be made void; which was done accordingly by act of parliament. [4 H. 8, c. 8.]

And it was further enacted, That all suits, accusations, condemnations, executions, fines, amerciaments, punishments, passed or had, or thereafter to be passed or had, upon the said Strode, and to every other person, that was in that parliament; thus far it is a private and particular act, but the reason of this, and the justice of it extends to all like cases; but then it goes farther, 'or that of any parliament hereafter shall be;' for any bill, speaking, reasoning, or declaring of any matter concerning the parliament, to be communed or treated of (these are very large and general words) be utterly void, and of none effect. And it goes farther yet, 'And that any person vexed, or troubled, or otherwise charged for any cause, as aforesaid, shall have an action of the case, against every person so vexing contrary to this ordinance, and recover treble damages and costs.'

Here now is an action given against one, for what they shall do in a course of justice. But it is because it is suing in an inferior court that has no jurisdiction in the matter. This act takes away all jurisdiction in such parliament cases, from all other courts. I know that in the case of Denzill Hollis (afterwards the lord Hollis) Mr. Selden and others, 3 Car. 1, the judges being consulted upon some questions propounded, *Res.* That that act of Strode's, was a particular act, and extended to Strode only; and no doubt it was a particular act in a great part of it, and in that part extended to Strode only.

But if the judges meant that no part of that act was a general law, then I must crave leave to say, 1. That their opinion was extrajudicial; it was delivered upon their being consulted with about questions propounded to them, and therefore hath not that weight. And I must take the liberty to appeal to the very words of the statute itself, and to any man of reason and honesty, to use his reason aright, that shall

read them; and I must offer some reasons against their opinion, and cite some good authority in that point, and then leave it to this court to judge of it.

The words and persons, and time mentioned in the latter part of that act, are general. It speaks, indeed, first of Strode in particular; but then it hath these words 'every other person.' It mentions that parliament in particular; but then it proceeds to speak of 'any parliament that thereafter shall be.' Then the things also are general that the act extends to, not only to indemnify Strode for what he had said, or done in parliament; but then the indemnity extends to every other person, 'for any bill, speaking, reasoning, or declaring of any matter concerning the parliament.'

The words of the royal assent to this bill, are such as are constantly used only to general acts, viz. 'Le Roy veut;' whereas to a particular act, the royal answer is, 'Soit droit fait al parties.'

And this act of 4 H. 8, is enrolled as general acts use to be. But a private or particular act is always filed, but never enrolled; for this latter distinction we shall find it in the case 33 H. 6, fol. 17, 18, for authority in this question, sir E. C. in his 4th Inst. fol. 19, holds this act of 4 H. 8, in the latter part of it to be a general act.

It is indeed commonly said 'Boni judicis est ampliare jurisdictionem.' But I take that to be better advice which was given by the lord chancellor, (sir Francis Bacon,) to Mr. justice Hutton, upon the swearing him one of the judges of the court of Common Pleas; that he would take care to contain the jurisdiction of the court within the ancient mere-stones without removing the mark.

I find but one resolution in all our books, that I can meet with, that seems to make against us in this point, and maintains a jurisdiction in this court, for a misdemeanor, or conspiracy supposed to be done by some particular members of the House of Commons, in the House in time of parliament. It is reported by Mr. justice Croke, in his Reports of the time of king Charles, fol. 181; but it is more fully reported in a late book, entitled *Memorials of the English affairs*, set out by a learned lawyer, and the son of a judge; and it is the case that I lightly touched upon but now, that of Mr. Hollis, Selden, &c.

The offence charged upon Mr. Denzill Hollis (who was afterwards the lord Hollis,) Mr. Selden, sir John Elliott, sir John Hobart and divers other parliament men, was for a force used upon the then Speaker, sir John Finch (afterwards lord keeper) in keeping him in the Speaker's Chair against his will, when he would have left it; and pressing him to put a question, which the king had forbidden him to put. For this supposed offence, after the parliament was dissolved, these parliament-men were first convened before the council, where they refused to answer the charge, it being for matters done in parliament.

Then the judges had questions propounded to them, to which they gave their resolutions, that for things done not in a parliamentary way, a parliament-man may be punished after the parliament is ended, if he be not punished in parliament; otherwise as just. Croke said, 'There would be a failure of justice; but, that regularly, he cannot be compelled out of parliament to answer things done in a parliament in a parliamentary course.'

This answer seems to be very oracular, for it resolves that a parliament-man shall not answer for things done in parliament in a parliamentary course. If it be done in a parliamentary course, what occasion can there be to answer for it? But who shall judge what is a parliamentary course, but a parliament? Not judges of the common law; for the parliamentary course differs from the rules of the common law. But they refusing to answer at the council board, were committed close prisoners to the Tower.*

After this sir Robert Heath, the king's attorney, preferred an information in the Star-chamber against them, that was not proceeded in. The lord keeper was under difficulties about it, says the author. The judges of the King's-bench were to consult with the rest of the judges in granting a Habeas Corpus for bailing the prisoners. The rest of the judges would hear arguments, so it was put off, and delayed, (as our author reports it.) At last an information was exhibited against them in the King's-bench. The defendants pleaded to the jurisdiction of the court; their plea was overruled, and they refusing to plead over, judgment was entered by 'nihil dicit,' and they fined and imprisoned.

Mr. just. Croke, at the latter end of those Reports, gives this further account of that case, that afterwards in the parliament 17 Car. 1, It was resolved by the House of Commons, that those parliament-men should have a recompense for their damages sustained for the services to the commonwealth in the parliament, 3 Car. 1. If a judge hath thought fit to report this, it may be as fit for me to mention it. I take that to be the first precedent or resolution given in any case for what was done in parliament, and it stands alone; I have heard of none since that neither. It seems to be directly against the provision made by it; it is clearly within the equity and reason of it, Strode's act. I wish I could not say that even those times of 3 Car. 1, were not full of trouble. It appears much by the difficulty the judges seemed to be at in the proceedings of that case; this detracts much from that veneration, that otherwise is justly due to a resolution so solemn as that of all the judges. [The Resolution of the Commons in Trewinnard's Case is called the judgment of the most high court of parliament. If it had been clear that the King's-bench could have punished it, they would have begun with it there, but

they tried the council and the Star-chamber first.]

The lord chancellor Bacon in his profound book of the advancement of learning, dislikes all precedents that taste of the times; and advises that precedents should be derived from good and moderate times.

The only reason that I find given for that proceeding in the case of Denzill Hollis, is that given by Mr. just. Croke, viz. That otherwise there would be a failure of justice.

This reason must be grounded either upon the infrequency of parliaments, or upon an opinion that parliaments will be partial in cases of their own members.

As to the first of these (the long intervals between parliaments,) this under favour ought to be no reason, especially to come from a judge's mouth, (I have a great honour for the memory of that reverend judge) who must needs know, and ought to assert it, that by the law parliaments ought to be very frequent, and judges ought to take part with the law, and to maintain it.

Before the conquest (as it is untruly called) by the law, parliaments were to be held twice a year, as appears by king Edgar's laws, c. 5, in Lamb. de priscis, &c.

And the Mirror of Justice, c. 1, sect. 3, tells us, That king Alfred ordained for a perpetual usage, that twice in the year, (and if need were) oftener, the seniors or earls should assemble themselves at London to speak their minds.

And it is reckoned among the abusions (as they are there termed) of the common law; That whereas parliaments ought to be twice in the year for the salvation of the souls of trespassers (and at London too) that they are there but very seldom, and at the pleasure of the king, for subsidies and collections of treasure.

And by the statute of 4 E. 3, c. 14, parliaments ought to be once a year, and oftener (if need be). I have heard a civilian in the House of Commons give this construction to that short act, that the words (if need be) should refer to the parliaments being (once a year) as well as to the words (and oftener) and I never heard that any man was of that opinion but himself; but I remember he himself laughed when he spoke it, but he was more laughed at for that ridiculous exposition. And should that sense be put upon it, it would make the law a very ridiculous thing indeed, for then the short of it would be this: That we should have a parliament when there is need.

But to refute that fancy, there is another statute of the same king's time, namely, 36 E. 3, c. 10, which says, That for redress of divers mischiefs and grievances, which daily happen, it is accorded that a parliament shall be holden every year, without any such restriction (if need be.)

And by the act of 16 Car. 2, c. 1, these acts are declared to be in force. And farther, it is declared and enacted, That the holding of parliaments shall not be discontinued above three years at the most.

* See Vol. 3, p. 294, of this Collection.

Now how can any man say in defiance of these laws, That there can be any long continuance of parliaments? His now majesty has been pleased graciously to declare his resolution often to meet his people in parliaments, and in the word of a king there is power. Nay, we have the king's oath for it, for he is sworn to observe the law; and 'eadem præsumitur esse mens regis quæ legis;' and it is an high presumption for any man to think, or say otherwise.

For that other ground of that reason given by Mr. justice Croke, viz. That there would be a failure of justice, if offences committed in parliament were not punishable in the King's-bench; namely, because parliaments will be partial in cases of their own members. This carries with it a very high reflection upon that great and solemn assembly, to entertain a thought so mean, and so dishonourable of the supreme court of the nation, that the court which is to correct the errors of all other courts, and is the last resort of the nation, that they should be guilty of injustice and partiality. No man that is a lover of his country, or a friend to his own true and honest interest, will harbour a dishonourable thought of that great assembly.

I am apter to think, that the reporter of that case did mistake, when he charged that worthy and reverend judge, Mr. just. Croke, with the offering of that for a reason. I find the most reverend of our judges speaking with the greatest reverence of that supreme court. Besides, the learned lord chief justice sir Edw. Coke, who often expresses his great veneration for them, hear what the chief just. Brook, and just. Saunders say of that assembly, in Plowd. Comment. in the case of Hill and Grange, fol. 175, a. towards the lower end of that folio, 'Injustice' (say they) 'may not be presumed of a parliament.' And in the earl of Leicester's case, in the same comment, fol. 398, towards the end of the folio, 'The parliament is a court of very high honour and justice, of which no man ought to imagine a thing dishonourable.'

I do agree, that an offence committed in parliament, is a very high offence; but the higher it is, the more proper it is for their judicature; and that court is armed with a power to punish the highest offences, and the highest offenders. But to take it out of their hands, and to make it determinable in any other court, is a disparagement to that grave and supreme court. We easily agree that a parliament may err, for they are not infallible; but the law hath provided a remedy against those errors, and a way to reform them. A subsequent parliament may reform the errors of a preceding parliament, as I have proved by several authorities. But to say they will be partial or unjust, or corrupt, or do any thing out of malice, is to raise a scandal upon the whole nation, whose representative they are.

I will make no difficulty to affirm, That if any offence whatever be committed in the parliament by any particular members, (as this

was accounted a force or riot in the case of Denzill Hollis and Selden, and others committed upon the Speaker) it is an high infringement of the right and privilege of parliament, for any person or court to take the least notice of it, till the House itself either has punished the offender, or referred them to a due or proper course of punishment. To do otherwise, would be to make the highest court an offender, and to charge them with injustice.

Nay, their right and privilege so far extends, that not only what is done in the very House sitting the parliament, but whatever is done relating to them, or in pursuance of their order, during the parliament, and sitting the parliament, is no where else to be punished, but by themselves or a succeeding parliament, although done out of the House, as in the case of Ferrers.

If any shall imagine, as Mr. Pryn does, and others, that of later times the parliament have encroached more power than anciently belonged to them, I have already answered this objection, by shewing how large a power they exercised of old: And see what is further mentioned in Lamb. Archion 57, viz. That king H. 3, was told by his Lords spiritual and temporal, that of ancient time the creating and deposing of all the judges and great officers belonged to the parliament.

I do not deny, but some sort of orders by them made, are no longer in force than while the parliament sits; but then, what is done after the parliament is risen, is not to be said to be done by their order, for then it ceases to be their order: This must be understood of matters executory, not as to things executed by their order during parliament.

However, this case of Denzill Hollis comes not home to our present case, but it is wonderfully short of it: This was an offence charged only upon some particular members; and it cannot be denied, but particular persons, even in the parliament, may misdemean themselves, and they are to be punished by the parliament, but no where else.

But in our case, that which makes the offence, and for which the information is brought by the king's attorney, is what is done by the whole House of Commons, and by virtue of their express order. Although, as I have already observed, the information itself does not expressly own it, yet the demurrer to the defendant's plea (which sets it all forth) does most plainly avow it. And this I am sure is without any colour of precedent, and never was attempted till this time.

If any man will extenuate or justify this way of proceeding, by saying, that this was not for any thing done in the House, but a matter done out of the House; viz. the printing and publishing was abroad in the printing-house, and in the streets, and spreading them abroad throughout the kingdom: yet this will not salve it, for the defendant did what he did as Speaker, and not in his private capacity. And it was done by order of the whole House and sitting the

parliament; so that this information does directly question the parliament itself, and arraigns their power and actings; for I have fully proved, that what the defendant has done is not his act, but indeed the acting of the whole House of Commons. And I have also proved, that the two Houses, as to the right of the power that they claim and use, is but one, and they are entire, though they may divide in the exercise of that power. So that it is a matter of the highest concernment to the nation that possibly can be.

Sir E. Coke in his fourth Inst. in his Chapter of the High Court of Parliament, mentions two cases only, and some other beginnings of a prosecution against such as absented themselves from parliament, and departed from it without licence; but they had no effect, as he affirms, but only against six timorous burgesses, (where thirty-nine members were informed against) who 'ad redimendam vexationem,' submitted to fines; but he could not find that ever they paid any.

The first of the two cases, is that of the bishop of Winchester, it is in the Year Book of 3 E. 3, fol. 18 and 19, Fitz. H. Abr. tit. Coron. plac. 161. And he affirms that those are all the cases that he can find concerning this matter. The suit against the bishop was by original writ in the King's-bench, and it charges him with a trespass and contempt in departing from the parliament without the king's licence.

The bishop there pleads (as the defendant does in this case) to the jurisdiction of the court. 'Et dicit quod si quis eorum' (speaking of the Lords of parliament,) 'deliquerit erga Dominum Regem in Parlamento aliquo, in parlamento debet corrigi et emendari, et non alibi in minori curia quam in Parlamento. Unde non intendit quod Dominus Rex velit in curia hic de hujusmodi transgressione et contemptu factis in Parlamento responderi.'

Note the plea, as to the offence, is very general, not only restrained to the offence of absenting from the parliament, but to any trespass or offence in parliament. *Si quis deliquerit.*

And it would be a little improper to call absence from parliament, offence committed in parliament, for it looks like the quite contrary: but in a just sense, any offence committed by a member relating to the parliament, though done out of the House, is termed an offence in parliament. So printing any thing by order of parliament, though it be done and executed in another place, yet it may be said to be done by the parliament, and in parliament, if it be by their order, and in time of parliament.

We may note further, that this is a prosecution only against one particular person, for a particular offence and contempt charged upon him. But in our case, the prosecution is against the very Speaker of the parliament, and is in effect a prosecution against the parliament; for it is against him, for what he did by command and order of parliament, and sitting the parliament.

And though the Attorney-General replied to the bishop's plea, that the king might sue in what court he would, yet the bishop rejoins upon him and maintains his former plea, and there it rests; so that as sir E. Coke observes, That the bishop's plea did stand and was never over-ruled, agreeable to the resolutions of former times. So this J. may claim as an authority on our side.

And though Mr. Plowden the lawyer [4 Inst. fol. 17], to the like information put in against him and others, 1 and 2 Philip and Mary, pleaded that he remained continually from the beginning to the end of the parliament, and traversed the absence, whereby he passes by the advantage of the plea to the jurisdiction, yet this is no authority against us, for he might think fit, 'Renunciare juri pro se introducto,' having so true an occasion of clearing himself from that scandalous imputation of being absent from doing his duty in parliament, which certainly is a very high breach of trust; and he might be impatient of lying under it, and therefore thought it best to traverse it to clear his reputation in that point; yet I must confess I should never have advised it, nor was there any further prosecution against him.

I will mention but one most excellent record more, and it is a record out of the Parliament Rolls, 27 E. 3, num. 9, sir Robert Cotton's Abridgment, and with that I will conclude. I take it to be very pertinent, and I am sure it is very seasonable.

Among the petitions of the Commons, one is, They pray the king, that he will require the archbishop and all other of the clergy, to pray for the peace and good government of the land, And for the king's good will towards the Commons.

The king's answer, is,

The same prayeth the king.

And I wish with all my heart, it were the Common-Prayer.

I have but one prayer more to make, and that is, that this court will allow the defendant's plea.

This Case is reported in 2 Shower, 471. Comberbach, 18. The following is Shower's report of it:

THE KING v. WILLIAMS.

"Information for publishing an infamous libel, called 'Dangerfield's Narrative.'

"The defendant pleads, that by the law and customs of England, the Speakers of the House of Commons have signed and published the acts of the House, &c.

"Mr. Attorney General demurs.

"Mr. Jones was beginning to argue, and took some exceptions, as that he does not aver the libel in the information and that in the plea to be the same.

"L. C. J. We will not, in such a case, debate the formality of such an idle insigui-

ficant plea: let us hear what they have to say for it.

"Mr. Pollexfen began, 'The court of parliament, &c.'

"L. C. J. Court do you call it? Can the order of the House of Commons justify the scandalous, infamous, flagitious libel.

"Mr. Pollexfen then said, 'I have no more to say, &c.'

"L. C. J. Let judgment be entered for the king.

"And afterwards Mr. Williams was fined 10,000*l.*, and upon payment of 8,000*l.* of it, satisfaction was acknowledged upon record."

He also gives the following note of the Case of lord Peterborough against Williams:

LORD PETERBOROUGH v. WILLIAMS.

"*Scandalum Magnatum* on the statute of 2 Rich. 2, c. 5, for publishing '*Dangerfield's Narrative*:' the defendant pleads the same plea as he did to the information in the king's name; but a demurrer being thereto.

"It was argued, that the declaration was ill, and that there was nothing of slander in it upon the plaintiff, for they had averred none, but only set forth the whole pamphlet with an '*in quo quidem libello diversa falsa et scandalosa continentur*,' and mention none in particular, which Mr. Pollexfen urged to be naught.

"And the Court doubted it.

"But the general opinion of the Bar was, that such their doubt was not on the point, but in favour to the defendant, to gain him time for a compromise; (it being thought that he had paid sufficient before for that offence) for the manner of declaring seems good, and if upon the whole it appear to the court there was any matter scandalous, the action lies, if otherwise not.

"And it was afterwards agreed, as I was informed.

"Note, In *Scandalum Magnatum* no costs are to be given the plaintiff, though a verdict be for him."

As to sir Robert Sawyer, see the Case of sir Thomas Armstrong, vol. 10, p. 105, of this Collection, and particularly the passage cited from Mr. Hargrave, p. 117.

Under Mr. Williams Wynn's permission, I insert from the Appendix to his "*Argument upon the Jurisdiction of the House of Commons*," the following passage:

"The Demurrer being allowed by the court, a plea in bar was pleaded by Mr. Williams, nearly similar to the plea to the jurisdiction, thus over-ruled; but this last plea was afterwards withdrawn, and judgment went by default. A fine of 10,000*l.* was imposed by the court of King's-bench; but James 2, afterwards remitted 2,000*l.* of it, annexing this sin-

gular condition, that nothing should be given to any of the courtiers who had been employed to solicit this abatement.

"Upon examining the notes and papers of sir William Williams, I find that the above was not the only prosecution that he was exposed to, for the discharge of his duty as Speaker.

"The same information of *Dangerfield*, which accused the duke of York, also contained charges against the earl of Peterborough, and that nobleman commenced an action for *Scandalum Magnatum*, against Mr. Williams, for licensing the publication of the information; and also seven others against the printers and booksellers who had printed and sold it.*

"To this action Mr. Williams put in a plea, similar to that in the former case; but the disposition of the court of King's-bench had already been found so hostile to the allowance of any privilege of parliament, that it was thought most advisable to compromise the matter, and James 2, who had been gratified by the early payment of Mr. Williams's fine of 8,000*l.*, interfered to induce lord Peterborough to accept 150*l.*, which was paid to him in satisfaction, and a *non. pros.* was entered on the roll.

"Much surprise has been expressed at the failure of three different bills, which were brought into parliament in 1689, 1690, and 1695, to reverse the judgment given in the King's-bench against Mr. Williams. It has been seen, that the Bill of Rights refers to this case, as one of the offences by which James 2 had forfeited the crown, and the House of Commons had expressly declared the judgment to be '*illegal, and subversive of the freedom of parliament*.' (July 12, 1689.) It does, therefore appear inconsistent, that this very judgment should have been suffered to continue unreversed, and the illegal fine which had been imposed on the Speaker, unrepaid.

"To account for this, it is necessary to look at the circumstances of the times, and the conduct then adopted by parliament, in similar instances.

"Among the difficulties which pressed upon the new government, after the Revolution, that of raising money was the principal, and parliament, disgusted with the profusion of king William's grants to his favorites, was led into the opposite extreme of parsimony, even in instances where the national justice called for a more liberal proceeding.

"We shall find, in consequence, that there was no disposition to make pecuniary compensation to any of those who had suffered illegally during former reigns, unless a fund, independent of the public purse, could be found for that purpose.

"With a view to supply this, a bill for the attainder and confiscation of the estates of the deceased chancellor, lord Jefferies, was brought in, and an intention was entertained of fining,

* "It appears, that in these different actions, lord Peterborough actually recovered and received above 6,700*l.* besides costs."

in different proportions, all those who were excepted from the act of indemnity.

"The natural effect of this was, to unite, not only the persons excepted, but all their connexions, in opposition to every bill for the reversal of proceedings, which were likely to entail pecuniary compensation to the party aggrieved; and this combination was strong enough (particularly in the House of Lords) to throw out every bill of this nature. The attainders of Russell and Sydney were indeed reversed, because no application could, in those instances, be made for compensation; but the bill for reversing the equally illegal outlawry of sir Thomas Armstrong, contained a clause, directing that the sum of 5,000*l.* of which his family had been deprived, should be repaid to them out of the estates of his judges and prosecutors, and was lost. A bill passed the House of Commons, for charging the heirs of lord Jefferies with the repayment of 14,760*l.* which he had extorted from Mr. Prideaux, as the condition of pardon for a charge of treason, and laid out in the purchase of an estate, yet even this was thrown out by the Lords.

"Upon the same grounds of objection, it is probable that the bills for the reversal of the judgment against sir Wm. Williams were lost.

"It was originally proposed by these bills, that the fine of 8,000*l.* should be repaid to sir W. Williams by the Exchequer, and afterwards to the Exchequer by sir Robert Sawyer, who had filed the information against him. Sir Robert was, in consequence, heard against the bill, both in person and by counsel, and though passed by the House of Commons, in 1695, it failed in the House of Lords.

"On this occasion, sir William Williams made a speech in vindication of himself, the notes of which still remain among his papers.

"I trust that I am not misled by the partiality of a descendant, in thinking the historical matter, which this defence contains, sufficiently curious to justify me in giving an extract from it.

"After stating proofs of the different facts in his case, viz. The order of the House, 9th November 1680, that the Informations of Dangerfield and others should be perused and signed by the Speaker, and printed by such printers as he should nominate, and that Dangerfield should have the benefit resulting therefrom; the printing of the Information during the sitting of parliament; Dangerfield's acknowledgment of his having received the emolument; the prosecution commenced by sir Robert Sawyer, and the pleadings therein already mentioned. The notes proceed thus:

"Aspersions—That I was in confederacy with king Charles the second, to discover the secrets of the Com'ons, when in the chaire, and approved by him upon such terms, concerted by sir Richard Mason.

"1. Mr. Francis Charleton will prove how I was first thought upon to be Speaker, two days before the meeting of the parliament, 21st October 1680.

"I was a stranger to it: he brought me the first notice of it, and my answer to him.

"Then proposed by my lord Russell, and unanimously elected by the House.

"And next day approved by the king.

"2. Earl of Macclesfield will testifye, that I refused the cheife justiceship of Chester, because I would not be thought to do any thing that might seem to incline against the interest of the Com'ons in that trust.

"3. I never had any place in king Charles II.'s time. I never sought any. I did not seek this. I do appeal to all the members, if ever I menç'oned this to any person.

"4. I was but twice with k'g Charles ye second: the 3d time I refused to go to him.

"5. My reward is my prosecu'ion, fine, and two years defence of the Com'ons.

"It is my glory I have left a record for the rights and freedome of parlm'ts. In this proceeding posterity will justifie me.

"I look upon this as the glory and honour of myselfe and family,

"And submit it to the wisdom of this House, to dispose of it as they shall thinke fitt.

"I have pleaded a plea, which will defend itselfe to posterity.

"I have been condemned illegally. I have p'd 8,000*l.* to ye crown, unjustly ag't law.

"I have paid it for the Com'ons of England.

"If I had betrayed all, or some of ye Com'ons;

"If I had submitted to the informac'ion;

"If I had tamely yielded and confessed;

"It had been better with my estate,

"But worse with my reputac'ion.

"I value much more your rights and my own honor, than I do my estate.

"The money I may recover againe, or not want;

"The dishonor had been irrecoverable.

"It is part of my honor,

"That I am thus exposed by my prosecutors, with the same violence, with the same tooles, with the same assurance:

"And if they had the same judges, I must expect the same judgm't * * *

* * * It is not my business now to recriminate. I will not imitate sir Rob't Sawyer, in his method of defending himselfe by recrimin'on.

"Consider, if ye 2 things objected to me were true:

"1. That ye informac'ion was printed by my order, after ye riseing of ye parl'mt:

"2. If Dangerfield has not had the benefit of this inform'n:

"How (does) this availe sir Rob't Sawyer upon this record of the inform'n? my plea and demurr on his p't, and defend the judgm't given ag't ye priviledge and rights and freedome of proceeding in parliam't.

"Let me be the vilest of men that sate in that chaire, doeth that mend sir Rob't Sawyer's case upon this judgm't?

“ ‘ This is to justifie ye proceeding and
judgm't of ye court of King's-bench ag't ye
Com'ons by a side wind.

“ ‘ This is to say, ye Com'ons could not
order printing, and the speaker ought not to
obey them or their order.

“ ‘ This is to bring the priviledge of ye
Com'ons into question in West'r-hall.

“ ‘ And to make those courts judge of the
priviledges of parl'mt, and consequently of
parl'mt, and to sett bounds to their proceed-
ings and debates, and to make Westm'r-hall
superior to parl'mts. ” ”

Proceedings for the reversal of the judgment
against sir William Williams were had so early
after the Revolution as July 10, 1689. See

Commons' Journals of that date. After that
period, farther proceedings were had at inter-
vals until the 21st of February 1695-6, on
which day the House of Lords read the second
time a bill which had been sent up from the
Commons, intituled, “ An Act for reversing a
Judgment given against sir William Williams,
for what he did as Speaker of the House of
Commons, and for asserting the Rights and
Freedom of Parliament.” And

Die Veneris, 21 Februarii.

Ordered, That the said bill be committed to
a Committee of the whole House, on Thurs-
day the 27th day of this instant February, at
ten o'clock in the forenoon.

After which I do not find any farther entry
respecting it.

411. Proceedings against JOHN Earl of MELFORT, JOHN Earl of
MIDDLETOUN, Richard Earl of LAUDERDALE, and several
others, for Treason and Rebellion, inticing the French King
to invade their Majesties Dominions, and remaining subject
to the French King : 6 WILLIAM & MARY, A. D. 1694. [Now
first printed from the Records of Justiciary at Edinburgh.]

CURIA JUSTICIARIE, S. D. N. Regis et Reginae,
Tenta in Prætorio Burgi de Edinburgh,
vigesimo tertio die mensis Julii millesimo
sexcentesimo nonagesimo quarto, per
honorabiles viros, Adamum Cockburn,
de Ormistoune, Justiciariæ Clericum, Do-
minum Colinum Campbell de Aberuchill,
Magistrum Davidem Hume de Crocerig,
Dominum Joannem Lauder de Fountan-
hall, Magistrum Archibaldum Hope de
Rankeillor, et Magistrum Jacobum Fal-
conar de Phesdo, Commissionarios Justi-
ciarii dict. S. D. N. Regis et Reginae.

Curia legitime affirmata.

THE said day their majestie's advocate pro-
duced ane Act of Councill, dated the 19th in-
stant, approveing his causing raise and execute
letters of treason before the saids lords against
the persones mentioned in the following Act
of adjournall, as being in France or haveing
bein there contrair to the late act of parlia-
ment,* and as corresponders with the late

* K. William and Q. Mary's first parlia-
ment, April 18, 1693. Chap. 8, Sess. 4.

Act against corresponding with France.

“ Our sovereign lord and lady, the king and
queen's majesties, considering that this king-
dom being now in a state of war with the
French king, is in great and imminent danger
from correspondencies with persons in his do-

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king James, and granted warrand to the said
lord advocat to insist in and follow furth the
said proces against the saids haill persones.

Their majestie's advocat produced the cri-
minall letters of treason dewly execute against
them, upon threescore dayes wairning, by a
pursevant and trumpet, with their majesties

minions : Do hereby, with advice and consent
of his estates of parliament, statute and ordain,
That none of the subjects within this kingdom,
without express leave from their majesties, or
their privy council, presume to go to the king-
dom of France, or any of the dominions sub-
ject to the French king, after the first day of
June next to come ; or being already in the
said kingdom of France or countries foresaid,
presume to stay or abide therein after the first
day of August next, without express leave
from their majesties or their privy council,
under the pain of treason. And further, it is
statute and ordained, that none of the subjects
of this kingdom presume without authority
foresaid, to correspond, keep intelligence, or
have commerce by letters, with any person re-
siding within the said kingdom, or dominions,
after the date hereof, under the pain of being
punished as corresponders with declared trai-
tors, and that this act continue and stand in
force during this war, and no longer : As also
that it be without any prejudice of any former
acts made against treason or treasonable cor-
respondences, or the punishment of such as
have already incurred the pains thereof.”

4 Z

coat of armes displayed, sound of trumpet, and using other solemnities necessar, at the Mercat-cross of Edinburgh, pear and shoar of Leith, as being out of the kingdome.

The said day John earle of Melfort; the earle of Middleton; Richard earle of Lauderdale; sir William Wallace, of Craigie; sir Adam Blair, of Carberrie; Alexander M'Lean, late commissar of Argyle; Alexander Robert-sone, of Strowan; Mr. John Johnstone, brother to the earle of Annandale; Mr. Alexander Maitland, brother to the earle of Lauderdale; — Maxwell, of Orchyeadtoun; Mr. Thomas Wallace, of Elderslie; — Grahame, younger, of Duntroon; Alexander Trotter, brother to the laird of Mortounhall; Mr. Andrew Hay, sone to the deceist Mr. Thomas Hay, sometyne clerk to the privy councill of Scotland; Mr. Charles Kinnaird, brother to the lord Kinnaird; David Lindsay, secretary to the earle of Melfort; collonell Thomas Buchan, somtyme designed lieut. generall Buchan; collonell — Cannon, sir Charles Cairney, otherwayes designed major generall Cairney; captain Andrew Rutherford, somtyme captain in Dumbartounes regiment; captain Patrick Auchmoutie, captain — Deans, captain — M'Adams, captain — Ruthven, leivtenant; Isaack Threrall, leivtenant George Skeein; leivtenant John Forrester, leivtenant — Auchmoutie, ensigne Alexander Innes; leivtenants Daniel and John Beanes, ensigne William Sloran; ensign Robert Maxwell, leivtenant George Hempseed, ensign William Ramsay, somtyme in Hodges regiment; ensign Alexander Sandilands, somtyme in Wauchop's regiment; ensigne Laurence Drummond, of —; ensign William Meinzie, brother to — leivtenant Patrick Auchmouty, somtyme in the Scots guards; captain Robert Somervill, captain William Davidson, leivtenant William Maine, leivtenant Samuel Whynrahame, leivtenant James Henrysone, leivtenant Samuel Maxwell, leivtenant William Maxwell, ensigne Robert Sutherland, ensigne Alexander Sinclair, ensigne Charles Patoun, ensigne John Riddell, leivtenant John Bell, somtyme in D'Offerrell's regiment; ensigne William Innes, in D'Offerrell's regiment; ensigne William Lyon, in D'Offerrell's regiment; leivtenant Joseph Brodie, William and Hugh Sutherlands, nepheus to major generall Sutherland; Walter Nisbet, sone to Alexander Nisbet, of Craigintinnie; William Sinclair, sone to deceist — Sinclair, of Dune; Charles Learmonth, sone to the deceist Learmonth, baillie of Edinburgh; Thomas Clerk, brother to the deceist master William Clerke, advocat; Robert Kinloch, of —, master William Pearsons, sone to — Pearsons, somtyme minister at Stirling; Mr. David Drummond, attendant on the earle of Melfort; Alexander Nisbet, sone to — Nisbet, merchant in Glasgow; and James Oswald, somtyme chaplaine to the lady Hacket; — Cuthert, sone to — Cuthert, provost of Inverness; sir James Mont-

gomerie, of —; captain Patrick Grahame, captains Robert and William Chairters, captain John Ramsay, leivtenant collonell Rattray, leivtenant collonell Olyphant, leivtenant collonell Douglass, Robert Stewart, agent in Edinburgh; ensigne John Menzies, sone to — Menzies, of Comrie; major John Gordone; — Hamiltoun, of Kilbrachmont; — Carmichaell, of Belbrae; captain James Murray, brother to Stenhope, leivtenant; James Murray, captain; John Livingstone, captain; leivtenant John Creichtoun, the captain of Clan Ronald; captain Robert Dunbar, the laird of Meldrum, sir John M'Lean, of that ilk; sir Aeneas M'Phersone, Alexander Tait, skipper in Leith, called Whyte Alexander; Alexander Tait, skipper there, called Black Alexander; — Irvine, of Stapleton; capitaine — Mair, being of tymes called to have compeared befor our saids lords, the said day and place, in the hour of cause; there to have underlyen the law for the crymes of treason and lese majesty comitted be them, in sua far as his majesty being ingadged in a just and necessary warr against the French king, for the maintenance of the religione and liberties of the people. The hail fornamed persones being native Scots-men, and borne subjects of the realme, contrair to their naturall duty and alledgiance, did, in the moneths of June, July, August, and remanent moneths of the year sixteen hundred and eighty nyne, upon the first, second, third, or ane or other of the dayes of ane or other of the saids moneths, and upon the first, second, third, or ane or other of the dayes of the moneths of January, February, March, or ane or other of the moneths of the year 1690, 1691, 1692, 1693, and January, February, March, and Aprile, 1694, most treasonably and undutyfully ryse, and joyne in armes and open rebellione with the French king and his forces and armes against his majesty and his government, and their native countrey, did intyse the French king and his forces to invade their majesties dominiones, and to quarrell and impunge their royall power and authoritie, and right and title to the croune, did fight, resist, and oppose their majesties forces warring against the French king, in Flanders and elsewhere, particularly at Loudon Stonekirk, att and near Mons, and Namure, &c. did aid, abait, assist, keep correspondence with, give help, redd, and councill to their majesties enemies, and the enemies of the Protestant religione, and their native countrey, went to and have remained within the kingdome of France and dominiones subject to the French king, ever since the dayes specified in the act of parliament past, in May, 1693, and to this very day, without leave from their majesties or the privy councill, as they who were lawfully cited upon threescore dayes wairning, att the Mercat cross of Edinburgh, pear and shoar of Leith, by a pursevant and trumpeter, with their majesties coat of armes displayed, and using other solemnities necessar,

to have found sufficient caution and sovertie acted in the books of adjournall for their appearance before the saids lords this day and place, in the hour of cause, to have underlyen the law for the crymes above mentioned, lafull tyme of day bidden, and they nor none of them enterand nor appearand, the lords justice clerk and commissioners of justiciary, therefore, be the mouth of James Guthrie, macer of court, decerned and adjudged the haill forenamed persones, and ilk ane of them, to be denounced our soveraigne lord's and lady's rebels, and ordained them to be putt to the horne, and all their moveable goods and gear to be escheat and inbrought to their majesties use, as outlawes and fugitives frae their majesties lawes for the crymes above specified, which was pronounced for doome.

April 30, 1695.

The said day anent ane petitione given in to the saids lords be sir James Stewart, his majesties advocat, makeand mention, that where in ane justice court holden be the saids lords, upon the 23d day of July last bypast; John earle of Melfort, John earle of Middleton, Ritchard earle of Lauderdale, sir Wm. Wallace, of Craigie, sir Adam Blair,* of Carberrie, and 90 others, were declaired outlawes and fugitives, for not compeiring before the saids lords of justiciary, for their goeing to and remaing within the kingdome of France, after the 1st day of June, 1693, contrair to the eight act, fourth sessione of his majestie's current parliament, and for several other treasonable crymes committed be them in manner mentioned in the lybell, raised against them ther-

* See his Case, vol. 12, p. 1207.

anent, and in the act of adjournall past therupon, and the haill persones above named and mentioned in the said act, being by his majestie's appoyntment cited or to be cited befor the estates of parliament, most of them (and all that are cited) to underlye the law for the treasonable crymes committed be them, and the rest as witnesses; and his majestie being willing that the persones indyted should (untill they be found guilty) have free liberty and allowance of defending themselves, and that neither they should be precluded from proponeing ther defences, nor the witnesses to be cited against them rendered incapable, through their being rebels, fugitives, or at the horne; and that therfor all the saids persones as weell pairties as witnesses may be relaxed, *ad hunc effectum* allennarlie, that they may have *personam standi in judicio* before the parliament, but prejudice to his majestie, of any casualty or benifite fallen to him throw their rebellione, therefore craving the saids lords would be pleased to grant relaxatione to the haill persones above mentioned, cited or sisted as pairties or witnesses, *ad hunc effectum*, that they may have *personam standi in judicio*, but prejudice to his majestie as aforesaid.

The lords commissioners of justiciary, having considered the petitione above written given in be his majestie's advocat, they allow relaxatione to be exped for John earle of Melfort, and the haill remanent persones above mentioned *ad hunc effectum* allennarly, that they may have *personam standi in judicio* befor the parliament, and that the persones accused may propone ther defences, and those called as witnesses may be capable to appear and depone, but prejudice to his majestie, of any casualty fallen to him throw their being declared fugitives, or at the horne.

412. Proceedings against KENNETH Earl of SEAFORTH, for High Treason: 9 WILLIAM III. A. D. 1697. [Now first printed from the Records of Justiciary in Edinburgh.]

CURIA JUSTICIARIE S. D. N. Regis, tenta in Pretorio Burgi de Edinburgh, decimo quarto die mensis Junij, 1697, per honorabiles viros, dominos Colinum Campbell de Aberuchill, Davidem Hume de Crocerig, Joanem Lauder de Fountainhall, et Jacobum Falconar de Phesdo, Commisionarios Justiciarum dicti S. D. N. Regis.

Curia legitime affirmata.

THE said day anent the criminall actione and cause intended, and depending befor the saids lords, at the instance of his majesties advocat, against Kenneth earle of Seaforth, makeand mentione, that where by all laws divine and humane, and by the laws and acts of parlia't of this kingdome and constant practique therof, the crymes of treason, rebellione and lese majes-

ty are most strictly and severely prohibit, and particularly by the act of parliament, James first, parl. first cap. 3, It is statute and ordained, that noe man notourly or openly rebell ag't the king's persone, under the paine of forfeiting of life, lands, and goods, and by the act James 2d, parl. 6th, cap. 13, It is ordained that none rebell against the king's persone or authority, and who soe makes sick rebellione, to be punished after the quality and quantity of sick rebellione, by the advice of the three estates; and if it happens any within the realme openly or nottourly to rebell against the king, or to make weir against the king's leidges, ag't his forbidding, in that case they are to be punished after the quantity of the trespass; and by the act James 2, par. 6th, cap. 24, It is statute, that if any man committ or doe treason against the king's persone, or his majesty, or

ryses in fear of warr against him, or resets any that hes committed treasone, or that supplies them in help, red or councill, or that stuffs the houses of them that are convict of treasone, and holds them against the king, or that stuffs houses of their own in furthering of the kings rebels, shall be punished as traytors; and by the fifth act parl. first, Cha. 2d, it is declaired, that it is and shall be high treasone to the subjects of this kingdome, or any number of them more or less upon any ground or pretext whatsoever, to ryse or continew in armes, to mantain any fforts, strengths or garrisons, to make peace or warr, or to make any treaties or leagues with forraigne princes or states, or among themselves, without his majesties speciall authority and approbatione first interponed therto, and all their majesties subjects are discharged to offer upon any pretext whatsoever to attempt the doing of any of these things hereafter, under the paine of treasone; and by the 2nd act of the second session of the same parliament, it is statute and ordained, That if any persone or persones shall heirafter plott, contrive death and destruction to the kings majestie, or to deprieve, depose, or suspend him from the style, honour and kingly name of the imperiall croune of this realme, or any other of his dominiones, or to levy warr or take up armes against his majestie, or any commissionat by him, or shall intyse any strangers or others to invade any of his majesties dominiones, every such persone being legally convicted, shall be decerned, declared and adjudged a traytor, and suffer forfeiture of life, lands and goods, as in cases of high treasone; and lastly by the 2nd act of the first session of this current parliament, it is declared to be high treasone in any of the subjects of this kingdome by wryteing, speaking, or any other manner of way to disowne quarrell or impugne their majesties royall power and authority, or right and title to the crown: Nevertheless, it is of verity that the said Kenneth, earle of Seaforth, shakeing off all fear of God and regaird to their ma'ties and their lawes, being suspected as disaffected to the late happy revolutione, and therupon put under arrest at London, in the year 1689, untill generall major M'Kay became baill for him, did upon one or other of the dayes or moneths of the said year breake your baill, and run away and repaired to the late king James then in Ireland, wadging warr against their majesties, and continued there dureing that rebellion untill that in the end of the year 1689, the said earle landed in the Lewes, and from thence came to the ffort of island Donald, belonging to himself, where he continued for severall moneths, keeping intelligence with generall major Buchan, who was then in armes in open rebellion ag't their majesties in this kingdome, commanding a party of about fyve hundred horse, with whom he purposed to have joyned, at least have assisted, or at least have appeared in armes with him in the foresaid rebellion, ffor accomplishing whereof soe soon

as the said earle gott intelligence of the said generall majors march, then he did convocat or cause convocat, or were otherwayes assisting to the convocating in armes of the sensible men in the countreys of Kintail, Lochcarron, Lochelsh, and other places pertaining to or depending on him and his other vassalls, followers or dependers, within the shyre of Ross or elsewhere, lykeas the s'ds persones and others disaffected to the government, did assemble and repaire in armes to the said earle as their head and chiftain, at least they being 1,500 less or more, and in a sort of a camp he was therre present with them in armes, commanding, assisting, or otherwayes abaiting them, against or at least without their majesties speciall authority and approbatione first therto interponed; and particularly upon ane or other of the dayes of the moneths of March, Apryle, May, June, July, August, September or October, in the year 1690, and att or about a place called Achelttrie near to Brand, and in other places near to the laird of Coulls house in the shyre of Ross, the said earle was there in armes with the saids rebellious company, who had collours displayed, and he went under the title of marquess of Seaforth, &c. major generall to king James fforces, or was otherwayes with them threatning destruction to all that owned their majesties government, at least he was in armes in manner forsaid, without their majesties authority and approbatione, and when by reasone of major generall M'Kays sudden march, Buchan was necessitat to retire with his horse to the highlands, the said earle not having gott his men together to joyne with Buchan, yet continued his camp with the forsaid rebels, daylie convocating and increaseing their number during some dayes that generall major M'Kay continued att Inverness, waiting upon the coming up of their majesties forces from the south, wherby the generall major discovering the said earles obstinat rebellione, and apprehending that he might withdraw with those in armes with him to the inaccessible highlands, and joyne with the other rebels there in armes, he upon the 30th day of August, 1690 years, or therabout, gave commissiones to the laird of Balnagowan, and major George Wishart and others, to attack with the forces apoynted to them, the saids earles countries of Assin-Lochglun and others, and to destroy the same by fire and sword, which persones having marched to those pairts in obedience to the saids commissiones, the inhabitants of these countreys being then in armes with the said earle, did leave and desert him, which occasioned the dissolving of his camp, and the forces that were with him forced him to send some of his friends pairtly to the generall major and pairtly to those commissionat, as said is, to stope their hostility, wherewith the said earle was threatened, and being thus deserted and brought to extremeties, and not till then, he delyvered himselfe when he could doe noe better, to the said generall major, by all which the said earles wicked and evill practices he was guilty of the crime

of treasone, lese majesty, seditiōne and riseing in armes against their majesties government, at least airt and pairt therof, and therby he hes incurred the paines of treasone and rebellione viz. the forfaulture of life, lands, and estate, and ought and should be punished therwith, to the example and terror of others to doe the lyke in tyme comeing.

Which criminall actione and cause being oft and diverse tymes called, was continued from day to day till this day, and the samyne being this day called, compeired sir James Stewart, his majesties advocat, as pursuer on the one pairt, and on the other pairt compeired Mr. David Forbes advocat, and gave in ane act of councill for deserting the dyet, wherof the tenor followes :

At Edinburgh the 18th day of March 1697. The lords of his majesties privy councill, having considered his majesties letter direct to them of date the first day of March instant, authorizeing and requyreing them to sett the earle of Seaforth att liberty, who as he is informed hes rendered himselfe prisoner to the garrisone at Inverness, and cast himselfe upon his majesties mercy, upon sufficient bale to live peaceably and appear when called for, and recomends to the lord advocat not to insist in the criminall process against the said earle, during his majesties pleasure, they doe hereby give order and warrant to the governour of the garrison of fort William, and in his absence

to the next commanding officer there, to sett the said Kenneth earle of Seaforth at liberty furth therof, in respect he hes given bond and found sufficient cautione acted in the books of his majesties privy councill, that he shall live peaceably under and with all submissione to the present government of his majestie king William, and that he shall not act, consult, or contrive any thing in prejudice thereof, nor shall not converse, nor correspond with any rebels, and that he shall appear before the saids lords of his majesties privie councill, whensoever he shall be called or requyred therto, under the penalty of two thousand pounds sterling in case he shall transgress in any pairt of the premisses, and recomends to sir James Stewart his majesties advocat, to desert the dyet in the process of treasone presently depending at his lordships' instance against the said earle, before the lord justice generall, lord justice clerk, and lords commissioners of his majesties justiciary, and not to intent nor insist in any new process of treasone against the said earle, untill his majesties pleasure be furder knownen therein, the said earle having given bond, and found cautione in manner forsaid, extracted by me.

Sic Subscribitur, GIB. ZELLIOT.

The lords commissioners of justiciary, conforme to the above written act, and by consent of his majesties advocat, deserts the dyet simpliciter against the earle of Seaforth, whereupon his procurators asked and took instruments.

413. Proceedings against Mr. ALEXANDER PITCAIRNE, a Minister of the Church of Scotland, for High Treason, and disowning, quarrelling, and impugning of his Majesty's Royal Power and Authority, and Rights and Title to the Crown: 9 WILLIAM III. A. D. 1697. [Now first printed from the Records of Justiciary at Edinburgh.]

CURIA JUSTICIARIE, S. D. N. Regis tenta in Pretorio Buegi de Edinburgh, vigesimo nono die mensis Novembris 1697, per honorabiles viros Dominos Colinum Campbell de Aberuchill, Davidem Hume de Crocerig, Joannem Lauder de Fountainhall, Archibaldum Hope de Rankeilior, et Jacobum Falconar de Phesdo, Commissionarios Justiciarum dict. S. D. N. Regis.

Curia legitime affirmata.

Intran'

Mr. *Alexander Pitcairn*, minister at Southronaldshay, now prisoner in the Tolbuith of Edinburgh.

YOU are Indytēd and accused, at the instance of sir James Stewart, his majesties ad-

vocat for his highnes interest, and by speciall warrant of the lords of his majesties privy councill, that where by the second act of the first session of this current parliament, intituled Act Recognoscing his Majesties royall authority ;* it is declared to be high treasone in

* *Act recognizing their Majesty's Royal Authority.*

“ The Estates of Parliament considering that the king and queen's majesties have accepted of the crown of this realm, tendered to them by the meeting of the Estates in their Claim of Right, dated the 11th day of April last, and according thereto have sworn the oath appointed by law to be taken by all kings and queens of this realm, before they exerce their regal power : therefore the Estates of Parlia-

any of the subjects of this kingdome by wryting, speaking, or any other manner, way, to disowne, quarrell, or impugne his majesties royall power, or authority, or right and title to the crowne: Neverthelesse, it is of vertie that yow shakeing off all fear of God, and regaird

ment for themselves, and in name and behalf of the whole subjects of this kingdom represented by them, do hereby assert, recognize, and acknowledge their majesties royal power and authority over the said kingdom, and their undoubted right and title to the imperial crown thereof: like as their majesties, with advice and consent of the said Estates of Parliament, do declare, that it is high treason in any of the subjects of this kingdom, by writing, speaking, or any other manner of way to disown, quarrel, or impugn their majesties royal power and authority, or right and title to the crown. And further, their majesties, with advice and consent foresaid, do statute and ordain, That the Oath of Allegiance hereunto subjoined, shall be sworn and subscribed by all the members and clerks of parliament, and by all other persons presently in public trust, civil or military, or who shall be hereafter called to any public trust within the kingdom; and do hereby retreat and rescind all preceding laws and acts of parliament, in so far as they impose any other oaths of Allegiance, Supremacy, Declarations and Tests, excepting the oath *de Fidei*."

As to this statute, Mr. Laing, vol. 4, p. 227, observes:

"The oaths to government merely professed, as in England, to be faithful, and to bear true allegiance to William and Mary; without an acknowledgment of their lawful title, or right to the crown. To relieve the scruples of the conscientious, a distinction between a king *de facto* and a king *de jure*, was thus humanely introduced; but there were few Jacobites, who hesitated, by the grossest equivocation, to accept the oaths to the government, which they meant to overturn, and to swear allegiance to William, whom they had conspired to dethrone."

By chap. 6, of the fourth session of the first parliament of king William and queen Mary, (April 18, 1693) intitled, 'Act for taking the Oath of Allegiance and Assurance.'

"Forasmuch as the imposing and taking the Oath of Allegiance, and the Assurance, enacted in this current parliament, as hereto subjoined, will be a further security to the Protestant religion and their majesties government, in this present exigence: therefore the king and queen's majesties, with advice and consent of the Estates of Parliament, statute and ordain, that the said oath of allegiance be sworn, and the same with the foresaid assurance be subscribed by all noblemen and their eldest sons being past twenty-one years of age, and by all persons in offices and places of public trust, civil, ecclesiastical and military." And the act

to the lawes of this kingdome, did in ane or other of the dayes of the moneths of the years 1695 or 1696, preaching in your South kirk of Southronaldshay, or some other kirk in these bounds, openly and traiterously say and averr, That king William was a villanous, and a tyr-

contains several clauses for enforcing such swearing, and subscriptions by persons in general. Among those clauses are the following that "they" (the persons enumerated in the act) "and all other persons, whether above ranked or not, who shall not swear the said oath, and subscribe the same, and the Assurance, shall not be allowed to keep any horses above an hundred merks price, nor any sort of arms, more shan a walking sword; certifying such as shall be found to have horses and arms contrary to this provision, either in their own or in the keeping of others, that both the owner and the keeper shall incur the penalty of one thousand merks, the one half to the informer, and the other to their majesties; and their majesties with consent foresaid, authorises and impowers the lords of privy council, to take such further effectual methods for disarming these persons, and seizing of their horses above the foresaid value as they shall judge necessary: as, likewise, they empower the council to call before them, all or any heritors, or other persons, whom they shall think fit, whether above ranked or not, and to put the said oath and assurance to them, and in case of their refusal to proceed against them by fining, confining, imprisonment or banishment, as they shall see cause; the fine, if they be heritors, to be the double of their cess or supply; and further, (if the council shall think fit) not exceeding a year's valued rent, and for others not heritors, the third part of their escheatable goods, by and attour the other penalties contained in the thirty-eight act of the second session of this current parliament."

The Oath of Allegiance, ('I, A. B., do sincerely promise and swear, that I will be faithful, and bear true allegiance to their majesties king William and queen Mary') had been enacted by the 'Act recognizing their Majesty's Royal Authority,' first parliament William and Mary, sess. 1, (June 5, 1689) chap. 2.

The Assurance had been enacted by the 'Act for Security of their Majesties Government,' first parliament William and Mary, sess. 2, (April 25, 1690) chap. 38. In the act before us, (sess. 4, chap. 6) it is given, with some slight variations from the original formulary, as follows:

"I, A. B., do, in the sincerity of my heart, assert, acknowledge, and declare, that their majesties king William and queen Mary, are the only lawful undoubted sovereigns of this realm, as well *de jure*, that is of right, king and queen, as *de facto*, that is, in the possession and exercise of the government: and therefore I do sincerely and faithfully promise and engage, that I will, with heart and hand, life and goods, maintain and defend their majesties

ranous traytor, who had put away the righteous king, or words to this effect or purpose; which being a manifest disowning, quarrelling, and impugneing of his majesties royall power and authority, and right and title to the crowne, you are therfore guilty, airt and pairt of high treasone, which being found by the knowledge of ane inquest, you ought to be punished by loss of life, lands, and goods to the example and terror of others to committ the lyke in tyme comeing.

Sic Subscribitur, JA. STEWART.

Pursuer.—His Majestie's advocat; sir Patrick Hume, sollicitor.

Procurators in defence.—Sir David Thoirs.

The Lords continues the dyet till Wednesday

title and government, against the late king James and his adherents, and all other enemies, who, either by open or secret attempts, shall disturb or disquiet their majesties in the possession and exercise thereof."

Mr. Laing (Hist. vol. 4, p. 232) speaking of this Test, says: "By a new assurance to

next, and grants captione for apprehending the absent witnesses against that dyet.

December 1, 1697.

Intran'

Mr. Alexander Pitcairne minister at South Ronald Shay, indyted and accused for treasonable speeches.

Pursuer.—Sir James Stewart, his majesties advocat.

Procurators in defence.—Sir David Thoirs.

The lords commissioners of justiciary with consent of his majesties advocat deserts the dyet simpliciter, and ordaines the pannall to be sett at liberty.

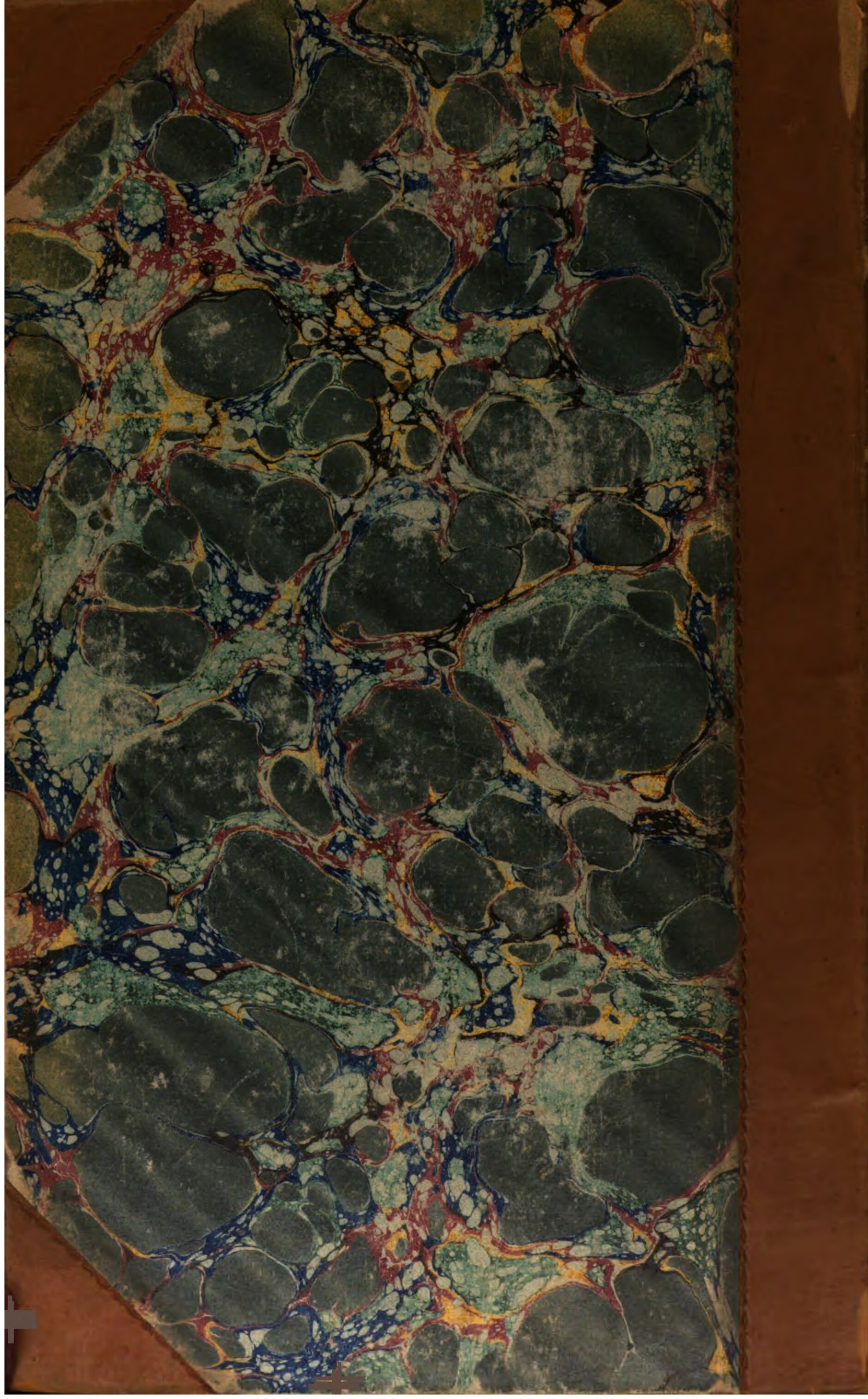
Sic Subscribitur, J. FALCONAR. I. P. D. C.

government, the distinction between a king *de jure* and a king *de facto* was abjured."

I believe that this is not strictly correct. I do not find that the swearing to the assurance was required by either the 38th act of the 2nd sess. or the sixth act of the fourth sess. of king William and queen Mary's first parliament.

END OF VOL. XIII.

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